

Chapter 2

On the Jurisdictional Control of the Acts of the Government of Romania

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Abstract The executive power in Romania is made up of two branches: the Presidency and the Government. In its status as executive authority, the Government issues decisions by means of which the execution of laws is organized. Based on legislative delegation, the Government also issues legal acts. These are represented by ordinances and emergency ordinances. The external control over the two categories of documents that the Government issues is exercised in different ways: control of legality and control of constitutionality. For ordinances and emergency ordinances; there is only control of legality for decisions. Because government decisions have the juridical nature of administrative acts, the contentious control over them may be exercised either directly or indirectly. Direct control is achieved by bringing about an action for annulment and thus constitutes a full-jurisdiction contentious control that is exercised by contentious-administrative courts, which are part of the judiciary. However, the injured party may opt for dispute settlement by certain administrative jurisdictions. The judge may examine the lawfulness and, within certain boundaries, the opportunity of Government decisions with an individual nature and only the lawfulness of decisions with a normative nature. Indirect control is performed by invoking the plea of illegality, which is to be settled by the court vested with the merits of the case, whether it is a contentious-administrative court or a common law one.

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2.1 The Government

Article 1 paragraph 4 of the Constitution of Romania¹ stipulates that the state is organized according to the principle of separation and balance of powers—legislative, executive and judicial—within the constitutional democracy. However, Title III of the Constitution, which contains the established regulations of the government, is called “Public Authorities”. This is one of the reasons why the doctrine held that the way, in which the above-quoted article 1 paragraph 4 of the Constitution has been drafted, may not, by itself, substantiate the existence of an “executive power”, arguing that the notion was emptied of the way in which the theory of separation of powers evolved (Iancu 2014, p. 533).²

We will avoid the dispute on this issue because it goes far beyond the limits of our study and we will accept for present purposes that the Government is one of the executive authorities of the Romanian state. The executive power has two branches: the President, on the one hand; and the government, the central administratively autonomous units and the local public administration, on the other hand. The Government consists of the Prime Minister, Ministers, and other members established by organic law. Article 102 paragraph 1 of the Constitution provides that the Government, according to its government programme accepted by Parliament, ensures the implementation of domestic and foreign policy of the country and the general management of public administration.

The structure and powers of the Government are regulated by Law no. 90/2001 for the organization and functioning of the Romanian Government and Ministries.³

The Government subordinates the ministries and other central specialized bodies.

The autonomous administrative authorities may be established by organic laws. Characteristic of these authorities is that they work independently and do not have superior management bodies and their members are appointed by Parliament.⁴

Local public administration consists of municipalities, cities and counties, which are the governing bodies of the respective territorial-administrative units and have

¹The Constitution of Romania was adopted at the meeting of the Constituent Assembly on 21 November 1991, was published in the Official Gazette of Romania, Part I, no. 233 of 21 November 1991 and entered into force after its approval by the national referendum of December 8, 1991. By the Law on the no. 429/2003 on the revision of the Constitution of Romania, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003, the Constitution was amended. After approval by referendum of the Law on the revision of the Constitution of Romania, the Constitution was republished in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003.

²The author quoted refers to the ideas expressed by Joseph Barthélemy in his *Traité élémentaire de droit constitutionnel*, Dalloz, Paris, 1932.

³Published in the Official Gazette of Romania, Part I, no. 164 of April 2, 2001.

⁴For example, there are such authorities as the National Audiovisual Council, the National Council for the Study of the Archives of Security, the Court of Auditors, the National Supervisory Authority for Personal Data Processing.

no legal personality (Chelaru 2012, pp. 174–177). The public administration authorities that carry out local autonomy in communes and towns are the elected local councils and mayors, and at the county level—county councils are set up that are led by a chairman. All these authorities are elected by direct, secret, and free suffrage for terms of 4 years.

The County Council is the public administration authority that coordinates the activity of commune and town councils in order to perform public services at county level (article 122 paragraph 1 of the Constitution).

In each county and in the municipality of Bucharest, the Government appoints a Prefect, who is the representative of the Government on the local level and runs the decentralized public services of the ministries and of the other central government bodies from the administrative-territorial units.

Between the prefects, on the one hand, local councils, mayors, county councils and their chairmen, on the other hand, there is no relationship of subordination.

2.2 Acts of the Government

The content of the functions and duties conferred on the Government is determined by its executive nature (Vedinaş 2014, pp. 381–382). The juridical instruments through which the Government fulfils these functions and duties are represented by decisions and ordinances, which it may adopt under article 108 paragraph 3 of the Constitution.

As far as Government decisions are concerned, the doctrine made certain clarifications (Ionescu 2012, p. 79). It was demonstrated that the decision is the only act that organizes the execution of laws, an issue, which is expressly provided for in article 26 paragraph 2s sentence of the Law on the organization and functioning of the Romanian Government and Ministries. This organization is the sole responsibility of the Government, but the Government cannot make decisions in the areas reserved to enactment by Parliament, nor can it regulate social relations that have not been subject to a previously adopted law.

Finally, the juridical force of the Government decision is inferior to the law, in whose enactment it was adopted.

In view of the above, Government decisions are *praeter legem* and *secundum legem* (Vedinaş 2014, p. 384).

Government activity is not limited to that of organizing the enactment of the law, but, under certain conditions, is also one of law-making. Under the latter aspect, the normative acts with legal power that the Government may issue are the ordinances.

Since Article 61 paragraph 1 of the Constitution expressly provides that Parliament is the sole legislative authority of the country, the Government cannot issue normative acts with law power only by means of legislative delegation (Iorgovan and Tofan 2001, pp. 62–78).

The ordinances that the Government may issue are either regular ordinances or emergency ordinances, legislative delegation being granted in a different manner for each of the two categories.

Legislative delegation for regular ordinances is achieved by an empowering law, passed by Parliament, which mandatorily establishes the field and the date up to which ordinances can be issued (article 115 paragraph 2 of the Constitution).

The constitutional regime of the ordinances issued by the government under an enabling law is characterized by the following features:

- it can only be adopted in the regulation of ordinary laws, and not in that of the organic laws;
- it is subject to the subsequent approval of Parliament, if the enabling law expressly requires it;
- it can be modified, supplemented, or repealed by the Government, but only during delegation.

