COMMAND ACTS OF MILITARY NATURE. CONSIDERATIONS ON THE ACTUALITY OF THE REGULATION

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Abstract

Command acts of military nature are traditionally regulated in Romanian law as absolute exceptions to the legality control of administrative litigation courts. The notion is mentioned in the Constitution of 1923, and it was later seen in the laws on administrative litigation in 1925 and in 1990. Currently, the Romanian Constitution of 1991, as revised in 2003, stipulates the command acts of military nature as exceptions to the judicial control of the administrative acts of public authorities, by way of administrative litigation. The administrative litigation law no. 554/2004 duly regulates this category of legal acts, including through the establishment of a definition. In spite of this complex, constitutional and legal regulation, the command acts of military nature have benefited from minor attention from the doctrine. Right from the beginning of the regulation, the extrajudicial character of the notion was emphasized, based on the need to ensure the discipline of the military and the conditions specific to the military operations. Besides the treaties and the academic law university courses, the interest of the doctrine in the legal regime is limited, the main cause being considered the lack of relevance in the practice of administrative litigation courts. Legal controversies regarding the legality of the Decree of the President of Romania no. 1331/28.12.2018 have brought back the interest in command acts of military nature, and therefore it is necessary to re-value this notion under the current demands of doctrine and practice. The article analyses, from a critical perspective, the controversial issues in relation to the main doctrinal approaches and the jurisprudence trends in this field.

Keywords*: administrative litigation, legality control, command act of military nature, administrative law.*

JEL Classification: K23

1. Introduction

The contentious administrative represents the totality of proceedings between the public authorities and the individuals considering themselves injured in their rights or legal interests, such proceedings being settled before the administrative courts. Such courts are not competent to settle all proceedings involving a public authority, but only those regarding administrative acts, typical or assimilated. The article dedicated to administrative courts, from the Constitution of Romania of 1991, amended in 2003, guarantees the judicial control of administrative acts of public authorities, by filing administrative proceedings, "except those regarding the relationships with the Parliament, as well as command acts of military nature" [art.126 paragraph (6)].

In agreement with the constitutional text, art. 5 paragraph (1) from the Administrative Proceedings Law no. 554/2004[2], as from time to time amended, sets forth that legal remedy cannot be sought by administrative procedures against: "a) administrative acts of public authorities regarding their relationship with the Parliament; b) command acts of military nature". Art. 5 paragraph (2) sets forth that legal remedy cannot be sought by administrative proceedings against "administrative acts for the amendment or annulment of which, by organic law, another legal proceeding is provided for".

In the specialty doctrine, the exceptions to the administrative proceedings upon administrative acts of public authorities are considered *motions to dismiss*. Traditionally, such motions to dismiss have been divided in two categories: a) motions to dismiss deduced from the nature of the act and b) motions to dismiss determined by the existence of a parallel appeal[3].

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[2] Published in the "Official Journal of Romania", Part I, no. 1154 of December 7th, 2004.

[3] Constantin C. Rarincescu, *Contenciosul administrativ român [Romanian administrative contentious]*, 2nd ed., "Universala" Alcalay Publishing House, 1936, p. 285; Antonie Iorgovan, *Tratat de drept administrativ [Treatise on Administrative Law]*, vol. II, *Forme de realizare a administrației publice. Domeniul public și serviciul public. Răspunderea în dreptul administrativ. Contenciosul administrativ [Forms of accomplishing public administration. Public domain and public service. Liability in administrative law. Administrative proceedings]*, All Beck Publishing House, Bucharest, 2005, p. 602.

The command acts of military nature are judicial acts of public authorities which are excepted to the control of administrative courts, as consequence of their special nature. The disputes in the contemporary doctrine regarding the character of exceptions to the control of administrative courts are not relevant to the command acts of military nature, the same being considered absolute exceptions to such control. The Administrative acts of public authorities regarding the relationships with the Parliament fall under the same category. Regarding the last category of excepted acts, the administrative acts for the amendment or annulment of which, by organic law, another proceeding is provided for, the opinions are different, being considered either absolute exceptions[4] or relative exceptions[5].

