RESEARCH ARTICLE:

The act of public power in the context of the Rule of law

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ABSTRACT

With the processes of modernization and democratization of social life, the notion of public power became more frequently used in the public space. The effective exercise of public power could fit among the most current problems of the Romanian society, yet it is very current from the perspective of trends in the European and international context, too.

Although the intellectual efforts to find an answer to the question about the essence of the phenomenon of public power have begun in antiquity, they still hold the field nowadays.

The administrative act is one of the forms by which the public administration carries out its mission, being the most important of them from a legal point of view.

The administrative act is the main legal form of activity of the public administration consisting of a manifestation of express, unilateral will that is subject to a public power regime as well as to the control of legality by the courts emanating from administrative authorities or from private persons authorised by them, by which related rights and obligations are born, amended or extinguished.

KEYWORDS: *public power, administrative act, rule of law.*

1.Introduction
Mechanisms for exercising public power

In specialized literature, during the last few centuries, **public power**, traditionally, was related to the state and was considered identical to the state power, separated in the three branches:

- ✓ Legislative
- ✓ Executive
- ✓ Judicial.

In accordance with the constitutional provisions, but also with respect to organic laws, public power is the authority of public administration defending the public interest, with the following prerogatives:

- ✓ Public law is the basis for its legal capacity;
- ✓ The public administration issues authoritative acts which are executed ex officio and directly applies, when applicable, administrative constraint of preventive, sentencing or enforcing character;
- ✓ It enforces criminal sanctions established by courts by definitive and irrevocable ruling;
- ✓ It issues normative acts, which have legal force that is inferior to the law, but which rank according to the position and competence of the authority applying them;
- ✓ Any individual act or any material operation carried out by these authorities is a concrete execution of the law (fulfilment of the law)

If the relationships between individuals are based on legal equality, those between the administration and those who are administrated imply legal inequality, in the sense of the superset character of those who administer.

"*Under the name of public power, a set of prerogatives granted to the administration should be understood in order to enable it to prevail over the general interest when it is found in conflict with the particular interest*"[1].

When the limits of public power are exceeded, there may be situations of attracting administrative-patrimonial liability, namely:

1. The exclusive patrimonial liability of the State for damages caused by judicial errors which do not exclude the responsibility of magistrates;
2. The public authorities' patrimonial liability for public service limits;
3. The joint liability of the official and the public authorities for damages caused by typical or assimilated administrative acts and
4. The liability of the public authority for damages caused by administrative acts and contracts.

In its entire activity, the **rule of law** was perceived and interpreted, over time, as the state that performs the rule of law, whether in relations with citizens or with various social organisations in its territory, interpreting the lead role in the public administration.

The notion of 'rule of law' is found in various constitutional texts: art. 28 of the Constitution of the German Federal Republic, art. 11 of the Spanish Constitution, art. 1 para. (3) of the Constitution of the Republic of Moldova, art. 1 para. (3) of the Constitution of Romania.

The rule of law, in the content of the abovementioned constitutions, relates to that structure in which the state and the law are in a complementarity report.

Therefore, law cannot exist outside the state, since it is the state which can confer on certain rules the character of legality and compulsiveness, their application being given by coercion methods. Moreover, the rules of law restrict the state, in the sense that the state's

[1]Rivero, J., Waline, J. 2000, *Droit administratif*, 18éme éd., Paris, France: Précis, Dalloz, p. 11.

agents must act, in certain contexts, in a certain way.

Therefore, the state cannot exist outside the law since nothing can exist beyond the state and no one is above the law. The state must obey its own rules, limiting itself[2].

The main feature of the rule of law is given by the force of the law and not by the law of force, as is the case in the police state. In conclusion, the reign of the people in such a state is replaced by the rule of law.

The essential principles of the rule of law are:[3]

- ✓ Rule of law;
- ✓ Separation of powers in the State;
- ✓ Legality of administration;
- ✓ Respect for fundamental rights and freedoms.

Along these lines, Paul Negulescu assumes that the attributions of the modern state are divided into three functions: to legislate, execute and distribute justice, all three functions being considered attributes of sovereignty. The legislature and the executive are regarded by the author as having a political character, with the role of watching over the achievement of general interests and ensuring the existence and integrity of the state.