If the enabling law provided for the necessity to approve the ordinance, the Parliament will approve it under the law. To this end, the ordinance shall require the approval of Parliament, according to the legislative procedure, until the expiry of the enabling term. Failure to meet the deadline entails the discontinuation of the effects of the ordinance.

The law, by which Parliament is to pronounce on such ordinances, may be one of approval, of approval with modifications or additions, or of rejection of a law.

The legislative delegation for the adoption of emergency ordinances is granted directly by the Constitution under article 115 paragraphs 4–6.

As suggested by the denomination of these normative acts, the constituent legislator's intention was to provide the government with a legislative instrument that could be used to solve certain exceptional circumstances and only if Parliament could not meet in a timely manner. Moreover, paragraph 4 of article 115 of the Constitution provides that "the Government may adopt emergency ordinances only in extraordinary situations whose regulation cannot be postponed, with the obligation to give reasons for the urgency within."

Unlike simple ordinances, emergency ordinances may also be adopted in the field of organic laws. Emergency ordinances cannot be adopted in the field of constitutional laws, however, cannot affect the regime of the fundamental institutions of the state, the rights, freedoms, and duties stipulated by the Constitution, electoral rights, and cannot aim at measures of forcible transfer of assets to public property.

Emergency ordinances are always subject to approval by Parliament. Moreover, the entry into force of an emergency ordinance is conditioned by its submission for debate in an emergency procedure to be brought before the competent chamber. If an emergency ordinance was adopted in the scope of an organic law, then the law of approval will have to be adopted by the majority provided for in the adoption of organic laws.

2.3 Control Exerted Over Public Administration

Government cannot be discretionary in the acts it adopts, which is why the latter are subject to control (Iorgovan 2005, pp. 479–517; Vedinaş 2014, pp. 145–149).

Any control activity involves a reference to a system of values and standards. We can describe public administration control as being the operation of checking the compliance of its business with a system of values and standards, whose main source is the law.

Depending on the purpose intended and on the modalities of achievement, there are several forms of control which are exercised over public administration, among which we can mention:

- political control;
- administrative control, which may be internal or external (in the latter case it is either about administrative tutelage or about control by autonomous authorities, as the Court of Auditors, or about a control exercised through administrative courts);
- control exercised by public authorities located outside the three branches of government, namely the Constitutional Court and the Ombudsman;
- judicial control.

All these forms of control can be grouped into non-contentious and contentious control, the latter being composed of control conducted by administrative jurisdictions, control performed by the Constitutional Court, and judicial control.

Administrative jurisdiction represents the activity of settlement of disputes, under contradictory conditions, which is realized by an administrative-jurisdictional body by adopting an administrative-jurisdictional act. The party that is dissatisfied with the solution adopted may appeal against the administrative-jurisdictional act.

The doctrine highlighted the following specific features of administrative jurisdictions: the object is the settlement of appeals against administrative acts; the settlement procedure is inspired by judicial proceedings; the solution adopted is expressed by a reasoned decision, which has the juridical nature of an administrative act with jurisdictional functions (Iorgovan 2005, pp. 462–468).

The change of political regime that occurred in Romania after the fall of communism was characterized, *inter alia*, by the liberalization of the access to justice. Therefore, public administration authorities found themselves caught in a variety of trials in which the courts were called upon to rule on the legality of administrative acts issued by them. Disturbed by this evolution of events, the executive reacted, firstly, by multiplying the mandatory administrative jurisdictions which, in order to be gone through, most often required the payment of stamp duty.

Administrative jurisdictions being mandatory, the courts rejected as inadmissible actions for annulment of administrative acts that were notified directly by those concerned. Therefore, such jurisdictions came up to form a barrier to access to justice. This was why, during the revision of the Constitution, article 21 paragraph 4

provided that “the special administrative jurisdictions are optional and free (Iorgovan 2004, pp. 31–32).”

2.4 Control of Ordinances and Emergency Ordinances Issued by the Government

Given the functions and the different juridical force of the two categories of acts the Government may adopt, the ways, in which their control is achieved, is different: control of legality and control of constitutionality for ordinances and emergency ordinances; only control of legality for decisions.

The forms in which the control of legality of the two types of documents is performed are also different: a non-contentious control, conducted by the Parliament, for ordinances and emergency ordinances; contentious control conducted by the courts for decisions.

The control conducted by Parliament in the legislative procedure for approval of ordinances being one of legality, and not of constitutionality, all government ordinances, regardless of their kind, are also subject to constitutionality control. The submission of this form of control is necessary because the government ordinances, without distinction, have equal juridical force to that of the law. This is what is inferred from article 146 of the Constitution, according to which the following normative acts are subject to constitutional control by the Constitutional Court: laws, government ordinances, international treaties and other international agreements, Parliament regulations.

Briefly said, only the law, as a juridical act of Parliament, and the normative documents with an equal juridical force to that of the law, are subject to the control of constitutionality (Iancu 2014), p 79.

From the peculiarities of the procedure for adopting Government ordinances also followed that their constitutionality control procedure differs in some respects from the procedure of controlling the constitutionality of laws. The constitutionality control of Government ordinances is made only after their entry into force, by way of settlement of unconstitutionality exceptions by the Constitutional Court.

Although these are Government-adopted acts, ordinances are not subject to legality control exerted under the administrative-contentious by the courts. Under Article 9 of Law no. 554/2004,⁵ the person whose right or legitimate interest has been damaged by an ordinance or a provision thereof may bring an action into the contentious-administrative court, together with the exception of unconstitutionality.

⁵Law no. 554 of 2 December 2004 on the Contentious-Administrative was published in the Official Gazette of Romania, Part I, no. 1154 of 7 December 2004. Subsequently, it has undergone several changes, the latter being those contained in Law no. 138 of 15 October 2014 published in the Official Gazette of Romania, Part I, no. 753 of 16 October 2014. From now on, we will refer to this act by the acronym LCA.

This provision has had its critics, who claimed that the plea of illegality would have been a juridical means sufficient to take out of the process the application of a provision of a government ordinance, without the need to invoke an exception of unconstitutionality (Drăganu 2004, pp. 57–65).