2. Evolution of command acts of military nature regulation

The notion of command acts of military nature was first encountered in the Romanian legal area at the beginning of the interwar period, following the effort of acculturating fundamental notions of administrative contentious from the law of Western countries. Until that time, this term was "unknown in our law, doctrine, case laws, legislation, as unknown as it was to the French, Italian law etc."[6].

The Constitution of March 29th, 1923 set forth at art. 107 final paragraph that "the judicial power is not competent to trial the governing acts, as well as the command acts of military nature"[7]. Specifying such notion was nevertheless unexpected, under the conditions in which it could not be found in the preliminary draft constitutional text, being the outcome of the debates in the mixed board formed of deputies and senators[8]. Regarding the need to supplement the initial text, the chairman of this board, Constantin Dissescu, famous Constitution expert, states that: „The powers of a commander, mainly, during the war, are limitless; they can supersede the powers of the Head of State, quoting Emperor Napoleon. He needs to take care of the troops' condition, to supervise all needs a war may require; he may take ownership of individuals' properties, to make contributions, to make requisitions, to conduct war operations and to command. In other words, the Commander is a dictator with powers limited by his own responsibility towards the country, to the Head of State and to the Ministry for Defence. As such, he might be the absolute head of the Army and of the country. The Commander powers are civil, political and military. Are they to be challenged by Administrative proceedings? I believe only the military ones, and the others, as they are accessory

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[4] Dacian Cosmin Dragos, *Legea contenciouslui administrativ. Comentarii si explicații [Administrative Proceedings Law. Comments and explanations]*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2009, p. 175; Verginia Vedinaș, *Tratat teoretic și practic de drept administrativ [Theoretical and practical treatise on administrative law]*, vol. II, Universul Juridic Publishing House, Bucharest, 2018, p. 241.

[5] Antonie Iorgovan, *op. cit.*, p. 607; Dana Apostol Tofan, *Drept administrativ [Administrative Law]*, vol. II, 3rd ed., C.H. Beck Publishing House, Bucharest, 2015, p. 177; Oliviu Puie, Tratat teoretic si practic de contencios administrativ *[Theoretical and practical treatise on administrative proceedings],* vol. I, Universul Juridic Publishing House, Bucharest, 2015, p. 599. We specify that prior to the amendment of Law no. 554/2004, by the provisions of Law no. 212/2018 for the amendment and supplement of Administrative Proceedings Law no. 554/2014 and of other regulatory acts (published in the "Official Journal of Romania", Part I, no. 658 of July 30th 2018), the administrative acts for which the judicial control was limited to the situation they were issued exerting excessive power fall under the same category: administrative acts issued for the decree of the state of war, state of siege, state of emergency, for the restoration of public order, for removing the consequences of natural disasters, outbreaks and epizootic diseases. Law no. 212/2018 amended art. 5 paragraph (3) from Law 554/2004, therefore, currently, the legal control over such acts is not limited in the case in which they have been issued exerting excessive power. For details see, Dan Constantin Mâță, *Drept administrative* [*Administrative Law*], vol. II, *Activitatea administrației publice. Domeniul public. Contenciosul administrativ. Răspunderea administrativ-contravențională [Activity of public administration. Public domain. Administrative proceedings. Administrative-contraventional liability]*, 2nd ed., Universul Juridic Publishing House, Bucharest, 2019, pp. 222-224.

[6] Constantin G. Rarincescu, *op. cit.*, p. 309.

[7] A. Lascarov-Moldovanu, Sergiu D. Ionescu, *Constituția României din 1923, adnotată cu dezbateri parlamentare și jurisprudențe [Constitution of Romania of 1923, annotated with Parliamentary debates and precedent case laws]*, „Curierul Judiciar" Publishing Printing House, Bucharest, 1925, pp. 413-424.

[8] Ion Dragoman, *Actele autorităților militare. Doctrină, legislație, regim juridic, jurisprudență, legalitate, control [Acts of military authorities. Doctrine, legislation, judicial procedure, precedent case laws, legality, control]*, Lumina Lex Publishing House, Bucharest, 2003, p. 259.

to military acts. Nevertheless, the individual injured in his property rights or personal rights, is entitled to damages"[9].

