THE EFFICIENCY OF LEGAL NORMS IN THE ACTIVITY OF PUBLIC ADMINISTRATION

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Abstract

Legal relations between the public administration and private persons are characterised by the higher-level position of the administration which can impose its will. This is why, one of the most important principles in the activity of public administration is the principle of legality, meaning that the whole activity is organised and conducted by law. "The law" is in fact the legal norm. Identifying the legal norm that is to be applied to a particular situation is not always easy, as in order to achieve this goal the national legislation, the international conventions that Romania has adhered to, the jurisprudence of the international courts that enforce the international conventions, the European Union acts with direct effect at a national level have to be considered. Many times a control of the compliance of the legal norm with the hierarchy of legal norms, or an interpretation of the legal norm is needed. Who is entrusted with these tasks? What are the powers of the public administration in this area? How is the effectiveness of a legal norm determined by the activity of the public administration? The paper considers these questions.

Keywords: *Public administration, legal norm, res judicata, legality.*

The idea of norm is generally associated with the idea of order. Order in nature, order in society, order in thinking are interdependent and overlapping areas of the universal order. In any culture a set of three major components may be identified: an action system - including a sum of patterns of human activity, a normative system – specifying the rules to be followed by the members of the society in order to exercise their rights, duties and responsibilities, a system of material and symbolic products – the result of human actions and interactions, influencing the way of life[1]. In the course of history people learned that in order to achieve certain common goals it is necessary to establish and follow rules that organize their activity. So, norms are rules that indicate the behavior of individuals in certain situations, so that their action would be efficient or positively appreciated[2]. Social norms are continuously changing when changing the social order, or within a particular social order according to changes in the material or spiritual evolution. Social norms are designed in order to protect social values and social values are different in time and space. For the protection of the most important and cherished values of a society

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[1] G. C. Mihai, R. I. Motica, *Fundamentele dreptului – Teoria şi filosofia dreptului (Fundaments of Law – Theory and Philosophy of Law),* All, Bucureşti, 1994, p. 237.

[2] G. Boboş, C. Buzdugan, V. Rebreanu, *Teoria gerală a statului şi dreptului (General Theory of State and Law),* Argonaut, Cluj-Napoca, 2008, p. 327.

legal norms are established, as compulsory norms, enforced with the coercion force of the state, if necessary.

Several factors, such as the growth of population, crowding of some geographic areas, diversification of social relations with high degree of repetition, the increase in the complexity of certain relations (commercial relations for example), imposed the need for compulsory norms in more and more areas of the social life.

The definition of legal norm included the fact that it is not only sanctioned by the state, but issued by the state[3]. Regulating more and more of the social relations by law, leads to a higher and higher intervention of the state in social life, not only in the relations between people, but also in the relations between the state and the people. The latter relations have diversified, including public service, fiscal relations, environment preservation or economic interventionism. Although an abstract notion, the legal norm is a real tool for establishing a correlation between justice, order and discipline in a society. Not always the technical elements of the legal relation are those determining the legal norm, but sometimes the political goals. We are using the term “political” in the sense of the governmental activity of organizing and developing certain sectors of social life, creating strategies and identifying action directions that will develop social life according to the interest of the whole society, of the state. The environment, public health, education, economic growth, the state budget are areas oriented by law. Any strategy in such areas is established and conducted through legal norms.

In the legal relations between the state and the people law is applied by the authorities of public administration. The legal norms will be efficient if they are clear and coherent. Coherence includes the respect for the hierarchy of legal norms.

In the Romanian legal system, on top of the hierarchy of legal norms is the Constitution (figure 1). At a lower level are the organic laws and ordinary laws (in this order), issued by Parliament. Emergency Government Ordinances and Government Ordinances have a statute equal to organic laws or ordinary laws, as they are issued by the Government under a legislative delegation given by Parliament. Then the administrative normative acts follow, their hierarchy being established by the rank of the issuing administrative body, starting with the Government.

Development of communications led to internationalization and, further on, to globalization of social relations. International organizations and even international supra-national structures appeared. Legal norms with an international source become incident at a national level. International acts are setting rules not only for the behaviour of the states in relation between them, but also rules for the relation between the state and its citizens, or rules for the behaviour of the private persons. The European Convention on Human Rights, for example sets basically a set of rules for the signatory states to ensure the protection of a set of rules for their inhabitants.

[3] *Idem,* p. 334.

