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ORIGINAL PAPER

Normative Administrative Act

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Abstract
Current legal reality indicates growing tendencies of the Romanian administration in adopting legal administrative instruments with the purpose of regulating different areas of both local and central interest, such as organizing institutions, establishing local taxes, fiscal competences and internal procedures, with the consequence of limiting some rights or protecting the others. These trends are determined, on one hand, by the slow and difficult process of adopting the laws by the Parliament and, on the other hand, by the administration's tendency to clarify, explain or interpret the gaps or inaccuracies of laws or to "adjust "the laws in its own interest. From the perspective of the state of law, the administration can act only through the adoption of secondary law-making acts, respectively only upon specific legislative ability and cannot act against the law. The rule of law requires that the normative administrative act should be in accordance with the law. This stage in the normative hierarchy refers to several aspects. Normative administrative act can be adopted only according to the law. It is subsequent to the law. This means that it cannot intervene unless it puts a law into force. It cannot, on the other hand, add anything to the law. Any administrative provision with tends to regulate primary and not subsidiary to the law is devoid of legal efficiency. The content of the normative administrative act must be in accordance with the law which is authorizing it. The law and doctrine state that a normative administrative act is adopted only in the organization and enforcement of the law. Public authorities can only interpret the law in the organization and enforcement of which they shall issue normative administrative acts. This interpretation is not authentic, nor mandatory for the courts, which have jurisdictional control over these acts. Seen as a source of law, normative administrative act is the only one which can be censored by ordinary courts of justice, giving it a special status within the constitutional order.

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The concept of normative administrative act

Defined in the interwar period (Negulescu, 1925: 344) as "an act done by a clerk, from the administrative branch, pertaining to an administrative matter, which fall within the prerogatives of that clerk", is presented in recent doctrine as "the main form of public administration bodies activity, which consists of a unilateral and express manifestation of willingness to create, modify or extinguish rights and obligations, in achieving public power, under the main control of legality of the courts" (Iorgovan, 2005: 25). If during the interwar period, the concept was used in a purely formal sense, the current doctrine puts emphasizes not only the formal-material aspect, but also the functional-legal side of the administrative act, referring both to the authority and to the applicable legal regime. Law no. 554/2004 published in the Official Monitor no. 1.154 from 7 December 2004, does not give an explicit definition to the normative administrative act, but only to the administrative act in general, which is, according to art. 2 para. 1 letter c), the unilateral act with individual or normative nature issued by a public authority, in exercising a public power, to organize law enforcement or to enforce the law itself in concrete, which creates, modifies or extinguishes legal relations. Although the text of the law does not specifically mention, the administrative act can be defined as being an administrative act, only if its effects create, modify or extinguish relations of administrative law. A legal act cannot be defined as an administrative law, unless its effects regulate specific standards of administrative law. Related to this aspect, we must emphasize that a normative administrative act it shouldn't be confused with the specific rules of administrative law. Usually, these rules are published through administrative regulations, but may also be subject to other higher legal acts, laws or ordinances. On the other hand, an administrative act must not contain only rules of administrative law, as it may also include rules of civil law, labor law, etc. The doctrine during the communist period was also highlighting the need for social relations particular to administrative law, namely "a normative act (...) can regulate different categories of social relations, hence it belongs to administrative law only if and to the extent that it regulates social relations subject to administrative law" (Ionescu, 1970: 26). The first observation arising from the definition given by Administrative Court Proceedings Act is that the normative administrative act is adopted unilaterally by a public authority. The unilateral nature exists also in the case of acts which need the consent of several people who are part of the collective structure of a public authority, for example a local council. The mechanism of decision within the issuing public authority and the procedure for adopting it (a certain quorum required by law) does not remove the unilateral character, because all individuals involved in the adoption of the act (civil servants, politicians, local and county councilors) contribute to the achievement of the competence of the administrative body, ultimately resulting in a single legal will, that of the issuing authority. Regarding the normative administrative act, the question is whether it is possible for a single individual to be competent to issue such an act or this power should be given to the sole responsibility of public authorities, which requires collective management bodies.

