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Administrative Acts Completely Removed from the Control of the Legality of the Administrative Contentious Courts

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Abstract: With the appearance and establishment of the administrative contentious, the issue of the existence of an absolute right of control of the courts over administrative acts arose. This presumption gained momentum when these new norms materialized, but the legislator, through the numerous normative acts, completely dismantled this attempt. In this article we will analyze which are in fact, the administrative acts that are completely removed from the legality control of the administrative contentious courts.

Keywords: military command act; administrative act; public authorities

1. Introduction

Analyzing the relevant regulations, we find from the provisions of article 126 paragraph (6) of the Constitution, as well as from those of Law no. 212/2018, the fact that three types of acts were highlighted which constitute exceptions to the control of legality exercised by the administrative contentious courts.

They were also settled in the literature, thus reaching the conclusion that the acts subject to legality control of the administrative contentious courts (Vedinaș, 2020, p. 461) are the following: public administration acts (civil, labor or commercial law), administrative acts provided in the Law no. 554/2004, within art. 5 paragraph (2) which are subject to a special control procedure, and finally, documents totally evaded from any form of control by the administrative contentious courts, which will make and the subject of our analysis in this article.

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2. Administrative Acts of Public Authorities Concerning Relations with Parliament.

We will begin the analysis of the regulations of the Constitution which expressly stipulate in Article 126 paragraph (6) that "Judicial control of administrative acts of public authorities, through administrative litigation, is guaranteed, except for those concerning relations with Parliament, as well as of military command documents. The administrative contentious courts are competent to resolve the claims of the injured persons by ordinances or, as the case may be, by provisions from ordinances declared unconstitutional[1]".

Making a slight legislative anamnesis to the 1923 Constitution, this category of exempt acts was called "government acts". Therefore, Article 107 of the above-mentioned Fundamental Law provided that the judiciary cannot judge acts of government as well as acts of command of a military nature (Debbasch & Ricci, 1999, p. 65).

In French doctrine, the theory of government acts turned out to be an administrative jurisprudential creation, which after 1822 was sanctioned by the legislator through the Council of State which rejected a claim concerning a political issue, and later in 1867 the same the court ruled that "political acts are not likely to be challenged through administrative litigation (Debbasch & Ricci, 1999)".

Continuing the analysis of the theory of governing acts, the specialists in the field made a distinction between administrative acts and governing acts, but, nevertheless, from an ideological point of view, the doctrinaires considered it extremely difficult to achieve such a concrete differences, limited only to providing a categorical enumeration of these types of acts.

Thus, according to French doctrine, acts of government represent the acts of the executive in its relations with the Parliament and the acts of the executive in its relations with foreign powers, among which we mention the acts referring to the conclusion and negotiation of an international treaty, acts referring to the application of treaties. war, acts of international politics.

Returning to the Romanian legislation, the phrase "acts regarding the relations with the Parliament" is permissive insofar as it refers to all administrative acts of all public

[1] Romanian Constitution no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003.

authorities in its relations with the parliament, opinion also supported by the legislator by Law no. 554/2004.

However, we can include all political acts issued in the exercise of constitutional powers between Parliament, the supreme representative body, and the two heads of the executive, in this case the President and the Government. Thus, for the concrete exemplification we mention the message of the president provided in art.88 of the Romanian Constitution, the dissolution of the Parliament by the President in art.89, the referendum in art.90, the consultation of the Government by the President in art.86, etc.

3. Military Command Documents

In the Romanian legislative system, the notion of military command appeared for the first time in the Constitution of 1923. It is interesting to mention that the fundamental law only referred to this notion, there being no written regulation defining this new concept. Being an element of novelty and also a regulated gap, the specialists in the field have developed a special interest in defining this new concept, manifesting different opinions.

Thus, a number of doctrinaires provided definitions and clarifications regarding the notion of a military command act. We will present as an example the opinion of the author C.G. Rarincescu according to which "the notion of the military command act, just like the governing act, does not emerge from the legal analysis and as such cannot be a legal notion; it can only be an extra-legal notion, born from the need to satisfy certain interests directly related to the activity of public services of a special nature, which is that of national defense" (Rarincescu, 2019, p. 303).

Further, highlighting the difficulties of defining the notion of military command act, it shows that the notion of military command acts, as it results from the preparatory works of the Constitution of 1923, presented by Professor C. Disescu, before a joint commission of the Chamber of Deputies and the Senate, must have the following characteristics: first of all, they must be acts that emanate from the public authorities that have the character of military commands, by military command being understood a totality of troops placed under the command of a determined boss; secondly, there must be acts, which must be of a military nature, referring to acts and operations in connection with military service and duties; and lastly, all these documents must include the idea of order.

Therefore, analyzing the scope of military acts of command and distinguishing as they were admitted in time of war, during the state of siege, declared by law or in time of peace, the author concludes that: "consequently the theory acts of military command cannot be applied to acts of military commands in their relations with the civilian population, which acts fall from the point of view of their legality under the censorship of the competent courts (Rarincescu, 2019, p. 308)". Following in the footsteps of these features, Prof. C.G. contingents and concentrations of troops, the distribution and deployment of units, the assignment and taking of command, maneuvers, exercises and military operations.

In an attempt to define the military command act in a decision pronounced by the Court of Cassation and Justice it is shown that by military command acts are meant all acts performed by the military authority, based on law and regulations, in order to train and lead military units or establishments, by their hierarchical chiefs, which also includes the advancement of officers in order to place them in those units or establishments.