By Decision no. 660 of 4 July 2007,⁶ the Constitutional Court ruled that the provisions of article 9 of LCA are unconstitutional to the extent that they allow the action brought before the contentious-administrative court to have as main object the ascertainment of the unconstitutionality of an ordinance or of a provision thereof.

The courthouse, before which the exception was raised, will check to see whether the exception meets the requirements of the law governing the activity of the Constitutional Court, and, if so, will forward it for settlement to this latter Court. The notification to the Constitutional Court is therefore the conclusion of the proceedings.

Pending the outcome of the plea, the courthouse shall adjourn the merits.

After having settled the exception, the case will be reinstated. If the exception was admitted and the ordinance of the Government or the provision thereof was unconstitutional, the court shall admit the action. If the exception was rejected, the court shall dismiss the action as inadmissible.

The Ombudsman can also raise exceptions of unconstitutionality of Government ordinances or provisions thereof. Unlike the persons, who allege injury to a right or legitimate interest, the Ombudsman is not obliged to bring an action into the contentious-administrative court and invoke the exception of unconstitutionality before a court, but may rather refer the matter to the Constitutional Court.

As regards the law of ordinance approval, it is subject to the usual procedure on the control of constitutionality, a control, which can be performed either before or after the promulgation.

2.5 Control of Government Decisions

Whether normative or individual, Government decisions are subject only to a control of legality, and not to a control of constitutionality.

By Decision no. 371 of 13 April 2010,⁷ the Constitutional Court stated, that “the Constitutional Court rules on objections to the unconstitutionality of a law or ordinance or of a provision of a law or a ordinance in force. Therefore, the provisions of a Government decision cannot be subject to a control of constitutionality”. The decision is all the more important as the objection of unconstitutionality referred to a regulation implementing an ordinance, which was approved by a Government Decision.

⁶Published in the Official Gazette of Romania, Part I, no. 525 of 2 August 2007.

⁷Published in the Official Gazette of Romania, Part I, no. 313 of 13 May 2010.

The solution is obvious because the Government makes decisions for the execution of a law or an ordinance, which also has the force of law. The possible unconstitutionality may be raised but not in relation to the enforcement provisions, but in relation to the law.

Whether normative or individual administrative acts, law enforcement documents belong to the category of administrative acts [article 2 letter (c) of LCA] and are subject to judicial review through the contentious-administrative procedure. This control will be able to verify only the compliance of the Government's Decision with the law, and not with the Constitution.

Judicial review of government decisions is carried out differently, a consequence of their having an individual or normative content.

Government decisions containing individual provisions may be challenged either directly with an action for nullity; or indirectly by way of an illegality plea, governed by article 4 paragraph 1 of the LCA. Normative judgments cannot form the subject of an illegality plea, the judicial review of these being exercised by the contentious-administrative court only directly in the action for annulment.

2.6 Contentious-Administrative Matters

A definition of the contentious-administrative matters was developed in the interwar Romanian doctrine, according to which the contentious-administrative represents *“all disputes arising between private persons and public administrations on the organization and functioning of public services and where the rules, principles and situations belonging to public law are put in question”* (Rarincescu 1931, p. 73).

The issues identified by the author quoted are also found in the legal definition of the contentious-administrative matters, contained in article 2 letter (f) of the LCA, a law text under which the contentious-administrative is *“the activity of dispute settlement by the competent contentious-administrative courts, under the organic law, wherein at least one party is a public authority, and the conflict was born either from the issuance or the conclusion, as appropriate, of an administrative act, within the meaning of this Law, or from the failure to settle within the legal term or from the unjustified refusal to settle a claim relating to a right or legitimate interest.”*

The current doctrine distinguishes between a broad meaning of the contentious-administrative matters, which evokes all disputes between the administration and private individuals, including disputes that are settled by judicial and administrative authorities; and a narrow sense, referring only to disputes settled by the courts.

The constitutional foundations of the Romanian contentious-administrative matters are to be found in article 52, which governs the right of the person whose right or legitimate interest has been harmed by a public authority through an administrative act or through the failure to settle within the statutory period a claim to obtain, under the organic law, the recognition of the claimed right or legitimate

interest, the annulment of the act and remedies; article 73 paragraph 3 letter (k) which provides that the contentious-administrative matters are regulated by organic law; article 123 paragraph 5 which, invoking administrative tutelage, established the prefect's right to appeal in the administrative court against unlawful acts issued by mayors, local councils and county councils; article 126 paragraph 6 which guarantees the judicial review of the public authorities' administrative acts, by way of contentious-administrative proceedings.

The following may address the contentious-administrative court: any individual who considers to be injured in his/her right or in a legitimate interest by a public authority through an administrative act or through the failure to settle a claim within the statutory period (article 1 paragraph 1 of LCA). The law treats the unjustified refusal of an authority to settle a claim as an administrative act.

The contentious-administrative court may also be lodged by a person injured in his/her right or legitimate interest through an individual administrative act addressed to another legal subject.

The purpose of such an action may consist in the annulment of the act, in the recognition of the claimed right or legitimate interest (which may include forcing the administrative authority to issue an administrative act), and in remedying the damage that has been caused to the plaintiff.

The issuing public authority itself may bring an action for annulment of the act, if the latter entered into civil circulation (article 1 paragraph 6 of LCA). An exception of unconstitutionality of the legal provision cited, which claimed that the provisions of Article 52 of the Constitution are infringed, since the beneficiary of the right acquired under the act was unable to defend himself, was rejected by the Constitutional Court. In the reasoning of its decision, the Court held that the principle of lawfulness, enshrined in article 1 paragraph 5 of the Constitution, requires that administrative acts be issued lawfully and those that do not comply with this rule either be revoked or cancelled. Moreover, "the identification of a person whose rights or interests have been harmed by the respective act is usually impossible, any unlawful administrative act injuring the public interest" (Constitutional Court of Romania 2006, decision no. 574).

However, the doctrine has been so applied in courts as to show that there may be cases when the annulment of the administrative act is carried out by the contentious-administrative court at the request of the issuing authority through an administrative hearing, the factor that caused the notification being therefore a violation of a private interest (Săraru 2014, p. 197).