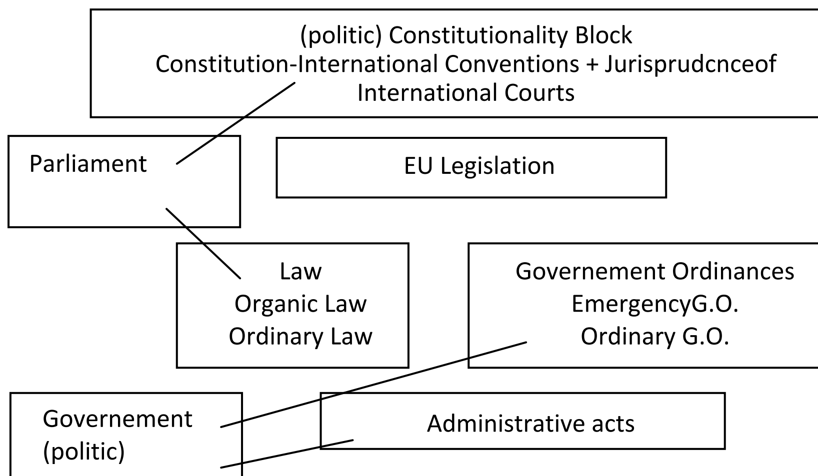

Figure 1. Hierarchy of legal norms in the Romanian legal system

The EU Treaties set rules for the behaviour of EU member states, but also rules for the relation between the member states and their citizens. Other EU acts, such as regulations, may set rules for individuals, private persons. Regarding the legal relations between the state and the people a new concept was developed: the global administrative law[4], as much of global governance is realised by public-private partnership involving states or inter-states organisations, informal inter-states bodies or formal inter-state institutions such as UNO. Such international bodies are sources of legal norms.

Legal norms established in international acts interfere with national legislation. To keep the rule clear, the legal system has to state clearly which of the norms will prevail in such an occasion. The Romanian legal system is giving priority to the international legal norm. Art. 11 of the Constitution establishes that treaties ratified by Parliament, according to the law, are part of national law. Art. 20 of the Romanian Constitution establishes that constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the convenants and other treaties Romania is a party to and where any inconsistencies exist between the convenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions. Due to the accession of Romania to the European Union, art. 148 par. (2) of the Constitution establishes that the provisions of the constituent treaties of the European Union, as well as the other compulsory community regulations shall take precedence over the

[4] B. Kingsbury, *The Concept of "Law" in Global Administrative Law",* in "European Journal of International Law", 20, 1, 2009,
http://www.iilj.org/publications/documents/2009-1.GAL.Kingsbury.pdf, accessed at 30.07.2013.

opposite provisions of the national laws, in compliance with the provisions of the accession act. Some of the international conventions, treaties or international legal norms are applied with the help of international courts. Such courts, as the European Court of Human Rights in the case of the European Convention on Human Rights, or the European Court of Justice in the matters of European Union Law, determine the correct interpretation of the international acts. So, each international act, together with the jurisprudence of the corresponding court, forms a block. Further, the international blocks, together with the Constitution form the "constitutional block", situated at the top of national hierarchy of norms.

In this thicket of legal norms, who establishes which is the norm ruling a specific legal relationship? As shown before, in the relation between the state and the people, or even in a relation between people, usually it is the job of administration. Administration is subjected to the principle of the supremacy of the law, the principle of legality being a supreme principle in the entire activity of the administration. The importance of this principle results from different legal dispositions. Chapter V of the Constitution of Romania, regarding the administrative authorities, shows that ministries are created, organized and function according to law; the Governments and ministries, with the approval of the Court of Auditors (Curtea de Conturi), can set up specialized authorities in their subordination only within the dispositions of the law; autonomous administrative authorities may be created through an organic law (art. 117). In the law of local administration the principle of legality is mentioned in art. 2 par. (1) together with other organizing and functional principles, such as the principle of decentralization, of local autonomy, deconcentration of public services, eligibility of local authorities and the principle of consultation of citizens on issues of local interest. The administrative tutelage of the Prefect upon local autonomous authorities, mentioned in art. 19 par. (1) of Law 340/2004 regarding the Prefect, is a guarantee for the principle of legality at a local level. Art. 1 par. (3) of the same law also mentions that the Prefect guarantees the supremacy of the law at local level. Regulating the civil service, Law 188/1999 mentions the principles of exercising the public power and one of them is legality, referred to in art. 3 letter a).