The doctrine and jurisprudence had the task to characterize these acts and to delimit them from the governing acts. Thus, Prof. Anibal Teodorescu, divides military command acts into two categories, respectively military command acts made during war such as: mobilization, movement of troops, their concentration on the line of attack or defense, advance or withdrawal and acts military command made in peacetime such as: the creation of new units, their abolition, their transfer from one garrison to another, the delimitation of recruitment areas, concentrations of troops for exercises and maneuvers. Other acts, such as: the appointment of an officer, promotion, punishment, relocation or retirement are not acts of military command, but simple acts of military administration, acts of authority. They will be able to be subject to the control of the administrative contentious, except if the law does not exempt them (Teodorescu, 1929, p. 425).

Next, we will analyze in detail a military command act subject to the control of the administrative contentious courts, established by Decision no. 2263/1997 of the Supreme Court of Justice, administrative contentious section. The plaintiff, a natural person, sued MAPN, so that the administrative contentious court would decide to annul an order of the Minister of Defense ordering his transfer to the reserve. In the order, the plaintiff further argued that it is mentioned only that his transfer to the reserve is made by applying art. 43 letter b) of law 80/1995 on the status of military personnel, being known that military acts of command cannot be challenged in court. Against this sentence, the plaintiff declared an appeal, arguing, in essence, that the

transfer to the reserve is not a military command act, but is a measure that is assimilated to the termination of the employment contract, regulated by the Labor Code.

Judging the appeal, the supreme court held that, indeed, according to the provisions of art. 2 letter b of Law 29/1990, the military command acts cannot be challenged in court. The military command documents continue to rule the supreme court, the documents that are issued by the competent military authorities, in order to ensure order within the military unit and the military personnel in these units. Therefore, those acts are considered to have a military content, referring to the service and duties of the military and that include the idea of order, command, acts whose execution ensures the military discipline, so necessary and characteristic of this body.

Therefore, it is further supported in the motivation of the decision any other acts issued by the military authorities, foreign to the actual necessities of the military actions, can be attacked through administrative litigation. In the present case, it is established that, by an order of the Minister of Defense, the applicant was placed in reserve. Or, in this document, compared to those shown, it cannot constitute an act of military command, in the sense of the Order of the Minister of Defense no. 126/1990, exempted from administrative litigation, according to art. 2 let. b) of Law 29/1990.

On the other hand, the applicant's transfer order does not contain the reasons for reaching this solution. In this case, the non-indication of the reasons or their mention in completely general and unverifiable forms attracts the absolute and irremediable nullity of the order of transfer to the reserve. Consequently, compared to the previous ones, the appeal was admitted, the appealed sentence was quashed and on the merits, the action was admitted, and the order to transfer to the reserve was annulled.

Regarding the documents of transfer to the reserve, like this one in this case, we consider that the administrative contentious court is going to verify if the provisions of art.85 and the following from Law 80/1995 on the status of military personnel were observed when issuing the order of transfer to reserve and, depending on the conclusions they reach, to admit or reject the actions that have as object the transfer to the reserve.

In order to comment in more detail on the above mentioned, we will analyze the starting point of this case, ie the beginning of this case given by the Bucharest Municipal Court by sentence no. 198/1991 by which the plaintiff, a natural person, requested the administrative contentious courts to cancel an order issued by the

Minister of National Defense, through which he was placed in reserve, because he considers himself injured in his rights recognized by law.

Resolving the case, the court held that the order in question is a command act of a military nature and applying the provisions of Article 2 letter b) of Law 29/1990 according to which military character, rejected the action. The solution was maintained by rejecting the appeal by the Administrative Litigation Section of the Supreme Court of Justice by Decision no. 116/1992.

By decision no. 116/1993, the supreme court pronounced the same solution, but besides the exception provided by art. 2 lit. b of Law 29/1990, added another exception, the one regulated by art. 2 let. c of the same law, according to which are exempted from the control of legality by the courts of administrative contentious, administrative acts for the abolition or modification of which is provided, by special law, another judicial procedure, in this case, according to Decree 214/1977 on pensions military personnel, in order to contest the pension decisions by the military dissatisfied with the established rights, the person in question may address, according to the provisions of art. 46 paragraph 2 of the decree, within 30 days from the communication, to the Central Pension Commission of the Ministry of National Defense, respectively of the Ministry of Interior. The decisions that were challenged in time, as well as the decisions of the central pension commissions are final. According to art. 47 of the same decree, the central pension commissions are appeal and control bodies in this capacity, the commissions judge and decide on the requests for review of the decisions given by the pension commissions and follow the correct application of the pension legislation by the pension bodies. In order to reject the action, the court of first instance correctly considered that it concerns a military command act, exempted according to the law, from the control of the administrative contentious courts, so that no further argument was necessary to motivate the justice of the rejection solution, of the action, which in fact regulates the way of contesting the calculation of the military pension and not the administrative act of authority - the retirement act.

4. Conclusion

Following the study presented above, we find that by establishing the institution of administrative litigation, numerous legislative aspects have been improved and a series of procedures have been optimized. Thus, the legislator considered it opportune, following the analysis of the entire Romanian legislation in the matter, to

evade from the control of legality of the administrative contentious courts the administrative acts of the public authorities in relations with the Parliament and the military command acts. The above-mentioned administrative bodies enjoy a complex and detailed legislative framework, being covered all aspects necessary to ensure the rule of law.

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