With regard to the legitimate interest invoked, LCA distinguishes between private interest and public interest.

Private legitimate interest is "*the ability to claim a certain conduct, in view of achieving a future predictable and prefigured subjective right,*" and public legitimate interest is "*the interest concerning the rule of law and constitutional democracy, the guaranteeing of rights, freedoms and fundamental duties of citizens, the satisfying of community needs, the achieving of competence of public*

authorities”, whilst the public interest is “*the interest concerning the rule of law and constitutional democracy, the guaranteeing of rights, freedoms and fundamental duties of citizens, the satisfying of community needs, the achieving of competence of public authorities.*”

Depending on the nature of the interest invoked as the basis for legal action requesting the annulment of an administrative act, doctrine distinguishes between subjective contentious-administrative matters and objective contentious-administrative matters (Trăilescu 2006, p. 111).

Contentious-administrative matters are subjective when the plaintiff seeks the annulment of an administrative act on the grounds that it affects one of his/her rights or legitimate interests.

Contentious-administrative matters are objective when the plaintiff seeks to defend an impersonal right or a public legitimate interest. This way, it seeks to restore lawfulness in general.

The actions in the contentious-administrative may be exercised by: the prefect, as (s)he can appeal against unlawful administrative acts, individual or normative, issued by the county council, a local council or a mayor (article 123 paragraph 5 of the Constitution and article 1 paragraph 9 of LCA), the Ombudsman (article 1 paragraph 3 of LCA), the National Agency of Civil Servants (article 3 paragraph 2 of LCA) and any subject of public law (article 1 paragraph 9 of LCA).

Under article 8 paragraph 1/1 of LCA, individuals and private legal persons may not bring actions to invoke only the breach of a public legitimate interest. They can formulate heads by invoking the defence of a legitimate public interest only secondarily, to the extent that the harm to a public legitimate interest derives logically from the infringement of the subjective right or private legitimate interest.

In terms of the effects that the action-admission judgment has, the distinction between the subjective contentious-administrative and the objective contentious-administrative is of importance when an individual administrative act is attacked (namely, a Government decision with such an object) (Vedinaş 2014, p. 179).

Thus, in the case of the subjective contentious-administrative matters, the authority of the res judicata of the judgment is relative, covering only parts of the process. For this reason, only the plaintiff will be able to invoke the annulment of the unlawful administrative act.

In case of objective contentious-administrative matters, the authority of the res judicata enjoyed by the court judgment is objective, which is why it produces *erga omnes* effects.

The distinction loses its significance in terms of the effects of the judgment, when the administrative act that was cancelled was normative in nature. In such a case, the final judgment, which annulled a Government decision, will be published in the Official Gazette of Romania, and the one, through which a document issued by a county or local public authority was cancelled, in the county gazette. It will generally produce binding effects from the date of publication.

2.7 Control Boundaries in Contentious-Administrative Matters

Lest it should become abusive, any control activity must take place within certain boundaries. The statement is verified in the case of the contentious-administrative matters as well, the law expressly providing that certain categories of administrative acts are exempt from this control. On the other hand, the contentious-administrative court cannot substitute the administrative authority controlled, which is reflected in a certain limitation of the aspects of the administrative act that can be controlled.

Under the first aspect, LCA provides that the following cannot be brought before a contentious-administrative court: the administrative acts of public authorities concerning their relations with Parliament; acts of military command and administrative acts for whose amendment or abolition other legal proceedings are provided under an organic law (article 5 paragraphs 1 and 2).

The administrative acts of public authorities that concern the relations between them and the Parliament, such as the decree promulgating a law, the decision by means of which Parliament shall give the vote of confidence to the Government and others, were included by the doctrine in the category of “governing documents”, the reason for their exemption from jurisdictional control being that they have a political motive (Waline 2008, pp. 314–319).⁸

In the jurisprudence of the High Court of Cassation and Justice, the distinction was drawn between acts and decisions that the Prime Minister issues in the exercise of the duties conferred on him/her by law, showing that the latter are administrative acts, subject to control by the contentious-administrative court. Essentially, it held that article 1 of the Law on the Organization and Functioning of the Romanian Government and Ministries expressly provides that the Prime Minister is a “public authority” and the Constitution does not mention his/her decisions among the administrative acts exempt from control. In that particular case, it was a decision of revocation of the head of a central government body (High Court of Cassation and Justice 2007a, decision no. 482).⁹

On the contrary, it was qualified as an act of government, exempt from the control of the contentious-administrative court, the decision by which the Government approved an intergovernmental agreement (High Court of Cassation and Justice 2007b, decision no. 2579).

The military command act is so defined by article 2 paragraph 1 letter (l) of LCA: *“the administrative act relating to the strictly military matters of the armed forces’ activities, specific to military organization, involving the right of*

⁸The law on contentious-administrative matters also defines the acts that concern the relations with the Parliament as being acts issued by a public authority, when fulfilling its duties, provided by the Constitution or by an organic law, in the political relations with the Parliament [(article 2 paragraph 1 letter (k))].

⁹Commented by Bogasiu (2013, p. 160-16).

commanders to give orders to subordinates in matters concerning team leadership, in time of peace or war, or, where appropriate, at military service fulfilment”.

The administrative acts of public authorities that concern relations between them and the Parliament and the military command acts are excluded from any judicial review, be it direct or indirect (via the plea of illegality).

Administrative acts for whose amendment or abolition other legal proceedings are provided under an organic law are subject to judicial review, but not in contentious-administrative courts. By way of example, we may evoke here the procedure of settling complaints filed against decisions of county commissions that process applications for reconstitution of land ownership, authored by people who were dispossessed during the communist regime, which is governed by articles 51–58 of the Land Law No. 18/1991, but also the contravention complaints procedure, regardless of the normative act regulating those offences. The competence to resolve such complaints belongs to the common law courts.

The law does not exempt from the control conducted by contentious-administrative courts the administrative acts issued for the application of the state of war regime, the state of siege or of emergency, those relating to national defence and security or those issued to re-establish public order and to eliminate the consequences of natural disasters, epidemics and epizootics, but provides that they can be challenged only for abuse of power. In the case of these acts, jurisdictional control is therefore limited.

