RESEARCH ARTICLE:

A critical analysis of the exceptions to judicial review

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ABSTRACT

The review of the Romanian Constitution adopted in 1991, by the Law on review published in the Official Gazette No. 669 of September 22, 2003, represents a particularly important moment for opening and developing the Romanian administrative review based on the principles of a state governed by the rule of law. We say this because the new rules which it contains eliminated many faulty regulations that the Law no.29/1990 on the administrative review contained. Moreover, it brings new rules that fit much better the social and legal realities in our country, found in a moment of affirmation within the democratic world.

The amendment that interests us in particular is contained in section 6 of Article 126, which provides the following: "the judicial review of public authorities' administrative actions, in relation to administrative review, is guaranteed, except for those relating to the relationship with the Parliament as well as to the provisions of military command. The administrative courts are competent to deal with the applications of the persons prejudiced by ordinances or, as the case may be, by ordinances declared unconstitutional".

KEYWORDS: Constitution, administrative review, administrative actions, judicial review

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1.Introduction

There are certain situations in which, even if all the conditions required by law for filing an application in the administrative court are met, this cannot be done. *In these cases the application in administrative court is rejected since the beginning, without being necessary to initiate the judgment of the dispute merits, regardless of whether the act is illegal or not, or whether it harms or not applicant's rights*.

These situations occur when the legislator exempts certain categories of administrative actions from judicial review in the administrative review. These exceptions are causes or pleas of inadmissibility which prevent the beginning of the trial before the administrative court.

Pursuant to the legal administrative doctrine[1], *the exception of certain categories of administrative actions to the applications in the administrative court was imposed by the evolution of the administrative litigation system in Romania.* This was also due to the fact that, after the Constitution was adopted in 1866, the common law litigations became exacerbated, going up to totally removing the "*special litigations*" of administrative review during certain periods of time.

Moreover, in the inter-war period, this issue was the subject of a constitutional rule in Article 107, final paragraph of the Constitution adopted in 1923, which stipulated that: "*the judicial power does not have the capacity to judge on the ruling party actions, as well as on the military command actions*".

The genesis for the establishment of such exceptions is identified[2] in France, where the State Council, since the dawn of its operation, as the appeal for annulment in cases of excess of power was contoured and progressed, admitted the existence of certain insusceptible administrative actions, for some reason, of being controlled, from the point of view both of legality and from the point of view of the judicial effects produced by the administrative courts.

In the Romanian legal doctrine[3] these exceptions are classified into two categories:

- exceptions resulting from the nature of the action;
- exceptions resulting from the existence of a parallel appeal.

a) Exceptions resulting from the nature of the document. As it comes out even from the title of this category, some exceptions to the administrative review aim the administrative actions which cannot be contested.

The impossibility of contesting certain administrative actions within the application in administrative litigation results from the nature of such actions.

We start from the idea that the public administration activity is governed, as we said before, by the principle of legality. However, for some reason, certain categories of administrative actions evade any judicial review.

This avoidance is made based on certain reasons relating to the achievement of a so-called protection of some strictly delimited segments of the political and administrative activity of the State.

The exceptions to the administrative review of public administration's activity are established by the legislative body of the State or by constitutional legal rules or by legal administrative rules.

The discussions which took place in the doctrine over the years had as direction the analysis of the practical need to exempt certain administrative actions from this type of review. Many of the exceptions

[1]Iorgovan, A. 2005. *Treaty of Administrative Law*, vol.II, 4th Edition, Bucharest, Romania: AII Beck Publishing House, p. 601.
[2]Idem.
[3]Rarincescu, G. R. 1937. *Romanian Administrative Court*, Bucharest, Romania: "Alcalay & Co" Universal Publishing House 1937, p. 285.

which have been introduced provided also the possibility of abuse in the administration's activity. These exceptions should not be confused with the specific exceptions to the civil procedural law, which represents one of the forms of manifestation of the action, a means to which, usually, the defendant applies in order to defend himself against the application[4].

b) Exceptions resulting from the existence of a parallel appeal.

This category of exceptions is analyzed by the Romanian legal doctrine by reference to the French law system. The parallel appeal represents a possibility of limiting the access to the action in the administrative court which consists in the fact that the applicant has at his disposal another remedy, of legal nature, by which to obtain equivalent satisfaction.

The theory of the parallel appeal does not have as effect, as it can be seen, the permanent exemption of certain administrative actions from any judicial review, but only to remove the competence of the administrative court to judge on certain actions and for their contesting, the special laws establish special jurisdictions and remedies[5].