If the way administration applies the rule is considered harmful, the judiciary will be asked to say if the administration has applied the law in a right way. Article 1, par. (2) of the Civil procedure code (Law no. 134/2010) states that courts are providing a public service, providing law enforcement and ensuring its supremacy. The judge searches for the elements of the legal rule, the hypothesis, the disposition and the sanction and is putting them together in a way that will bring justice within the law to the particular conflict[5].

A separate institution, the Constitutional Court, is competent to decide if a national legal norm issued by the Parliament, the Government or public administration is in accordance with the "constitutionality block".

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[5] E. M. Fodor, *Norma juridică parte integrantă a normelor sociale (The Legal Norm as a Part of the Social Norms),* Editura Argonaut, Cluj-Napoca, 2003, p. 155.

Courts are issuing decisions with *inter partes* effect. Law no. 134/2010 (the Civil procedure code) even show that the judge is forbidden to establish dispositions with a generally compulsory application through his decisions in the causes he is called to solve. Nevertheless, in order to create a constant practice of the courts, to ensure the predictability of the law, the Civil procedure code provides two instruments: the appeal on a point of law and the preliminary question addressed to the High Court of Cassation and Justice. The appeal on a point of law (art. 514 – 518) provides the possibility for the Attorney General to notify the High Court of Cassation and Justice that a certain law matter, with a high degree of repeatability, has been given different solutions by courts, and ask for the right interpretation of the law. The solution of the High Court of Cassation and Justice is compulsory for all courts, starting with the date it is published in the Official Journal. The preliminary question procedure (art. 519 – 521) allows a court that comes across a new legal matter that is essential for its decision, that was not previously solved by the High Court of Cassation and Justice and it is not the subject of a pending appeal on a point of law, to ask the opinion of the Supreme Court. The decision of the High Court of Cassation and Justice is also compulsory for all other courts, starting with the date it is published in the Official Journal.

The decisions of the Constitutional Court have a compulsory effect for the Parliament in the first place, if an unconstitutionality exception is admitted. The Parliament, in such a situation, is invited to change the contested legal text, in a way that will be compatible with the "constitutionality block". Such a decision undoubtedly has an *erga omnes* effect. The contested text will no longer exist in the future. The decisions of the Constitutional Court that give a certain interpretation to a legal text also have an *erga omnes* effect. It looks that there are different opinions on the matter of the effect of a decision of the Constitutional Court that rejects an unconstitutionality exception, especially when the Constitutional Court is asked to establish if a national legal text is compatible both with the Constitution and an international convention or EU treaty, as included in the "constitutionality block". In theory there are divergent opinions. Opinions coming mostly from within the Constitutional Court (but not only)[6] consider that, in case the exception is rejected, national courts cannot remove the incidence of the legal text declared by the Constitutional Court in accordance with both the Constitution and the international act. The High Court of Cassation and Justice, on the contrary, considers that it may remove the national legal text, as it is the competence of national courts to ensure the preeminence of the international acts. We agree with the opinion within the Constitutional Court. The principle of subsidiarity is giving to the national courts the possibility to protect the preeminence of international conventions on human rights and EU treaties, but does not prevent this to be done by the Constitutional Court. Not every country has a Constitutional Court and the tasks of different constitutional

6 E. M. Fodor, *Excepția de nelegalitate a actului administrativ (The Exception of the Ilegallity of the Administrative Act),* in "Caietul științific", nr. 4, 2011, Republica Moldova, p. 302-308, S. M. Costinescu, K. Benke, *Efectele deciziilor curții constituționale în dinamica aplicării lor (The Effects of the Decisions of the Constitutional Court in the Dynamics of Their Application)*, http://www.ccr.ro/uploads/RelatiiExterne/2012/CB.pdf (22.03.2013) and the opinions mentioned in these works.

courts are not the same. Due to the specificity of the hierarchy of legal norms in our legal system, if the Constitutional Court is called to rule upon the accordance of the national law with the Constitution, and the "constitutionality block" includes certain international acts, the decisions of the Constitutional Court should prevail once it established that the national legal rule does not contravene an international act. Only in absence of a previous decision of the Constitutional Court on the matter, if judiciary courts are called to find the legal norm for a certain situation and it is found that a national legal norm is breaching an international act, they may decide to set aside the national legal norm.