However, it is worth mentioning that, by Decision no. 302 of 1 March 2011,¹⁰ the Constitutional Court upheld the plea of unconstitutionality of the provisions of the above-quoted article 5 paragraph 3 and found that the phrase “those relating to national defence and security” is unconstitutional. It was argued that the Constitution instituted the jurisdiction of the courts to exercise control over the administrative acts of administrative authorities, in the contentious-administrative courts, whilst also establishing the acts exempt from this control in article 126 paragraph 6. Yet, the documents relating to national defence and security are not exempt from control by the Constitution.

The legal definition of the state of siege is provided by article 2 of the Government Ordinance no. 1 of 21 January 1999 on the state of siege and emergency as follows: “*The state of siege is the set of exceptional measures of political, military, economic, social and other nature, applicable throughout the country or in certain territorial-administrative units, established to adapt the defence capacity of the country in front of serious danger, actual or imminent, that threatens the sovereignty, independence, unity or territorial integrity of the state.*”

The state of necessity is defined in article 3 of the same normative act as “*the set of exceptional measures of a political, economic and public policy order, applicable throughout the country or in certain territorial-administrative units, which is constituted in the following situations:*

¹⁰Published in the Official Gazette of Romania, Part I, no. 316 of 9 May 2011.

- (a) *the existence of serious danger, actual or imminent, against national security or against the functioning of constitutional democracy;*
- (b) *the imminence of occurrence or the occurrence of catastrophes which make it necessary to prevent, mitigate or eliminate, as appropriate, their consequences”.*

Excess of power is also defined in article 2 paragraph 1 of LCA, as follows: *“exercise of discretion by public authorities in violation of competence limits prescribed by law or in violation of civil rights and freedoms.”*

2.8 The Competence of Action Settlement in the Contentious-Administrative

Originally, the Romanian contentious administrative matters developed exclusively under the influence of the French equivalent (Râciu 2012, pp. 16–19).

Thus, after the French model, the State Council was established in 1864. The Council functioned within the administrative power and had competence over settling litigations between the public administration and individuals.

Very soon, however, this system was abandoned, the Anglo-Saxon model being adopted.

In 1866, when the first constitution was adopted in Romania, the State Council was abolished and the contentious-administrative matters have been assigned to the courts of common law. The reasons for this mentality change consisted of obedience manifested by the State Council to the Government, who used it to establish an authoritarian government (Râciu 2012, p. 20).

At various times, the jurisdiction of the courts was wider or narrower (for example, during 1905–1925, with a 2-year break, the power to resolve the appeals against administrative acts was conferred on the High Court of Cassation and Justice but only in the case of administrative acts laid down by law), but in Romania a similar institution to the State Council would never again be established.

Unlike other contemporary legislations, which either created an autonomous system of administrative justice [the case of France, where control in contentious-administrative matters is carried out by administrative courts, whose decisions are subject to appeal in one of the seven administrative courts of appeal, their decisions being in turn under the control of the State Council (Tofan 2006, pp. 223–224)] or have assigned jurisdiction in this matter to common law courts, the Romanian legislation provides that the contentious-administrative courts are represented by the Contentious-Administrative and Fiscal Department of the High Court of Cassation and Justice, the contentious-administrative and fiscal sections of the courts of appeal and the administrative and fiscal courts. In fact, the setting up of administrative-fiscal courts is for the time being a desideratum, the respective duties being fulfilled by the contentious-administrative and fiscal sections of ordinary courts.

The maintaining of the special administrative jurisdictions, in spite of their being no longer mandatory, makes it for the Romanian contentious-administrative system to be a mixed one (Tofan 2006, p. 221).¹¹

The courts are competent to settle disputes on essentially administrative acts issued by or entered into by local authorities and county, as well as those relating to taxes, contributions, customs duties and accessories thereof up to 1,000,000 lei.

The contentious-administrative and fiscal sections of the courts of appeal ultimately settle disputes concerning administrative acts issued by or entered into by the central public authorities, as well as those relating to taxes, contributions, customs duties and accessories thereof exceeding 1,000,000 lei. They ultimately settle all claims on administrative acts issued by central public authorities, which involve amounts of non-reimbursable funds from the European Union, regardless of the value.

Since the Government is a central public authority, the disputes concerning the acts it issues will be resolved in their merits by the courts of appeal.

Courts of appeal act as courts of judicial review, having the substantive jurisdiction for resolving appeals against judgments of the courts.

The Contentious Administrative and Fiscal Department of the High Court of Cassation and Justice is not competent as a court of first instance, but can only settle appeals against sentences handed down by the contentious-administrative and fiscal sections of the courts of appeal.

The territorial jurisdiction to settle such disputes belongs both to the applicant's home court and to the court, in whose jurisdiction the administrative authority sued is established. The applicant is free to choose one of the two courts.

2.9 Claim Settlement

2.9.1 *Prior Procedure*

The process of settling the claim of an individual who maintains that one of his rights or legitimate interests was injured through an administrative act can proceed in two phases: the administrative and the judicial phase.

As far as the first stage is concerned, LCA requires (by article 7 paragraph 1), under penalty of forfeiture of the right to obtain a decision that could solve the dispute on the merits, the obligation of going through a prior administrative procedure, which aims to enable the issuer to reassess the case, according to the petitioner's arguments and to revoke his own act, if he deems this to be the legal the solution. The prior complaint may be addressed either to the issuer of the act, a case

¹¹This situation is not unique. Thus, even in the UK a number of administrative jurisdictions were established, jurisdictions which settle more disputes than those addressed by the ordinary courts. However, the House of Lords remained the single supreme judicial authority for both jurisdictions.

which the doctrine classifies as “graceful appeal”, or to the superior body (if any), an event called “hierarchical administrative appeal.”¹²

If the law provides a jurisdictional-administrative proceeding for the settlement of the dispute, the applicant may choose between following it or not. If the party has opted for the settlement of the dispute through an administrative-judicial procedure, it is no longer required to go through the prior administrative procedure as well. On the contrary, it will have to follow the prior administrative procedure if it opted for direct notification of the court.