The form of the final paragraph of art. 107 from the Constitution of 1923 was received with reservations by the specialists in constitutional law and in administrative law. Lack of any doctrinarian or case laws-based points of reference, both in the Romanian and the Western area, favoured such attitude and generated the superfluousness of regulation. The main argument was based on the fact that the majority of acts covered by this notion were anyway excluded from judicial control, being considered preparatory measures or military operations (marches, fights, defence, and retreat) which do not produce legal effects[10]. Furthermore, the Law for the Court of Cassation and Justice of February 17th, 1912 sets forth the competence of the 3rd Section also with regard to the appeals of the service members against the higher military authorities „but only in relation to the decrees of discharge or to the amount of the pension benefit"[11].

The adoption of the Administrative Proceedings of December 23rd, 1925 did not clarify the utility of regulating command acts of military nature. First, art. 2 paragraph (1) from this regulatory act fully assumed the provisions of the constitutional text: "the judicial power is not competent to trial the governing acts and the command acts of military nature"[12].

Second, the command acts of military nature were enumerated, as an example, in the categories which are component of the governing acts as one of the "measures taken for the protection of a general interest regarding public order, domestic and foreign security of the State or to other higher rank requirements"[13]. The judgment behind such enumeration, quite confusing, was not explained by the initiator of the law and it did not result following parliamentary debates on the draft regulatory act either. In the Explanatory Statement, G. G. Mârzescu, Ministry of Justice, limited himself to show that "we loaned to the current law in agreement with doctrine on the matter, the enumeration as an example of different acts, characterized, under the law, as governing acts and which illustrate better than any definition what is to be understood by such acts"[14]. In a similar meaning, Grigore Procopiu, the law rapporteur in the Senate, highlighted that „the current law not doing but the development of the principles specified in the Constitution, made, the same as the Constitution, an exception with regard to the governing acts and to the specified command acts of military nature, in the meaning of such exception, by enunciative enumerations which help the court findings establish the dividing line of such governing acts"[15].

Finally, art. 3 from the Administrative Proceedings Law 1925 provided for that "the acts of military authority could be appealed unless they relate to the decrees of discharge and to the amount of the pension benefit". This text was identical to the provisions of art. 5 §3 (g) from Law for the Court of Cassation and Justice of February 17th, 1912, but, related to the provisions of art. 107 final paragraph from the Constitution of 1923, it was considered either unclear or unconstitutional[16].

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[9] *Apud* Gheorghe Ion Ganea, *Actul de comandament cu caracter militar [Command act of military nature]*, Institutul de Arte Grafice al Coop. "Presa", Bucharest, f.a., pp. 20-21.

[10] *Ibidem*, p. 100.

[11] *Apud* Constantin G. Rarincescu, *op. cit.*, p. 425.

[12] For the text of the Administrative Proceedings Law of 1925 please refer to the *Biblioteca legilor uzuale adnotate [Library of annotated usual laws]*, vol. 3, *Legea Curții de Casație și Legea Contenciosului administrativ, ambele cu Expunerea de motive a ministrului și Rapoartele de la Senat și Cameră [Law of the Court of Cassation and Administrative proceedings law, both with the Explanatory statement of the ministry and the Reports from the Senate and Chamber]*, Institute of Graphic Arts and Publishing „Curierul Judiciar", Bucharest, 1926, pp. 73-78.

[13] The other categories enumerated in the second paragraph of art. 2 from the Administrative Proceedings Law of 1925 were as follows: declaration of the state of siege, facts of war which might result from a force majeure occurrence or the immediate needs for battle, the execution and interpretation of treaties and conventions with the foreign states, the measures against outbreaks, epizootic diseases, floods, hunger, domestic disorders, naturalizations, acts by means of which legal persons are dissolved or are forbidden operation in accordance with the special laws as well as those referring to extradition of foreigners.