In the fulfilment of the state's executive function, Paul Negulescu distinguishes two categories of activities: some related to governance, other to administration, including in the administration activity all public services intended to satisfy certain general, regional or communal interests[4].

In defining the notion of executive body, Anibal Teodorescu[5] starts from the idea of sovereignty of the State, which implies the power to command (the function of will) – accomplished through the legislative body – and the power to carry out the command (the function to execute) – carried out through the executive body. In continuation of this logical line, the author considers that the notion of executive body actually expresses two organs: the judicial authority and the administrative authority but, in the sphere of the executive, these two authorities have well-established competences, which prevents justice from making administrative acts and the administrator from judging conflicts between individuals.

In a merger of the two conceptions outlined above, prof. Constantin Rarincescu also starts from the idea of sovereignty, accomplished through the three functions: legislative, administrative and judicial. The author defines administrative activity as an administrative "function" which is carried out both by the issuance of legal acts, as well as by committing material acts, i.e. provision of services and works[6].

We will have to note that the public administration as a whole fulfils, as appropriate, both executive and administrative activities. If executive activities are usually carried out exclusively through the subsystem of State public administration authorities, administrative activities are found throughout the system of public administration[7].

[2]Gheorghe, M. 2002., *Inevitabilul drept*, Bucharest, Romania: Lumina Lex Publishing House, pp. 116-118; Gilia, C. 2007. *Teoria statului de drept*, Bucharest, Romania: C. H. Beck Publishing House, pp. 2-4.

[3]Diaz, E. 1998. *Estado de derecho y sociedad democratica*, Madrid, Spain: Taurus, p. 203.

[4]Negulescu, P. 1934. *Tratat de drept administrativ*, 4th edition, Bucharest, Romania: Mârvan Publishing House, p. 72.

[5]Teodorescu, A. 1929. *Tratat de drept administrativ*, vol. I, 2nd edition, Bucharest, Romania: M. Eminescu Graphic Arts Institute S.A., p. 148.

[6]Rarincescu, C. 1937. *Contenciosul administrativ român*, 2nd edition, Bucharest, Romania: Alcalay Co. Universal Publishing House, p. 22.

[7]Munteanu, C. D. *Administrația ca putere publică,* in Transylvanian Review of Administrative Sciences, 20/2007, pp.85-95.

These activities, consisting of competences that include duties on economic-social and environmental development of the commune, city or municipality, administration of the public and private domain of the commune, city or municipality as well as the management of services provided to citizens, are exclusive competences of local public administration authorities and usually take the form of administrative management acts, but also authoritative (establishment of local taxes), as administrative and technical – administrative agreements or material facts.

In order for social relations to be carried out under optimal conditions, human society is organized in different forms. In all the complexity of social life the administration is one of the most important human activities.

"*Public administration is inextricably linked to the state*"[8]. Over time, the notion of public administration has experienced various acceptations, and one of the ones we consider to be appropriate in the context of the realization of this work is that of Prof. Andre de Laubadere stating that the administration is defined as "*a whole of authorities, agents and bodies responsible under the impulse of political power to ensure multiple interventions of the modern state*"[9].

In practice, in close connection with the notion of public power, the expression of public power regime[10] is used, representing the common factor for all public authorities, which have as their mission the fulfilment of the laws.

Thus, closely linked to the public power regime, is also public interest, which is because the purpose of the administration itself is to satisfy the public interest. The latter defines the social need of an individual, group, collectivity, nation, appreciated by public power as being useful for the purpose of performing under optimal conditions the socio-economic life specific to that human collectivity.

Man is a social being. He cannot produce everything he needs for his existence[11]. The social division of labour implies the diversity of ways to satisfy personal and general interests. Human needs can be met both by involving individuals in the provision of public services and by doing so by the administration.

The issue of the administrative act under the regime of public power distinguishes it from the acts of the administration issued under common law or civil acts in general and gives it a compulsory character and its execution is enforced ex officio. Accountability for the administrative act was a broadly debated topic in doctrine and specialized literature.

2. Manifestations of the administration's will in the context of public power

In the post-war period, the legal acts of the administration were analysed under the designation "executive power acts", distinguishing administrative acts of authority and administrative acts of management. The administrative act of authority was defined by Romulus Ionescu as being "*a manifestation of will carried by a competent administrative body, by which it creates a general or individual legal situation governed by public law rules in which we find the idea of dominance and*

[8]Brezoianu, D., Oprican, M. 2008. *Administrația publică în România*, Bucharest, *Romania:* C.H. Beck Publishing House, p.3.