The party who opted for the administrative-jurisdictional procedure may choose to waive this dispute settlement, however, being obliged to notify the administrative-judicial body concerned about this decision. In this situation, the party must notify the contentious-administrative court within 15 days of the notification.

Regarding the establishment of the obligation to go through an administrative procedure prior to the notification of a contentious-administrative court, the Constitutional Court ruled that it does not violate the freedom of access to justice, recognizing the right of the legislator to establish, in consideration of special circumstances, special rules of procedure as well as methods of exercising procedural rights (Constitutional Court of Romania 1994, decision no. 1).

2.9.2 *Judgment*

Regardless of the way in which it will solve the action under the contentious-administrative procedure, the court is empowered to suspend the execution of the administrative act in question until the final judgment is ruled.

The court may pass a judgment on the application for suspension even before being notified by means of an action under the contentious-administrative procedure. In this case, the injured party will have to prove, however, that it filed a prior complaint. If the injured party does not bring an action in the contentious-administrative court within 60 days, the suspension shall automatically be terminated. Suspension of enforcement may be required, however, even after the prior complaint was settled or after the term required by law to deal with it expired. The application for suspension may even be included in the contentious-administrative action or may be made separately.

In all cases, the court will order the suspension of the enforcement of the contested act only if the reasons given in support of the application are well-founded and thereby prevent an imminent loss.

The contentious-administrative procedure regulated by Law no. 554/2004 is defined as a full-jurisdiction contentious procedure (Vedinaş 2014, p. 172).

¹²These concepts were used under the influence of the French contentious-administrative matters, where the request addressed to the administrative courthouse is called “appeal”. In Romanian law, the common meaning of the concept “appeal” is that of extraordinary remedy that can be exercised against a court judgment. Even the Law of the Contentious-Administrative uses the notion of “appeal” with this meaning.

This statement is based both on the judge's competence to analyse the administrative act whose nullity (s)he is required to take note of and on the solutions (s)he may adopt.

Under the first aspect, the judge has the opportunity to conduct a full review of the contested administrative act, i.e. both on its legality and, within certain boundaries, on its opportunity.

In a narrow sense, the legality of the administrative act has an abstract nature, given by its compliance with the law, substantive and procedural, and its opportunity refers to concrete issues such as the problem that the adoption of the administrative act seeks to resolve, the need to address it, the timing and ways of solving it etc.

The question of the relation between legality and opportunity, however, was controversial in the Romanian doctrine. It was argued either that opportunity and legality are two validity conditions of administrative acts, or that only legality is such a condition, while opportunity is only a requirement of lawfulness (Iorgovan 2004, pp. 42–44; Bogasiu 2013, pp. 192–195). Adoption of one or another of the opinions also has consequences on the answer to the question related to which aspects of the administrative act the judge can control: only legality or both legality and opportunity.

The consequence of the adoption of the first opinion is that opportunity is regarded as a matter for the discretion of the Government and of administration in general, to choose the means by which one can achieve the aim pursued by issuing the administrative act, which escapes judicial censorship, while in the second case the judge can also control the opportunity, which is only one aspect of the legality of the act.

The majority doctrine evolved in the sense that opportunity is a dimension of the lawfulness of the administrative act by targeting the time, place and conditions, means, duration, quality of life, and the public interest (Iorgovan 2004, p. 51; Vedinaş 2014, p. 101).¹³

The contemporary legislator avoided to expressly state, whether the judge can control the administrative act both as regards its legality and its opportunity. Moreover, as the penalty, which the judge can apply, is annulment of the act, and nullity is the sanction applied for breach of the legal provisions enacted for the valid conclusion of the act, it can be inferred that control is aimed exclusively at legality. This is all the more as, in the Romanian contentious-administrative matters, the court with control-exerting competence is external to the public administration and cannot be substituted by it.

In reality, things need to be nuanced.

Despite some inconsistencies, the relevant jurisprudence states that opportunity is an aspect of lawfulness, so although administrative authorities are acknowledged to have a wide discretion on the choice of the most appropriate solutions in a given

¹³One might thus speak about “the sphere of legality conditions on opportunity-connected grounds”.

case, they are denied an absolute monopoly in this regard. The examination of jurisprudence reveals, however, that the peculiarities of a fact are decisive in terms of the intensity of the control performed by the judge.

Thus, the High Court of Cassation and Justice refused to verify the possibility of the administrative act ordering the removal of a police officer in another unit (High Court of Cassation and Justice 2006, decision no. 2913), which seems to enter into the same category with the decision which held that, in the Romanian contentious-administrative matters, the rule is represented by the legality control of administrative acts (Ovidiu 2010, p. 292).

There are times when the court refused control almost completely.

The doctrine offers as examples the instances where the court was asked to pass a judgment that should act as an administrative act (if the court accepted the application, that would violate the principle of separation of powers, which is why it only obliges the public authority to issue the administrative act) and those when a particular duty has, by its intrinsic nature, a highly discretionary nature, as no text of law establishes how this should be properly exercised, in particular, by the administration, when even the court refuses to compel the authority to perform the duty in a certain way (the court would not be able to compel the authority to issue a certain plan of urbanism, with the characteristics set by it) (Ovidiu 2010, pp. 292–293).

On the contrary, the Court of Appeal of Alba-Iulia speaks about the legality and opportunity control of the measures adopted through administrative acts (Ovidiu 2010, p. 16) and the Court of Appeal of Targu Mures decided that the unlawfulness of an administrative act may be caused by the inappropriate character of the measure adopted (reorganization of a municipal library by decision of the local council) (Ovidiu 2010, p. 106).

Frequently, opportunity is analysed in terms of abuse of power. Although it is acknowledged that the administrative authority has a discretion margin as regards the opportunity of taking a measure, the court held that it must fall within the limits and scope of the law (Ovidiu 2010, pp. 274–275).

The acts referred to in article 5 of the LCA, which are issued for the instatement of the state of war regime, of the state of siege or of the state of emergency, those issued for the reestablishment of public order and for the neutralization of the consequences of natural disasters, epidemics and epizootics, as we have already shown, may be attacked only for power abuse, which implies a proportionality control (Andreescu 2014, pp. 97–108). In such cases, the judge exercises only limited control (Vedinaş 2014, pp. 206–207) and the plaintiff may rely only on impairment of a right, not of a legitimate interest.