The theory of the parallel appeal, as we said before, is of French origin and its development in France is connected with certain considerations and historical and legal reminiscences, specific to French law. We have to mention that in the French law this cause of inadmissibility, which in the beginning was interpreted in a much wider sense and led to the exemption of numerous categories of actions from the appeal to annulment for excessive power at the State Council, was subsequently interpreted in a much more restrictive manner, which directly caused an enlargement of the admissibility for the appeal to annulment at the State Council.

Prof. Rarincescu said that, in Romania, the theory of the parallel appeal could be applied only to matters of lack of competence, if the litigations courts received recognition of the right to judge even on disputes submitted through special laws of other courts. In such a situation, the legal order for the distribution of powers to the courts would be violated, which cannot be acceptable in his opinion.

We consider this opinion as realistic as possible, but, to try to clarify the applicability of the parallel appeal theory in our law system, we must present, as recorded by the doctrine, the conditions which must be met for a parallel appeal to exist and to constitute an exception or a cause of inadmissibility:

- it must be a real jurisdictional appeal and not a hierarchical or administrative appeal
- it must be a direct action able to allow the contestation of illegality of an act by the main action, obtaining even cancellation or elimination of the prejudicial act;
- for the theory of the parallel appeal to be applied the applicant must be able to obtain through the special remedy a satisfaction equivalent to that obtained in the case of the action in administrative court.

From the analysis of these conditions we draw the conclusion that the exemption of certain actions from the judicial review in the administrative court, based on the parallel appeal, can be carried out in our system of law only if it is created by a special law, other than that governing the administrative review, a special court for judging on a strictly delimited category of administrative actions, in which case the administrative court would represent the common law for appealing against illegal administrative actions, and these legal rules providing competence in the field to certain

[4]Dogaru, I. 1995. *Treaty on civil proceedings*, vol.1, General Theory, Bucharest, Romania: Europa Nova Publishing House, p. 173.
[5]Rarincescu, G. R. *op.cit.*, p. 329.

special courts for certain administrative actions would have a derogatory character.

Law no. 554/2004 stipulates in Article 5, paragraph 2, that "*the administrative actions for the amendment or annulment of which another judicial procedure is provided, by organic law, cannot be contested by administrative review".*

This provision allows the possibility of setting up a parallel appeal for the amendment or annulment of certain illegal administrative actions. By organic law, competence may be given to a court, other than that of administrative litigation, for interpreting the complaints against a certain category of administrative actions.

2.Constitutional Aspects

As it can be noted in the administrative doctrine[6], the fundamentals and directions of such exceptions varied from the formation of the State Council in France until today, outlining however some dominant notes, dedicated legislatively and a few times through the Constitutions (such as, for instance, Article 107, final paragraph in the Romanian Constitution adopted in 1923). *It is to be noted that after December 1989 the principle solution of the Constitution adopted in 1923 was resumed in two stages, even if in other form*.

In this respect, the Romanian Constitution, in its initial form from 1991, decided in Article 48, paragraph 2, the following provision: "*The conditions and limits for the exercise of this right shall be regulated by organic law*". This constitutional text remained unchanged, becoming Article 52 paragraph 2, as a result of the Constitution review by Law no. 429/2003, approved by the national referendum from October 18 – 19, 2003.

The law on the review took over by article 126, paragraph 6, thesis I, the conception of article 107, final paragraph of the Constitution adopted in 1923, in the following wording: "*The judicial review of public authorities' administrative actions, by way of administrative review, is guaranteed, except for those which relate to the relationship with the Parliament, as well as for the military command actions (...)*".

In this text, the expression "*ruling actions*" was replaced with the phrase „*actions relating to the relationship with the Parliament*", in the conditions in which Article 48, paragraph 2, which became art. 52, paragraph 2, remained in force. Thus, the issue of their conciliation occurred[7].

For this purpose, the specialty legal doctrine[8], identifies two possible interpretations, namely:

- Article 126, paragraph 6 is the only site for the matter concerning the scope of the pleas of inadmissibility, and Article 52, paragraph 2 aims at other aspects and
- Article 126, paragraph 6 regulates the pleas of inadmissibility of legal „*rank*", within the limits accepted by Article 53 of the Constitution.

A reference in the analysis of these two possible interpretations is Prof. Antonie Iorgovan's approach[9].

Thus, the author inclined, in a first approach of the theme, to the second interpretation, confirmed by subsequent criticism, but the team who has completed the text of the draft law relating to administrative conflict agreed with the first interpretation, fact for which the "*military command actions*" were given an extensive definition, in the version of the project referred to the Parliament.

[6]Iorgovan, A. *op.cit.*, vol.II, 4th Edition, Bucharest, Romania: AII Beck Publishing House, p. 604.

[7]Prof. Ioan Vida launched the thesis of „*intra-constitutional antinomies*" **(See** Ioan, V. **Intra-constitutional Antinomies**, in the Magazine Pandectele Române, no.1/2004, p. 182-196).