[14] *Biblioteca legilor uzuale adnotate [Library of annotated usual laws]*, vol. 3, *Legea Curții de Casație și Legea Contenciosului administrativ, ambele cu Expunerea de motive a ministrului și Rapoartele de la Senat și Cameră [Law of the Court of Cassation and Administrative proceedings law, both with the Explanatory statement of the ministry and the Reports from the Senate and Chamber]*, Institute of Graphic Arts and Publishing „Curierul Judiciar", Bucharest, 1926, p. 81.

[15] *Ibidem*, p. 86.

[16] Gheorghe Ion Ganea, *op. cit.*, pp. 91-92.

On such regulatory background, the need to develop a theory regarding the military administrative orders in the Romanian judicial doctrine became obvious. Except for the lectures and the university treatises on public law, the interest of the doctrinaires towards this matter being limited to some studies published in specialty periodicals and in a doctoral degree thesis. Without a doubt, the explanation can be found in the shortage of consistent case laws, compared to other matters of administrative proceedings.

The author having developed the most articulate theory upon the legal procedure regarding the command acts of military nature, representing a source of inspiration so far, was Constantin G. Rarincescu. In a study published in the "Pandectele Române"[*Romanian Pandects*] periodical (*Command acts of military nature*) in 1925 and, subsequently, the work dedicated to the *Romanian Administrative Contentious* from 1936, he highlighted the extra-judicial character of this notion "born from the necessity to give satisfaction to certain interests in direct relation to the activity of a public service of a special nature, which is the interest of national defence"[17].

The Constitution of 1938 assumed major part of the provisions of art. 107 from the Constitution of 1923, so that, in accordance with art. 78 paragraph. (2), "the judicial power is not competent to trial the governing acts, as well as the command acts of military nature"[18].

During the communist regime, the notion of command acts of military nature is not found either in the Constitution or in the infra-constitutional legislation. Nevertheless, from the point of view of the material content of the notion, we find that this concept may be partially identified in the exception to the judicial control of the administrative acts "in relation to the country defence, state security or public order", in accordance with art. 14 (a) from Law no. 1/1967 regarding the hearing by the courts of the motion files of the individuals whose rights have been violated by illegal administrative acts[19].

Under the provisions of Administrative Proceedings Law no. 29/1990[20] this notion returns in the Romanian regulatory area. Art. 2 (b) from the said regulatory act states that "command acts of military nature" cannot be brought before the court. The Constitutional Court of Romania ruled on the constitutionality of the legal text, in relation to the requirements of art. 21 paragraph (1) and (2) from the Constitution, finding that: "The Administrative Proceedings Law no. 29/1990, although prior to the Constitution, established certain conditions and limits on part of the injured individual, in exerting his right, among which also the exclusion of the military administrative acts from under the administrative control. In this regard, the limits of exerting the respective right is found not to be obstructing its exercise, referring only to stances justified by the interest obviously public which it refers to"[21].

The Constitution of Romania of 1991, in the form adopted in the session of the Constituent Assembly of November 21st, 1991, does not cover any provision related to the acts excepted to the control of administrative court. This technique was considered erroneous as "it is essential that the text of the Constitution expressly provide for administrative acts categories of the public authorities which are excepted to the control of the administrative courts by administrative proceeding, to the effect of not allowing the parliamentary majority that, on political grounds, group interest etc., always increasing the exceptions' range, until their transformation into rule"[22]. Therefore, by the Law on amending the Constitution no. 429/2003[23], art 125 was amended and supplemented

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[17] Constantin G. Rarincescu, *op. cit.*, p. 310.

[18] For a comparative analysis of the articles regarding the administrative proceedings in the two interwar Romanian Constitutions, please refer to Constantin C. Angelescu, *Contenciosul administrativ român sub regimul Constituțiilor din 1923 și 1938 [Romanian administrative proceedings in the Constitutions of 1923 and 1938]*, Excerpt from „Arhiva de drept public" [*Public law archives*], year I (1939), no. 1, Alexandru A. Țerek Printing House, Iași, 1939, 19 p.

[19] Published in the "Official Journal", Part I, no. 67 of July 26th, 1967.

[20] Published in the "Official Journal of Romania", Part I, no. 122 of November 8th, 1990.