[9]Andre de Laubadere. 1973. *Traite de Droit Administratif*, 6th edition, vol I, Paris, France: L.G.D.J, p.11.

[10]For a more detailed analysis of this concept see Ciorăscu, F., Gălățanu, C. Gh. *Conceptul de putere discreționară în administrația publică*, in the paper *Reformele administrative şi judiciare în perspectiva integrării europene*, published in Judicial and Administrative Sciences Section, Scientific Notebook no. 7/2005, Paul Negulescu Administrative Sciences Institute, pp. 323-328.

[11]Vedinaș, V. 2012. *Drept administrativ*, 7th edition, Bucharest, Romania: Universul Juridic Publishing House, p.15.

commandment" and the administrative act of management also represented "*a manifestation of will made by a competition body, but it tends to create to an administrative body a legal situation of a patrimonial nature governed by private law*". Interestingly, in the sphere of executive power acts, the term of the agreement does not appear, although the administrative act of management is assessed, in reality, as having the character of a civil act.

Prof. Paul Negulescu specifies that when a public authority concludes a sale-purchase agreement with an individual, relating to an immovable property, a legal situation is created by the buyer and another one by the seller, both governed by private law. These legal situations cannot be altered by unilateral acts, but only by the consent of both parties, through bilateral acts. The sale-purchase act is therefore an administrative act of management[12].

The notion of administrative act was used in a purely formal sense to evoque the legal acts of the administrative authorities, not the legal regime of power. Between the administrative act and the administrative act of management there was no gender-species correspondence, in the light of the applicable legal regime, the first was a species of authoritative acts, the second was a species of private law acts.

By levering the elements used in defining the administrative act, it can be appreciated that this is the main legal form of public administration activity, which consists of a manifestation of express, unilateral will that is subject to a regime of public power as well as to the control of legality by the courts, emanating from administrative authorities or from private persons authorised by them, by which related rights and obligations are born, amended or extinguished.

[12]Negulescu, P. 1934. *Tratat de drept administrativ*, vol. I, 4th edition, Bucharest, Romania: Marvan Publishing House, p.304.

The term of administrative act shall also be governed by the new law of administrative litigation defining it as "*the unilateral act of an individual or normative nature issued by a public authority for the purpose of executing or organizing the execution of the law, generating, modifying or extinguishing legal relationships*"[13].

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The public administration is based on and for the purposes of enforcing the law, through administrative acts of a normative or individual nature, through legal material facts and administrative material operations.

Administrative acts are manifestations of unilateral will[14], conducted in the exercise of the executive function of public authorities, in order to produce legal effects, the achievement of which is guaranteed by the possibility of resorting to the constraint force of the state. The central organs cannot carry out administrative burdens by themselves in every point of the territory, hence they need a local public network to exercise their action. In order to

[13]Administrative Contentious Law no.554/2004, published in the Official Gazette of Romania, Part I, no.1154 from December 7th, 2004, modified by O.U.G. no.190/2005, as well as by D.C.C.no.189/2006, no.647/2006 and no.65/2007.

[14]*Cliza, M. C.* Aspecte teoretice și practice privind calificarea corectă a unui act administrativ. Regulamentele emise de C.N.V.M. pentru remunerarea membrilor și a personalului propriu, *available at https://www.juridice.ro/491900/aspecte-teoretice-si-practice-privind-calificarea-corecta-unui-act-administrativ-regulamentele-emise-de-c-n-v-m-pentru-remunerarea-membrilor-si-personalului-propriu.html*

solve problems of local interest, the autonomous authorities of local public administration are invested, by law, with certain duties which represent their material competence. Within this competence, local public authorities adopt or issue different legal acts on behalf of and in the interest of local communities or citizens who embody them and commit material facts producing legal effects, for the purpose of generating, modifying or terminating legal relations, usually of administrative law, but also legal relations belonging to other branches of law. The mission of the local public administration to organize law enforcement is carried out by an executive-instrument activity and by a performance activity in the various public services[15].

Local public administration adopts normative acts and individual acts.