In this case, in my opinion, the only answer can be the one which requires the adoption of the normative administrative act by collective public authorities. Being, in essence, a smaller law, both in terms of legal strength, and also regarding the level of the body which adopts it, the normative administrative act must respect, wherever possible, the principles for adopting the laws, in terms of acts adopted by the legislative power. Recent jurisprudence demonstrated, in many occasions, that normative administrative acts

issued by the holders of single-person position bodies, are illegal, because they are issued by abuse of power, mainly by expanding the boundaries of competence required by law, and also by breaking the rights and freedoms of citizens. (E.g. the order of the President of Health Insurance House, which named the issuing body of the tax decision for social health contributions). The distinction between individual or normative, from the text of the law refers to the extent of the effects of the administrative act. Normative administrative acts include compulsory regulations of principle, formulated in abstract, in order to be applied to an indeterminate number of persons, and individual acts are expressions of will which create, modify, abolish rights and obligations for one or more persons established in advance.

The features and particularities of normative administrative act

The normative character

Viewed from the functional perspective, the law) is a normative act which regulates a primary domain (Dănișor, 2008: 146. This is the central normative act in the legal system, being developed by the representative supreme legislative body of the state power, according to pre-established constitutional procedures, which includes general legal norms with compulsory and permanent character, under the sanction of the coercion force of the state. The law is issued in exercise of legislative functions conferred to the Parliament by the Constitution, while the administrative act is adopted in exercising the administration function to organize and enforce the law. The normative feature of the law, borrowed by the normative administrative act, requires that it contains general, abstract, regulations with mandatory character for an undetermined number of legal subjects or situations. The normative administrative act requires certain behaviors or establishes conducts, namely it imposes actions or inactions, establishing rights and obligations for the subjects of the administrative law. We can say that the normative administrative act is impersonal because it does not address to a specific topic or determined persons, predetermined and identified as such. This impersonal character does not mean that any administrative act applies to absolutely everyone. Some acts target all citizens, others target certain categories of subjects, such as taxpayers, drivers, civil servants, etc.

Source of law

Creating general and impersonal rules of conduct applicable to undetermined subjects, which can be enforced, if necessary through the coercive force of the state, only the normative administrative act has the character of a source of law (Dănișor, 2008: 155). These acts have an inferior judicial power than the other sources of law (constitution, laws, and ordinances), which means that the legal regulations they cover must be in accordance with the laws and other sources of higher law. As a rule, normative administrative acts include general rules derived from the law that organizes or puts it into enforcement. These are such acts, the ones issued by the Government and specialized public administration or by other central or local public institutions, only if they contain specific rules of administrative law.

Amongst these acts we can observe two categories. The first category refers to organizational administrative acts which regulate the organization and operation of a public authority or a public service. They are such acts, rules of internal procedures, rules of organization and functioning. These acts are adopted fallowing the principle of legality and autonomy of will of the authorities, which gives them the right to organize their internal structures according to the specific of each separate administration. Such acts

were also called acts of internal administration (Negoiță 1977: 44). The second category, functional administrative acts are those which relate to the activity of an authority, the relationship between the authority and subjects, in the process of law enforcement. For example, local council decision for approving the amount for local taxes and contributions.

For these acts, specialization of each authority in relation to the different areas of activity where they operate on the basis and organization of the law, determines the reason of these rules. The administrative act may also regulate primarily, only in case of special and concrete delegation by law. In this situation, normative administrative act contains regulations derived directly from the Constitution. Thus, it was emphasized in the doctrine that "when there is a reserved legislative area, the general regulator power being given to the Executory, meaning that it can regulate by normative administrative act any area which is not expressly given to the competence of the Legislative, normative administrative act is subsequent directly to the constitution" (Dănişor, 2006: 200). As we shall see, courts of justice and the Constitutional Court have limited regulatory jurisdiction by normative administrative act, being excluded the area of organic laws, and also certain situations in which it was violated the principle of legality of administrative acts. It should also be noted that, during the communist period, it was allowed that the public authorities could issue normative regulations. In this regardit is stated that "the state administration represents a legal environment, because it is the expression of the legal rules governing its organization and activity and is also the instrument of legal norm that it enforces and also issues" (Negoiţă 1977:41). A controversy in the doctrine was referring to the decrees of the President of Romania, with reference to the normative character and, implicitly, to the character of the source of law. Thus, it is accepted that presidential decrees can be a source of administrative law to the extent that they have normative character and are regulating in the area of Government competence (Deleanu, 2001: 362).