[8]Iorgovan, A. 2005. *Treaty on Administrative Law*, vol.II, Bucharest, Romania: AII Beck Publishing House, p. 604.

[9] Idem, p. 604-605.

Taking into account the orientation of the parliamentary debates on this topic, the author changed his opinion, noting that: "*The text of paragraph 2 of Article 52 of the Constitution, after the Constitution review, in 2003, acquires a restrictive significance",* and more, he notice that*: "if, until the Constitution review, the former Article 48 paragraph 2, become Article 52, paragraph 2, represented the constitutional ground for the exceptions to the administrative courts review, that is for the pleas of inadmissibility, in the new conditions this text appeared to us, as expressly mentioned, as the constitutional ground only for the limits, namely for the limited review for certain categories of actions*".

3.The Positive Aspect of the Analyzed Constitutional Amendments

In our opinion, the amendment made to Article 126 paragraph 6 from the Romanian Constitution, represents the considerable widening of the scope of administrative actions which may be contested in the administrative court, the being also possible for Government decrees to be contested.

The meaning of constituent's will results extremely clear from the new constitutional rule: in general, two categories of administrative actions will be exempt from judicial review - actions concerning the relationship with the Parliament and actions of military command. It was wished that these administrative actions be not be subject to justice censorship[10].

In this respect, the Constitutional Court also rules, by Decision no. 293/ July 1, 2004[11] – relating to the challenge on constitutional grounds of the provisions of Article 2, section a, third thesis, part one of Law no. 29/1990 - according to which "*constitutional provisions shall be interpreted restrictively, any other exception representing a supplement to the Constitution, impermissible by its supreme nature and by its pre-eminence in relation to the entire intra-constitutional legislation*".

We must notice here the role held by the legal administrative doctrine, who brought countless critics to the provisions laid down by Law 29/1990, in relation to the number unjustifiably high of administrative actions exempted from the judicial review.

Establishing in Article 1 of Law 554/2004 the plenitude of powers for the administrative courts in relation to the administrative litigations, the legislator exempted however from this review, by Article 5 paragraph 1 - 2 certain categories of administrative actions (scope of the pleas of inadmissibility), as follows: "*The following cannot be contested in the administrative court:*

a) the administrative actions of the public authorities concerning their relations with the Parliament;

b) the military command actions.

The administrative actions for the amendment or annulment of which other legal proceedings, provided by an organic law, are provided, cannot be contested by administrative review".

[10]Popescu, C. L. *Administrative review according to the revised constitutional provisions*, Dreptul magazine no.10, 2003, p. 17.
[11]Published in the Official Gazette no.702/04.08.2004.

4.Conclusions

In conclusion, the concept of exception to the administrative review refers to the situation in which, even if all conditions are met for filing the application in the administrative court, this cannot be performed on the ground that the law prohibits, in a limitative manner, the review on this path of certain categories of administrative actions.

The exceptions to the administrative review may be organized by two ways, namely:

- the determination of a limitative list of administrative actions which cannot be challenged in court and
- granting judgment competence for the disputes concerning certain administrative actions to other law courts than administrative courts (special procedure).

The distinction between the two modes of exemption of certain administrative actions from the judicial review in the administrative review is obvious, because, in the first case, these actions cannot be controlled either by the administrative court or by other court, while, as regards the second mode, these actions may not be subject to the legality review before the administrative court, but they may be subject to such control before other courts, particularly designated by law.

In this respect, Professor Iorgovan appreciates that: "*The theory of parallel appeal is not actually a theory of justification of "exemptions" of administrative actions from jurisdictional reviews, on the contrary, it is the theory that argues that on those administrative actions a jurisdictional review other than that of ordinary courts (common law), of administrative litigation shall be exercised*"[12].

It should be specified that there is nothing to prohibit the judicial review of the administrative actions referred to in Article 5, paragraph 1 - 2 of Law 554/2004 with subsequent amendments and supplements, in any other way than the administrative review, therefore by any courts other than those of the administrative litigation. The solution correlates logically with Article 21 of the Constitution on the free access to justice, in the case of violation of rights, freedoms or of one person's legitimate interests.

In connection with this matter Professor Iorgovan notices that: "in the strict sense, the scope of the administrative actions exempted comprises only the two categories of administrative actions referred to in Article126, paragraph 6 of the Constitution, resumed, in an appropriate wording in paragraph 1 sections (a) and (b) of Article 5 of Law 554/2004, because paragraph 2 of Article 5 of the same normative act does not regulate itself an exception to the judicial review, but only a plea of inadmissibility for the competence of administrative courts, within the meaning of Article 1 paragraph 1 section f) of the law[13], because there is a

[12]Iorgovan, A., *op.cit.*, 2000, p. 189.