Normative acts are characterized by the fact that they contain general rules of conduct, impersonal and of repeated applicability to an indeterminate number of subjects. Individual administrative acts are characterised by the fact that "*the manifestation of will of the competent body creates, modifies or extinguishes subjective rights or obligations in the profit or burden of one or more persons determined in advance*"[16].

In regard to authoritative acts of individual character issued by local public administration authorities, the share is owned by authorizations, sanction acts (contravention reports), acts conferring personal status and local public patrimony acts.

The legal regime of administrative acts[17] can be defined as the assembly of substantive and formal rules setting out the conditions of validity, the procedure for issuing or adopting, executing, forms of legality control or opportunity, administrative and judicial remedies, effects (extent and termination), applicable penalties, which customize acts of administrative law in relation to other legal acts.

The dimensions of the legal regime concern:

a.the conditions of validity[18] of the administrative act, (about which has been written since 1959), namely the conditions relating to the form and substance of that type of legal act;

b.the procedure for issuing or adopting the administrative act;

c.the legal force and legal effects of the administrative act, starting with the creation, the effects in themselves, until the production of these effects cease;

d.the control exercised on the administrative act.

As a consequence, in relation to the above-shown ones we retain the following:

- ✓ The administrative act is the main legal form of public administration activity;
- ✓ The administrative act is a manifestation of express, unilateral will that is subject to a public power regime;
- ✓ The public power regime does not exclude the exercise of legality control by the courts of law;
- ✓ The administrative act can emanate from public authorities or private persons authorised by the administration to provide public services;
- ✓ The administrative act can produce legal effects which may consist in generating, modifying or extinguishing rights and obligations.

Beyond administrative acts, the remainder of the activities by which the public administration is carried out were classified in[19]:

[15]Negoiță, Al. 1992. *Contenciosul administrativ și elemente de drept administrativ*, Bucharest, Romania: Lumina Lex Publishing House, p.6.
[16]Iovănaș, I. 1997. *Drept administrativ*, Arad, Romania: Servo-Sat Publishing House, p.218.
[17]Iorgovan, A. 2002. *Tratat de drept administrativ*, vol. II, 2nd Edition, Bucharest, Romania: All Beck Publishing House, p.40.
[18]Drăganu, T. *Acts of As Administrative*, Bucharest, Romania: Scientific Publishing, p.107.
[19]Iorgovan, A. *op. cit.* p.11-17.

-Material operations and facts of the public administration bodies, formed in their turn from: technical-administrative and technical-material (productive) operations;

-Operations to achieve public services (supplying electricity, caring for patients or applying medical treatment).

The material operations and facts of the public administration bodies are not express manifestations of will made in order to produce legal effects. They usually intervene in connection with the issuance and enforcement of legal acts of the public administration bodies. Material operations and facts can condition the legality of administrative acts or can ensure the effectiveness of administrative acts or the proper conduct of the activity of administrative bodies as a whole.

As has been shown in the doctrine, there are also situations in which the issuance of a legal act is conditional not on a simple administrative operation, but by a unilateral administrative act. This is the case for administrative authorisations, in the broad sense of the term.

The overwhelming majority of administrative operations in the activity of the public administration are considered as conditions for the validity of administrative acts. Thus, the authorisation to construct a building is given after the measurements of the land on which the property is to be located and the outline of its location are carried out, the issuance of a medical certificate of exemption from a given activity is given after the examination of the patient in question, the issuance of the driver's licence is made after the individual has taken theoretical and practical exams before the competences commission, etc.

In our law, there is no express regulation of the responsibility of the administration for its unlawful deeds - we could conclude that such an act causes the dispute to emerge from the sphere of administrative law and directs it to civil law, which will entail its resolution as if two individuals were concerned.

In other words, the unlawful deed "strips" the administration of its public power - which confers the privilege of jurisdiction materialized in the existence of administrative contentious -and reduces it to the mere status of an individual. Therefore, according to that conception, the guilty legal person of public law, for its own deed or for the deed of its foresaid, will be sued before the court of common law, like any private legal person, hence the rules applicable for such a legal person of common law will apply to it by analogy.

It should also be noted that this reasoning has historical roots since practically always our law which leaves the judgment of the administration accountable to be governed by the provisions of the Civil Code[20], and also this conception is broadly shared by our doctrine, both civil and administrative. Moreover, some authors go even further in this regard considering that, including the responsibility of the administration for its acts, if the action for liability is introduced after the annulment of that act, would also be a civil tort[21].