It argues that, according to the provisions of art. 93 of the Constitution, which establishes that the President of Romania institute, according to the law, state of siege or state of emergency throughout the country or in some territorial-administrative units and request the Parliament approval of the adopted measure, within 5 days of taking it, the decree of the President, based on those provisions, regulate the relations in the sphere of the executive in extraordinary situations and represent a source of administrative law. On the other hand, it is argued that it cannot be established, as a rule, that the decrees adopted by the President of Romania have normative character (Iorgovan, 2005: 132). In my opinion, in view of the nature of the presidential function, as it is regulated by the current Constitution, the President of Romania has the right to issue normative decrees. Only as an exception, in totally extraordinary situations, in its duty as commander of the armed forces, namely in the situation of rejecting the aggression, a task governed by the provisions of art. 92 par. 3 from the Constitution of Romania, we can say that the act has a normative character, and is implicitly a source of law. Regarding other constitutional prerogatives, the President cannot take fundamental decisions for the fate of the country unless he leads the Supreme Council of National Defense, as its President, its decrees acting only to make incident the collective judgments of the Supreme Council of National Defense, and in fact, to trigger the application of the legal framework in that area. Therefore, presidential decrees, issued in exercising of his constitutional powers, can only be individual administrative acts and may not constitute sources of administrative law.

Issuing in the achievement of the public power

This specific feature of the administrative act, generally, was forgotten by the Parliament at the time of the initial adoption of Law no. 554/2004 on administrative court proceedings. In spite of the important and defining character of this feature for the nature of the administrative act, the legislator needed three years to complete the contentious law, so that by Law no. 262/2007 amending and supplementing Law of administrative contentious no. 554/2004, published in the Official Monitor no. 510 of 30 July 2007, modified the content of the definition of administrative act from art. 2 par. 1 letter c, by adding the exercise of the public power when issuing an administrative act. The error of the legislator, whether or not intentional, is inexplicable because, in addition to the fact that the public power defines the administrative law and distinguishes this branch of public law from private law, the subject has been the object of debate in the Romanian doctrine, following the French branch, but also in foreign legal doctrine in general. Adding the feature of being adopted in a public power regime of the administrative act seems to be the legislator's option on doctrinal contradictions regarding the characterization of public law to be dominated by the theory of public power to the disadvantage of the public service feature. Or it can be a random choice on the concept made only in order to separate the administrative acts from other acts of the administration, which don't have administrative nature (e.g. provision of a mayor to hire a driver or contractual staff for his institution). This, while the Administrative Contentious Law does not define the term of public power, but only the term of public service.

Publicity

The moment from where the administrative act starts to take effect is its publication, as opposed to individual administrative act which is brought to the attention of the subject or determined subjects, to which it is intended to, through direct communication. It is necessary to bring the normative administrative act to the attention, by publicizing it in the Official Monitor of Romania or in county official monitors or of Bucharest city, respectively, or by other methods of advertising specific to each act, for example directly to public authorities. Normative administrative acts, such as orders with normative character, instructions and other acts of head of ministries and other bodies of central public administration, are published in the Official Monitor of Romania, Part I, to be known and opposable *erga omnes* due to the their normative character. In accordance with the doctrine (Soare, 2006: 132). I consider that, given that the publication condition is not fulfilled, such acts don't come into force, because they don't have legal force. They can be considered, possibly, as a draft law.

Not being made public, a normative administrative act does not have legal effects and does not bind the subjects to which it is addressed to execute it, because they don't know the content of the act and they are unable to comply with it.

Regarding normative administrative acts issued by local authorities, these may, in relation to their nature, be published in official monitors of counties or may be subject to publication in accordance with art. 83 of Law no. 24/2000 regarding the norms of legislative technique for elaborating laws, according to which, in order to make them come into force, the normative acts adopted by local public authorities are made public, under Law no. 215/2001, republished, as amended and supplemented, by display in authorized locations and through publication in a local newspaper of wide circulation.