[13]"*According to the judicial organization in Romania, in force on the respective date, Law 554/2004 understood by the administrative review court; "the Department of administrative and tax review of the High Court of Cassation and Justice, the departments of administrative and tax review of the courts of appeal and tax-administrative courts ". Law no. 247/2005 by amending both Article 33, devoted to the courts of appeal [paragraph (3)), as well as Article 34, consecrated to the courts [(4)) of Law no. 304/2004 on judicial organization (Of. Gazette, no 576 of June 29, 2004), establishes the rule according to which, within the courts of appeal and, accordingly, within the courts, departments or, as the case may be, panels of judges operate, being specialized in civil and criminal, commercial cases, cases with minors and family, cases of administrative and tax review, cases on conflicts of labor and social insurance, as well as, in relation to the nature and number of cases, maritime and river harbors departments for other matters". Article 35 of Law 304/2004, in its turn, is modified, waiving the imperative solution, covering only the possibility of*

judicial review performed, but it is performed by the common law courts".

The same author notices that "*in relation to the new constitutional rules we will have to admit that the traditional notion of plea of inadmissibility can still be used only in a broad sense of the term, because in a strict sense only two categories of situations are affected: absolute exceptions, the two hypotheses covered by paragraph 1 sections (a) and (b) of Article 5 of Law 554/2004, which take over the solution of paragraph 6 of Article 126 of the Constitution, and the relative exceptions, the hypothesis of "parallel appeal", covered by paragraph 2 of Article 5 to which we refer, of Law 554/2004*".

The terminology proposed by the author for the situations referred to in paragraph 1 of Article 5 of Law 554/2004 is that of "*exceptions to the administrative review*", and for parallel appeal, he proposes the expression "*plea of inadmissibility in the administrative courts*".

Treating the issue of the appeal parallel, Professor Iorgovan observes that: "s*ince it has as subject disputes relating to the administrative, material action, it is still an administrative litigation, but is formally settled out of the administrative courts*".

The legislator requested that the "*parallel appeal*" be still regulated by an organic law and include *"legal proceedings"*, namely proceedings to be carried out before the court within the meaning of Article126 of the Constitution. The fact that the phrase "*other legal proceedings*" refers to the proceedings before the courts of law also comes from the corroboration of Article 128 paragraph 1 of the Constitution ("*The legal proceedings shall be conducted in the Romanian language*") with Article 21 paragraph 4 of the Constitution "*special administrative jurisdictions are optional and free*".

Therefore, we appreciate that we cannot speak of the incidence of "*plea of inadmissibility*" covered by paragraph 1 of Article 5 of Law554/2004 in the event of jurisdictional-administrative proceedings[14]

It should be noted that the institution of such exceptions corresponds to a moment of evolution in the Romanian administrative review, Law 554/2004, following that, certainly, improvements to be brought in accordance with community law, considering the provisions of EU Constitution which also include, inter alia, the fundamental right of citizens to "*a good administration*", in accordance with which the Romanian legislation will have to bear the amendments.

establishing specialized courts: "in the fields referred to in Article 34 paragraph (3) specialized courts may be set up" paragraph (1). A typing issue is to be noticed, paragraph 4 of Article 34 is identical, under the aspect of fields, with paragraph 3 of Article 33, and then, it would have been correct for paragraph 1 of Article 35 to provide both cases: "in the fields referred to in Article 33(3) and Article 34(4) ...". It was too much to pretend typing subtleties in a law which is the expression of a manifestation of Power of the executive, through unconstitutional solutions noticed even by non-experts, but not by the judges of the Constitutional Court, in the Decision 419/2005. The irony, those from the field of political power, including the President of Romania in operation, in a first stage, vehemently criticized the Constitutional Court for the fact that it dared to declare a few unconstitutional articles, when the Court could be criticized for the fact that it had not declared unconstitutional the law, in general, and, in any event, the titles affecting the justice.
Returning to Law 247/2005, we further retain that it also amends Article 37 of Law 304/2004, permitting the establishment of specialized departments and panels of judges within the courts.
Therefore, we must consider Article 2 paragraph (2) Ut, f) of Law 554/004 implicitly amended by Law 247/2005, by administrative review court understanding the departments or, as the case may be, the panels of judges specialized in administrative –tax litigations from judges up to the High Court of Cassation and Justice", Antonie Iorgovan, Treaty on Administrative Law, vol. II, 4th Edition, AII Beck Publishing House, Footnote 2), page 606;

[14]Iorgovan, A. *Comment on some points of view with regard to the Administrative Review Draft*, in RDP no.3, 2004, All Beck Publishing House, p. 87–88.

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