Divergent opinions of central public authorities lead to inconsistencies in the enforcement of law and cause distrust in the system. It is not only this controversy that leads to situations where two national central public authorities, with decisional power, have different opinions upon the legal norm conducting a certain situation.

One situation is when the legal text is interpreted differently by the administration in contrast with the courts. Law no. 189/2000, establishing compensations for Romanian citizens seeking refuge due to ethnic persecutions during the Second World War, brought a controversy upon the meaning of "refugee". The county pension authorities considered that only persons that were born, or were conceived inside the legal time of conception, at the time they left their domicile could be considered refugees according to the law. The supreme court decided that, on the contrary, the legal text does not distinguish between those already born and those who were born during the time their parents were in refuge, and that all persons who suffered the consequences of the status of a refugee should benefit from the law. Although from the year 2004 the interpretation of the High Court of Cassation and Justice was unchanged[7] on the subject, in 2009 there were still disputes in court against the position of the administrative authorities on the matter[8].

Another situation is when the court, in a particular case, decides that a national legal text is contrary to an international convention or treaty that takes preeminence according to the Constitution. As the judicial decision is compulsory only for the parties involved, in many situations the administration will continue to apply the national legal text to other legal relations, thus forcing every person injured by its actions to take the matter to the court. If such a conduct would be understandable as long as the High Court of Cassation and Justice has not given its solution to the matter, things will be awkward after an appeal on a point of law.

Such was the case of the Government Emergency Ordinance no. 50/2008, later modified by the Government Emergency Ordinance no. 218/2008, regarding the car pollution tax. Since the enforcement of this act the tax was contested as being contrary to art. 90 of the EC Treaty. After a divergent jurisprudence, a landmark

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7 High Court of Cassation and Justice, Decision no. 86/2004, at http://www.scj.ro/SCA%20rezumate %202004/SCA%20r%2086%202004.htm (05.01.2013).

8 High Court of Cassation and Justice, Decision no. 1.781/2009 against the Cluj County Pensions Authority, http://legeaz.net/spete-contencios-inalta-curte-iccj-2009/decizia-1781-2009 (05.01.2013).

decision, no. 2.421/2009, was pronounced by the Cluj Court of Appeal. The solution, establishing the contrariety of the Government Emergency Ordinance no. 50/2008 with art. 90 of the EC Treaty according to the interpretation given to this article by the European Court of Justice, was embraced by all national courts. Against a constant jurisprudence, the legislator did nothing to align the national legislation to the European one, forcing the administration, that is subordinated to the Government, to apply a national legal norm that was set aside by courts. Press articles showed that in 2009 only in Cluj County the contested legislation has been applied to about 21.000 car registrations, although the administrative authorities were well aware of the courts decisions pronounced every month against them[9]. Furthermore, in 2011 a decision in an appeal on a point of law was issued by the High Court of Cassation and Justice[10], establishing that action in court was admissible without a prior administrative procedure for the restitution of the illegal tax. This decision is of the outmost importance, as it states that state authorities have to correctly identify and apply European legislation, according to the considerations of the European Court of Justice in decision *Van Gend en Loos* and according to art. 1 par. (5) of the Constitution of Romania (the fundamental law is compulsory) combined with art. 148 par. (2) of the Constitution (pre-eminence of the European law). But, a decision on a point of law is only compulsory for the courts and not outside of the judiciary system, so the administration continued to listen only to *inter partes* decisions and ignore the court decisions as a general rule.

Such conduct lead to great prejudice, as over 300.000 cases reached the courts[11] overloading the judiciary system and considerable expenses were paid by the administration to the winning parties.

Unfortunately, the above mentioned situation was not unique. Decision no. 19/2011 issued by the High Court of Cassation and Justice on an appeal on a point of law established that certain remuneration obtained in a type of overall agreement should be considered in calculation of pensions. The decision was based on the hierarchy of legal norms, considering that dispositions of points I – V from the appendix to the Government Emergency Ordinance no. 4/2005 were contrary to Law no. 19/2000, a framework law, and thus they have to be set aside. Again, administrative authorities only took into consideration the *inter partes* decisions, forcing all injured parties to take the same legal matter to court, in spite of the decision on a point of law[12].

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9 http://ziuadecj.realitatea.net/eveniment/cum-se-castiga-impotriva-taxei-auto-de-poluare--11014.html (05.01.2013).