Recently, due to the digitization of media, the publication also takes place on the web-site of the institution. Addressing to a generic and indeterminable number of people, individual communication is not possible. For this reason, the Contentious Administrative Law established in accordance with art. 23 that, in case of cancellation of a normative administrative act, final and irrevocable court decisions which have cancelled in whole or in part an administrative act with normative character are generally binding and effective only for the future. They shall be published, after motivating them, at the request of courts, in the Official Monitor of Romania, Part I, or, where appropriate, in the official monitors of the counties or of Bucharest city, being exempted from paying fees for publication. If the time when the individual act is communicated is linked to the possibility of the person to start the judicial supervision procedure, by a prior complaint followed by a possible legal action in court, the moment of publicizing the normative administrative act is not linked to any sort of obligation for the subjects. This is because the administrative act is in effect until the moment of revocation by the issuing authority, and throughout this period, the interested person may fill in a prior complaint at any time.

Besides, in my opinion, this complaint can also be made after the revocation of the normative administrative act, even if the normative administrative act is no longer into force. In this situation of revocation of the act, any possible action, following the prior complaint, cannot be devoid of purpose, because, in the event of revocation, the normative administrative act produced legal effects throughout its existence, and where these effects were unlawful and caused violations of rights and legitimate interests of certain people they must be removed. In this sense was also rendered the decision of the High Court of Cassation and Justice no. 3585 dated September 27, 2007 unpublished, which, ruling on the exception of illegality of a repealed normative administrative act, stated that the repeal of the act during the proceedings does not render the object to appeal, because, on one hand, the administrative act with normative character targeted by the exception of illegality produced legal effects during the period when it was in force, and on the other hand, the legality of the act is analyzed in relation to the regulations in force at the date of issue and adoption. An additional argument is also the decision of the Constitutional Court regarding the possibility of declaring unconstitutional a law repealed, applicable for the same reasons to the normative administrative acts after they cease to be in force.

By the decision no. 766 dated 15.06.2011, regarding the exception of unconstitutionality of art. 29 par. (1) and Article 31 par. (1) and (3) of Law No.47 / 1992 on the organization and functioning of the Constitutional Court, it was decided that the collocation 'force' in the above mentioned, is constitutional as far as it is interpreted that the laws or ordinances, or the provisions from laws or ordinances whose legal effects continue to be produced also after they cease to be in force are also subject to constitutionality control. The decision marked a change in the practice of the Constitutional Court, the previous solution being rightfully appreciated as restrictive regarding the a posteriori role carried by the Court. In this regard it was emphasized in the literature that (Dănişor, 2014:206) "this manner of proceeding is not responding to the fulfilment of the other finality of the control: effective protection of rights and freedoms because they have been possibly affected by the law as long as it was in force".

Linked to the moment when the normative administrative act entered into force, in doctrine (Nedelcu, 2009: 133) it is stated that normative administrative acts should enter into force in accordance with art. 78 of the Constitution of Romania, namely three days after publication, if there is no other special term regulated inside the normative act. I agree with this opinion, but only regarding the recipients to whom the normative

administrative act is addressed to, who need time to comply with the regulated provisions. We cannot hold that, for the issuing authority, the act enters into force within three days from publication, because, as a result of the principle of legality in public administration activity, the act creates for the issuing body rights and obligations from the adoption date, namely it should be brought to the attention, to carry out its assumed obligations, to organize the regulated procedures and it cannot be revoked anymore, but only according to the law. Therefore, for the issuing body, the administrative act shall take effect from the time of its existence, namely from the time when the manifestation of will was produced, made under the procedural conditions provided by law. For this reason, the conditions for legality are analyzed in relation to the date of issue, and not only in terms of when that legal effect entered into force. Unlike normative administrative act, the individual one does not have to be published, but only communicated to the stakeholders. In this regard, it was adopted a solution of principle during the meeting of judges Section of H.C.C.J. from 22 October 2012, which established that the acts issued by the heads of central public authorities approving, for example, organizational structure, number of positions or the rules of organization and functioning of the institution, are acts of an individual nature being issued under delegation assigned to the issuer by Government decision, for enforcement and practical application of legal provisions with higher legal force, which makes their publication in the official Monitor not to be compulsory.