A proportionality check is also performed by the judge, when the administrative act restricts rights and fundamental freedoms. It was decided that the administrative law report is subject to the principle of proportionality between the individual measures taken by public authorities and the protected interest, a principle which requires that administrative acts do not exceed the limits of what is appropriate and necessary to achieve the purpose, so that the inconvenience caused to individuals not does become overly burdensome and disproportionate in relation to the aims pursued (Bogasiu 2013, p. 195).

In such cases, the judge can directly apply article 53 of the Constitution, according to which the restriction of certain rights may be imposed *“only if it is necessary in a democratic society. The measure must be proportionate to the situation that caused it, applied without discrimination and without prejudice to the existence of such right or freedom.”*

The examination of the jurisprudence cited reveals the fact that things are not much different from the French contentious-administrative matters, where, as noted in the doctrine, the judge never invalidates an act without it being illegal, just because it is inappropriate (Vedel and Devolvé 1992, p. 442, quoted by Iorgovan 2004, p. 45). At the same time, by exercising control over the power abuse, even in cases other than those expressly provided by law, the solutions adopted by the Romanian contentious-administrative courts are similar to those adopted in France¹⁴ and even Germany.¹⁵

In terms of solutions,¹⁶ the court may, at first, annul the contested administrative act, in whole or in part.

Depending on the subject of the action brought by the plaintiff, the court may however adopt other measures, namely to force authority to issue an administrative act, to release another document or to perform some administrative operation; the court may also rule on the legality of the administrative operations on which the issuance of the act that makes the object of judgment was founded (an exception occurs if the annulment of the act is required even by the issuing public authority, if the act cannot be removed as it entered the circuit civil and produced juridical effects); it can compel the public authority to repair the material or moral damage caused to the plaintiff, forcing it to pay damages.

Moral damages are awarded in case of breach by the administration of personality rights such as the right to physical and mental integrity, the right to health, the right to privacy, the right to dignity, the right to image, the right to protection of personal data and the like (Chelaru 2012, pp. 18–44), and consist in the authority being ordered to pay a lump sum that is fair compensation to the effects of the injury-generating offense (Bogasiu 2013, p. 200).

2.10 Indirect Judicial Review

The judicial review of the acts of Government, as well as of administrative acts issued by other public authorities, conducted under contentious-administrative procedures, represents a direct control. There is also indirect judicial review, which is performed by invoking the plea of illegality of the administrative act. This control

¹⁴Which sanctions power abuse.

¹⁵In Germany, the Code of administrative jurisdiction assigns to the judge the power to review acts adopted by exceeding the limits of discretion of the administration.

¹⁶The solutions that the court can adopt are set out in article 18 of the Law.

is indirect because the object of the dispute is not the legality of the administrative act itself, this being considered only incidentally and to the extent necessary to the settlement of a common law dispute, with which it is connected.

The plea of illegality is governed by article 4 of the LCA, which, in its first paragraph, states, that “*the legality of an individual administrative act, regardless of the date of issue, can be searched at any time in a process, by way of exception, ex officio or at the request of the interested party.*”

The plea of illegality cannot be invoked against administrative acts that cannot be checked for legality in an action for annulment (Chiriac 2009, pp. 100–104).

There are considerable differences between the direct control and the indirect control of administrative acts.

Thus, while in a direct control procedure the judge cannot pass a judgment on the legality of such an act unless notified through an action with such an object, the plea of illegality may be invoked both by one of the parties to the proceedings and ex officio by the court.

The admissibility of contentious-administrative action is conditional upon the fulfilment of a prior administrative procedure, a condition, which is not required in the case of the plea of illegality.

Contentious-administrative proceedings have to be made subject to a prescription term, and the plea of illegality may be brought at any time.

Through a contentious-administrative action the following acts may be censored: individual administrative acts, normative administrative acts, the refusal to settle an application and administrative contracts (the last two being related administrative acts), while the plea of illegality may be brought only against an individual administrative act.

The settlement of a contentious-administrative action lies under the competence of the contentious-administrative court, the plea of illegality is settled by the court, hearing the merits of the dispute and before which the exception was raised.

The judgment of a contentious-administrative court, which settled an action for annulment, may be attacked only through an appeal, whilst against the judgment of a common law court which settled a plea of illegality a remedy provided by law for judgment on the merits cause may be exercised, that is, as a rule, the appeal.

As far as the above-mentioned are concerned, some clarifications are required.

Although article 4 paragraph 1 of LCA provided, even in its original wording, that the plea of illegality may invoke the illegality of individual administrative acts, the High Court of Cassation and Justice held that the wording of the legal text quoted is only a “legislative inadvertence” and the “plea of illegality may be invoked on the normative administrative acts, for reasons related to the principle of law, according to which the law shall be construed to produce effect, and with the principle of legislative coherence” (Birsan 2009, pp. VI–VII).

This jurisprudence, however, did not take into account the fact that the plea of illegality was designed as a means of defending a party from a trial, if the opponent relies on the existence of a right whose source is an administrative act. In order to provide efficiency to a right, which is based on an unlawful administrative act, the legislator has allowed examination of the legality of the latter even if the time for

bringing an action in the contentious-administrative expired. The reasons stated are not to be found in the case of the normative administrative act, if only for the fact that it can be attacked at any moment through an action.

Nevertheless, the respective jurisprudence has led to the legislator's reaction, under the form of Law no. 76 of 24 May 2012, which amended article 4 of LCA, inserting a paragraph that reads as follows: "*Normative administrative acts cannot form the subject of the plea of illegality. The judicial review of administrative acts with normative character shall be exercised by contentious-administrative courts in the action for annulment, as provided by law.*"

The competence to hear the plea of illegality was originally assigned to the contentious-administrative court. As a result, the common law court, finding that the settlement of the dispute on the merits depended on the administrative act, notified, by a motivated conclusion, the competent contentious-administrative court and suspended the case. Suspension of the case could not be prescribed, if the court before which a plea of illegality had been raised was the contentious-administrative court with competence to settle it and not even when the plea of illegality had been raised in criminal cases.