10 Decision on a point of law no. 24 from 14th November 2011.

11 Statement of the Minister of Environment and Climate Changes, http://adevarul.ro/locale/ploiesti/300000-decizii-judecatoresti-definitive-restituirea-taxei-auto-plati-14-milioane-lei-doar-ianuarie-1_51223ea000f5182b857645d0/index.html (10.03.2013).

12 Cluj County Court (Tribunalul Cluj), department of administrative and fiscal contentious, labour and social sucurity, civil sentence no. 13/2012, http://www.tribunalulcluj.ro/Practica%20judiciara/2012/2012%20 Contencios.pdf (22.03.2013), issued in a case brought to court on the 19th December 2011, after the decision no. 19/2011 on a point of law was published in the Official Journal no. 824 from 22nd November 2011.

The decision no. 24/2011 on a point of law established that state authorities should correctly interpret and apply the law. Normally, a decision on a point of law that sets aside national legal norms or establishes an interpretation of the law should be a signal for the Parliament or for the Government that legislation has to be changed in accordance with its conclusions. If this is not happening, the leader of an administrative authority competent in the legal matter solved by the High Court of Cassation and Justice, or by other courts, should take action and issue internal rules in order to correctly apply the law. It could not be expected from the lower civil servants to do such a thing by themselves.

The above described categories of situations are possible because there is no legal disposition obliging the executive power to obey jurisprudence in a repetitive situation, or to obey a decision of the High Court of Cassation and Justice on a point of law or on a preliminary question. Real life showed that governments have a tendency to force the application of a legal text that is only set aside by the courts as being contrary to a legal norm with a higher rank in the hierarchy of legal norms, without being declared unconstitutional. Also, the administration persists in the interpretation of the legal acts that was proven wrong by the courts of law in particular repetitive cases. Administration is built as a hierarchy, with the exception of autonomous authorities, but in the end the Government is the head of the entire administration. In our opinion, in case of a national legal act contrary to international conventions on human rights or European legislation, the courts or an injured party may raise an unconstitutionality exception, based on art. 20, or art. 148 par. (2) of the Constitution of Romania, in the sense that a national legal text contrary to international acts breaches the preeminence of the letter ones and thus is unconstitutional. Although the constitutional text only states that the international legal act will take precedence, the only way this expression will have real effect is to interpret it in the way that if the hierarchy established by the Constitution is breached, the legal norm with inferior rank is unconstitutional and thus, either the legislator will correct the situation, or the illegal norm (the one with lower rank) will cease its effects as a result of unconstitutionality (art. 31 of the Law no. 47/1992 on the Organisation and Operation of the Constitutional Court). If the solution given by the Constitutional Court is considered compulsory by all courts of law, this will lead to a uniform appreciation, will eliminate a divergent jurisprudence or will eliminate a divergence between the Constitutional Court and the High Court of Cassation and Justice: either the legal text in question is in accordance with international legal acts that should take precedence and all courts of law should enforce it together with the administration, or it is not and it will be changed or ineffective. The same interpretation may be applied if a contrariety exists between national legal acts, based on art. 1 par. (5) of the Constitution of Romania. The supremacy of the Constitution and the laws means the respect for the hierarchy of legal norms, so a legal norm with provisions contradicting another legal norm with a higher rank is breaching the principle and thus is unconstitutional. If such an opinion is not embraced, in order to give a full meaning to the principle of legality in the activity of the administration, as well as to the constitutional dispositions regarding the supremacy of the law, legislation should be completed with

dispositions that make the decisions on a point of law or the decisions issued following a preliminary question of the High Court of Cassation and Justice compulsory not only for the courts, but for the administrative authorities also. Such dispositions might be considered as breaching the principle of the separation and balance of powers - legislative, executive, and judicial (art. 1 par. 4 of the Constitution of Romania), especially as art. 126 par. (3) of the Constitution refers to the compulsoriness of the interpretation of the High Court of Cassation and Justice only for the other courts of law, according to its competence. Modifying the latter text, in order to make the above mentioned decisions of the High Court of Cassation and Justice compulsory for administration too, will provide the possibility to oblige the administration to respect the interpretation of a legal text given by the High Court of Cassation and Justice. We do not think it will lead to an overlapping of duties between state powers, as the mission of the courts is to establish if the law is obeyed, and this can be done by setting order between contradictory legal norms or interpretation of legal text. The decision to modify legislation according to the decisions of the judiciary power remains linked to the political will that has to be driven by the necessity of interpreting in good faith the constitutional principles.