The role and place of the normative administrative act in the hierarchy of the internal rules in a state of law

Like any administrative act, the normative act benefits of the presumption of legality, the presumption of authenticity and the presumption of truthfulness, features that give it the legal force to be mandatory executed. Legality is the essential feature which characterizes the legal regime of administrative acts. This means that administrative acts must comply with the Constitution, with the laws passed by the Parliament, and also with other administrative acts with a greater legal force. This presumption of legality determines the strength of administrative acts, as acts of authority, which implies their execution by default, the requirement to observe them being part of the execution of the law.

On the other hand, diversified administrative practices, which have often been contradictory and the diversity of actions specific to public administration, causes a peculiar dynamism and mobility to administrative acts. These acts are replaced or changed quite quickly after their adoption, phenomenon that creates a real legislative inflation. Because of the specific of the administrative activity and of the fast transformations taking place in the administration, administrative law norms are more mobile than the norms of private law. Therefore, it was stated in the doctrine that administrative judicial norms have a wider legislative dispersion, leading to lack of coding which characterized the administrative law (Nedelcu, 2009: 148). The mobility specific to the norms of administrative law, characterized by constant adaptation to both the laws and ordinances that must be implemented, and also to the rules that govern the organization or the competence of the public authorities, leads to the fact that normative administrative acts will take more or less legal forms, depending on the means of action used, on the "interest" of the administration, especially local administration, interest which, depending on the colour of the political party, is different from the interest of the central administration or from the interest of the legislative authority. It should be reminded that, this mobility of administrative acts, despite being more hardened in the communist period, was specific to

the interwar period as well. In this respect (Negulescu 1925: 8), it was pointed out that "it is a stated fact (...) that public services are growing considerably, despite all criticisms that are made and despite the bad administration, which does not meet public needs and the high costs, brought by these services and yet new governments find necessary to bring other services, keeping also the ones criticized."

The above-described facts give a special role to the normative administrative act within the constitutional order, largely due to administration's attempts to primary regulate areas where this thing is prohibited or in other areas by breaking superior judicial norms. The question is whether the central or local administration can regulate in certain areas which are constitutionally reserved to certain normative acts. The answer can only be a negative one. Just as the area reserved to organic laws, as required by the Constitution in the provisions of art. 73 par. 3, having regard to the exceptional nature of those rules, cannot be covered even by an ordinary law, even more so a normative administrative act cannot regulate such relations. In this respect, the Constitutional Court ruled in a recent decision (https://www.ccr.ro/files/products/Decizie_172_2016.pdf), that the provisions of art. 18 of Law no. 360/2002 on the Statute policemen are unconstitutional, because they are contrary to article 1 par. (4) of the Constitution, regarding the principle of separation and balance of state powers (by delegation of one competence that belongs exclusively to the legislator to a member of the Government), and also art .1 par. (5) of the Constitution, in its structure regarding the predictability of law.

Those provisions established that, in the situations and conditions provided by the order of the minister of interior, the management positions can be occupied by exam or contest, as appropriate. The Court assumes that the legal regime of the policemen, civil public servant, with special status, is regulated by organic law according to Article 73 par. (3) let. j) of the Constitution, respectively Law No. 360/2002 and, therefore, essential aspects of employment on management positions of policemen must be regulated by organic law. Consequently, rules relating to the conclusion, performance, modification, suspension and termination of legal relation of employment, implicitly the ones regarding employment on management positions are related to the manner of execution of work relations. Legal provisions criticized not only because they don't regulate the employment procedure of policemen in management positions, but delegates the regulation of these important aspects to the ministry of resort who is empowered to adopt orders. Since, according to article 73 par. (3) let. j) of the Constitution, the status of civil servants is regulated by organic law and, taking into account that the essential aspects on employing on management positions aim at a change of work reports, the Court held that the issues in question should be regulated by an organic law, following that the specific rules of the procedure for employing on management positions should be explained and detailed by order of the minister of resort. Consequently, the criticized provisions of law, which establish the regulation of these issues through administrative acts, are contrary to Article 73 par. (3) let. j) of the Constitution.