The former regulation was closer to that, which had inspired it, respectively to the French one, which, regulating the plea of illegality, assigned to the administrative judge jurisdiction to settle it, even if he were not be given jurisdiction to hear an action for annulment of an administrative act. The French judge may settle the plea of illegality in two cases only: (a) in civil law, if a normative administrative act affects the inviolability of the home, individual freedoms and property rights; and (b) the judge of criminal cases may assess the legality both of individual administrative acts and of the normative ones, that are applicable in criminal proceedings before the Court (Chiriac 2009, pp. 98–99).

In 2012 LCA was amended and in the terms we present, the jurisdiction to deal with the plea of illegality is attributed to the court before which it was invoked. Therefore, no matter if the court that settles the dispute on the merits is a contentious-administrative court or a civil, commercial or criminal court, it will settle the plea of illegality. If it found the illegality of an individual administrative act, the court before which the plea of illegality was invoked will hear the case, notwithstanding the act whose illegality was found.

This change, justified through the intention to ensure the celerity of the substantive trial proceedings, manages to make the judgment of the plea of illegality evade its natural judges, who are specialized in the settlement of contentious-administrative litigation. As a result, in a matter as important as the legality of administrative acts, judges, who are not familiar with the subtleties specific to the issuance of administrative acts and to their contentious control, get to pass judgments, with the risk of adopting solutions that do not obey the law. It is true that, by accepting the plea, the administrative act, whose illegality has been established, is not annulled, but only removed from the evidence on the basis of which the dispute will be resolved, but most individual administrative acts give rise exactly to the rights or juridical positions that have generated those disputes.

Or, in such circumstances, the annulment or removal of the act is technically the same—the action of depriving the act of any juridical effect.

Another issue that has generated controversy was that related to the invoking of the plea of illegality in the case of administrative acts issued before the entry into force of the Law of 2004¹⁷ on the Contentious Administrative Litigation. This controversy should have ended due to the amendment of LCA by Law no. 262 of 19 July 2007 which expressly provided that the illegality of any individual administrative act, “regardless of the date of issue” can be investigated by means of an exception.

However, the High Court of Cassation and Justice removed the legal provisions allowing the invocation of the plea of illegality against administrative acts issued before the entry into force of the LCA, i.e. before 2004. In its reasoning the Court stated that it assumes the role of the national judge as first conventional and Community judge arising from article 20 paragraph 2 of the Constitution¹⁸ and article 148 paragraph 2 of the Constitution.¹⁹ In this context, the Court held that the legal provisions are at variance with the European Convention on Human Rights, the ECHR jurisprudence, the Charter of Fundamental Rights of the European Union and the case law of the Court of Justice in Luxembourg (High Court of Cassation and Justice 2008, decision no. 2307).

This happened despite the fact that, in several judgments, the Constitutional Court had already ruled on the constitutionality of the legal provisions challenged. It is true that the exceptions of unconstitutionality rejected by the Constitutional Court held that the provisions of article 4 paragraph 1 of LCA, which admit the invocation of the unlawfulness of an administrative act, regardless of the date of issuance thereof, infringe the principle of non-retroactivity of the law, enshrined in article 15 paragraph 2 of the Constitution and the constitutional provisions on equality of citizens before the law and public authorities, individual freedom and private property rights.²⁰

As we have seen, the High Court of Cassation and Justice has not discussed the constitutionality of these laws, but their conformity with international treaties to which Romania is a party.²¹

¹⁷The former regulation, contained in the Law no. 29/1990 on the contentious-administrative, did not cover this exception.

¹⁸Which provides that “If any inconsistencies exist between the covenants and treaties on fundamental human rights to which Romania is a party and internal laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favorable provisions.”

¹⁹According to which “Following the accession, the provisions of the constituent treaties of the European Union, as well as the other binding community regulations have precedence over opposite provisions of the national laws, complying with the provisions of the Act of Accession.”

²⁰We would like to cite here, as an example, Decision no. 425 of 10 April 2008, published in the Official Gazette of Romania, Part I, no. 354 of 8 May 2008.

²¹For a critical presentation of the decision of the High Court of Cassation and Justice, please see Chiriac (2009, pp. 102–104).

2.11 Conclusions

In its status of executive authority with the broadest duties and powers, the Government also has at its disposal the means necessary to achieve them. The decisions it issues are aimed at organizing the enforcement of the law and the actual enforcement of the law, where appropriate, but also aim at exercising state power. To a greater or lesser extent, these features are found in other administrative acts issued by the authorities that are part of the government.

These are considerations that justify the juridical force of such acts, but also causes of the obvious disparity of power that exists between their issuers and those to whom they are addressed (the administrator). It is from here that the great importance of the setting up of such a system of contentious control of the acts issued by the Government derives, a system that should be accessible to individuals as well.

Of the known systems, Romania opted for carrying out the contentious-administrative control through the courts. This system has the advantage that the judges, who have the competence to exercise control, as they are independent, are protected from the possible influence of the Government. As a result, at least from a procedural point of view, the initial imbalance between the issuer and the recipient's act fades.

The disadvantage is that, being outside the public administration, the judge does not always have an accurate representation of the social needs, to which the administrative act that is censored tries to answer, nor of the social, economic and other consequences that its annulment may have. This is also one of the causes of the non-unitary character of jurisprudence, which we presented in our study, adopted in the matter of the opportunity control of administrative acts.

Of course, we cannot expect that the system of exercising contentious control over the public authorities' acts will change in Romania, but, from a legislative standpoint, the control boundaries should be better clarified. In this regard, we believe that a control of opportunity cannot be totally ruled out, but it should represent an exception.

The jurisprudence seems to be going in the direction we expected, but it is still inconsistent and unpredictable. However, the unpredictable nature of jurisprudence is likely to create uncertainty in the administration, especially because the officials involved in the procedure of issuing administrative acts may be involved in a possible contentious-administrative trial, where their personal liability can also be engaged.

Therefore, we believe that the way in which the revision of the Constitution was performed with the administrative jurisdictions that have become optional had no beneficial effects. Should a new revision take place, which has been actively discussed lately, this issue should also be reviewed. It would be a potentially beneficial measure, but only if it were accompanied by legislation to guarantee the independence of the administrative-judicial court members.

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