Even though the tradition of Romanian law identified administrative and civil liability, there were a number of

[20]Rarincescu, C. 1936. *Contenciosul administrativ român*, Bucharest, Romania: Alcalay Universal Publishing House, pp. 83-85.

[21]To this end, refer to Iovănaș, Ilie. 1997. *Drept administrativ*, Servo-Sat Publishing House, , p. 173; Deleanu, I. 2007. *Tratat de procedură civilă*, Bucharest, Romania: C.H. Beck Publishing House, vol. II, p. 396; Tarhon. V. Gh. *Răspunderea patrimonială și regresul organelor administrației de stat pentru pagubele cauzate prin acte administrative ilegale*, in Romanian Law Magazine, no. 5/1968, p. 55. In any event, the question whether or not that liability is a civil tort may not have any influence on the jurisdiction of the court which will judge the claim for damages, as the law itself is expressly governed by art. 19, para. 2 of Law 554/2004 establishing that if an administrative act has been cancelled without any claim and compensation, they may be requested later, but still before the administrative contentious court.

judgments of the Court of Cassation which decided to engage the state's liability even if it could not be imputed to a fault, the damage being caused in the exercise of normal and lawful activity.

3.Conclusions

The issue of administrative act is widely analysed in the specialized doctrine, which is natural in the context in which it represents the essential form of materialization of the entire activity of the public administration.

However, there are manifestations of will of the public administration[22] which do not materialise in administrative acts in their classical form, but in explicit agreements or rejections to comply with requests, and sometimes the very manifestation of the explicit will is absent, the administration proving passivity or inaction.

The most illustrative example is the silence of the administration (the conceptual approach that we will use in the paper, since, although in the current Romanian legislative context is not found, it is used by classical doctrine to illustrate what the law currently refers to as the act of not responding within the legal term).

Silence, which in the sphere of criminal law is a genuine right of the suspect or defendant, loses all this significance in administrative law, where the administration[23] is required to respond to individuals in the light of its general interest mission. That obligation consequently entails the need to recognise the possibility for a citizen to be able to carry out administrative and judicial arrangements against such an attitude manifested by indifference and passiveness, similar to the case when it faces an explicit refusal which it considers to be unjustified.

Following the same idea, it is appropriate to be able to attract the responsibility of the administration or of both contracting parties in case of the administration's agreements, which, although lacking the classic unilateral nature of the administrative act, in their large proportion belong to the sphere of public law. In the stated context, it is noted that the concept of administrative act in the broad sense of administrative litigation is extended, which is based on the provisions of art. 52 para. (1) and (2) of the revised Constitution.

Based on the constitutional provisions, the hypothesis of not resolving an application in within legal term was added by Law No. 554/2004 a new hypothesis, namely that of the unjustified refusal to resolve an application relating to a right or a legitimate interest.

The legal nature of their assimilated administrative acts is expressly referred to in article 2 para. (2) of Law No. 554/2004, according to which those assumptions are assimilated to unilateral administrative acts, as in the case of administrative agreements which are assimilated to the administrative act by art. 2 para. (1) lit. c) 2nd thesis of the law, which also allows the qualification as such of other categories of agreements subject to the law of administrative contentious.

Furthermore, in the case of administrative agreements we note that a new normative framework was adopted in 2016 in matters of a significant typology (public procurement agreements, sectoral agreements, concession agreements and service agreements). Despite the temptation to expand research on the analysis of special laws in the matter of administrative acts, an understandable temptation in the context of the importance and novelty of this normative framework, rigorously driven to maintain research into the

[22]Catană, E. L. 2017. *Contenciosul actelor administrative asimilate*, Bucharest, Romania: C.H. Beck Publishing House, p. 27.
[23]Dragos, D. C. 2005. *Legea contenciosului administrativ. Comentarii si explicatii*, Bucharest, Romania: All Beck Publishing House, p. 115.

achievement of the main objective of the paper determined by the chosen scientific theme, namely that of administrative acts assimilated in administrative contentious, the paper is confined to analysing the incident regulatory framework in the matter with a focus on the analysis of the especially regulated administrative contentious by one of the new laws entered into force, namely the law of remedies No. 101/2016, respectively through the analysis of administrative contentious with referring to other important public administration agreements, as well.

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