Also, the Court holds that, according to the criticized provisions of the law, it brings us the situation that an essential aspect which targets the execution of working reports will be governed by an administrative act. Or, the norms which regulate the employment on management positions must meet certain requirements of stability and predictability. Thus, delegation of attribution to establish this norm to a member of the Government, by issuing acts of administrative nature which have an infralegal character, determines a state of legal uncertainty, such acts having usually a high degree of successive changes over time. So, on the background of legislative gaps highlighted

above, the Court also holds that the legislative solution provided by Article 18 of Law No.360 / 2002 is contrary to the norms of legislative technique, since, according to the Law no. 24/2000 on norms of legislative technique to develop normative acts, republished in the Official Monitor of Romania, Part I, no.260 of 21 April 2010, as amended and supplemented, normative orders are issued only on the basis and enforcement of the law, and they should be strictly limited to the framework established by the basic acts and for which execution were issued, without letting them to fill in the law, as it was done by the Order Vice prime minister, the Minister of Administration and Interior, no.69 /2009.

The Court, therefore, concludes that, for removing the flaw of unconstitutionality, essential aspects of employing on management positions should be regulated by an organic law, following that the rules specific to this procedure to be explained and detailed by order of the Minister of Administration and Interior. More observations can be deducted from the decision of the Court. First, as emphasized, the normative administrative act, which is an act with inferior legal force, cannot regulate the area of organic laws. The opposed solution would determine the violation of the principle of legality, because the administrative acts with normative character are issued only on the basis and in execution of the law and must be strictly limited to the framework set up by the acts on the basis and in execution of which they have been issued. The Court also explicitly underlines that mobility of the norms of administrative law and their frequent and unpredictably change would lead to a state of legal uncertainty, being contrary to the nature of organic laws and to the principle of security of judicial reports. Such an act does not meet the stability, predictability and clarity requirements. Not least, although it has not detailed the argumentation, the Court notes that by a normative administrative act the law cannot be completed. This observation is important because the current administrative activity that is the main form in which public administration is trying to elude the legal provisions with higher legal force. For example, administration's excess power, by widening regulatory competence in contradiction with the law, was considered when issuing the sentence no. 835 dated 08.02.2012 in case no. 9.914/2/2014 of Bucharest Court of Appeal - Section VIII Fiscal and Administrative Contentious. By the provisions of art. 35 par. (1) from the Order of the president of National Health Insurance House no. 617/2007, it was established that in accordance with art. 215 par. (3) of the law and art. 81 of the Code of Fiscal Procedure, for the individual persons' obligation to pay the taxes to the fund, who are insured through a contract of insurance, other than those for which revenue collection is done by ANAF, the debt is constituted, where appropriate, by the declaration referred to at art. 32 par. (4), tax decision issued by the competent authority of CAS, and also judgments on debts owed to the fund. According to the Court, it was held that the provisions from above violate art. 86 par. (1) of the Government Ordinance no. 92/2003, according to which the tax decision is issued by the competent fiscal body, and according to art. 17 par. (5) of the same law, the tax bodies are the National Agency for Fiscal Administration and its subordinate units, and also the specialized departments of local administration authorities. As a result, the organs of the National Health Insurance House are not tax bodies and, therefore, cannot issue tax decisions. The tax decision is a document which establishes the taxes (covered by Title VI of the Fiscal Procedure Code) and not an act of enforced execution. As a result, tax decision should not be confused with the enforcement title, while the latter is issued separately in accordance with art. 141 par. (4). Consequently, the power to issue enforcement titles does not include the one to issue tax decisions, these competencies being established by the legislator separately.

In conclusion, we emphasize that an administrative act must obey the constitutional principle of legality which dominates public law norms, so that, the administration will have to avoid regulations where the domain is specifically reserved to certain normative acts of a higher legal force and also excess of power by acquiring some illegal competences. A normative administrative act must meet the following characteristics: to be in accordance with the Constitution and the laws of the legislature body and to contain provisions contrary to them; to observe the principle of hierarchy of superior judicial norms in relation to the lower ones; to fall within the limits of territorial and material jurisdiction of the issuing public authority and not to be issued by excess of power; it cannot primary regulate in areas where regulation is provided for legally binding normative acts; to be issued in the form and respecting the procedure for each separate document.

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