[21] Decision of the Constitutional Court no. 103 of October 1st, 1996 regarding the challenge to constitutionality of art. 2 (b) from the Administrative Proceedings Law no. 29/1990, published in the „Official Journal of Romania", Part I, no. 7 of January 20th ,1997. The appeal filed against this decision was overruled by the Decision of the Constitutional Court no. 139 of November 19th, 1996, published in the "Official Journal of Romania", Part I, no. 7 of January 20th, 1997.

[22] Mihai Constantinescu, Ioan Muraru, Antonie Iorgovan, *Revizuirea Constituției României. Explicații și comentarii [Revision of Romanian Constitution. Explanations and comments]*, Rosetti Publishing House, Bucharest, 2003, p. 107.

[23] Published in the "Official Journal of Romania", Part I, no. 669 of September 22nd, 2003.

(following renumbering becoming art. 126) in the meaning of guaranteeing judicial control of administrative acts of the public authorities, by administrative proceedings, except for those regarding the relationships with the Parliament, as well as except for the command acts of military nature.

3. The conditions of the command acts of military nature

Law no. 554/2004 defines in art. 2 paragraph 1 (l) the command act of military nature as „the administrative act regarding strictly military issues of the activity of the armed forces, specific to the military organization, which imply the right of the commanders to give orders to the subordinated military staff in issues regarding conduction of the troop in peace or wartime, as the case may be, to the completion of the military service".

This legal definition represents a novel element in the evolution of military administrative orders' regulation, being supported by the few attempts to define such notion, formulated in the administrative doctrine.

The doctrine's efforts focused on identifying the conditions and traits of the command act of military nature. The conditions are three and they shall be complied with accumulatively: a) the public authority issuing the act is a military commandment; b) military content of the act; c) the act is based on military order and discipline.

Regarding the first condition it has been shown that the *notion of commandment* must be accepted in a broad meaning, as being "a totality of troops under the command of an appointed chief, as the head of state in his position of supreme commander of armed forces, the ministry of defence in the capacity of superordinate body of all military structures, the chief of staff as the highest rank authority in the army (he leads, being liable for the operational capability of the same) or the higher military, operational or territorial commandments, to the level of large operative units"[24]. The organic element is essential for qualifying a legal act as a command act of military nature, because as previously shown in the classic doctrine "in this case the material criteria alone cannot determine such acts, as it is not sufficient to refer to the military matters, but they need to be issued by the military authority"[25].

The military content of the act is circumscribed only to the actions related to the military service and obligations. Traditionally, the following acts in direct relation to the military acts are covered by this category as follows: service orders and instructions regarding the preparation and training measured of the troops and officers; orders regarding the general or partial mobilizations; troop concentrations for exercises; orders regarding setup, reorganization or dislocations of military units; orders regarding assigning or taking of command; orders and instructions regarding manoeuvres and exercises[26].

The acts issued by the military authorities which do not relate to proper said military acts but to the human resources management, such as rank appointment, career advancement or sanctioning, relocation to other garrison, discharge or retirement are not covered by the command act of military nature[27]. Moreover, also the administrative contracts which the military authorities conclude with various individuals for supply or other purposes, in order to ensure the operation of the national service of public defence are not covered by the command act of military nature[28].

The last condition, *the act is based on military order and discipline*, is considered a consequence of the first conditions and it is substantiated on the concepts of authority, hierarchy, subordination and discipline which are intrinsic to any military organization[29]. The classic doctrine

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[24] Ion Dragoman, *op. cit.*, p. 265.

[25] Gheorghe Ion Ganea, *op. cit.*, p. 86.

[26] Constantin G. Rarincescu, *op. cit.*, p. 311; Mircea Preda, *Drept administrativ, Partea general [Administrative law, General part*], 3rd ed., Lumina Lex Publishing House, Bucharest, 2006, p. 259.

[27] Lucian Chiriac, *Drept administrativ, Activitatea autorităților administrației publice [Administrative law, The activity of the public administration authorities]*, Hamangiu Publishing House, Bucharest, 2011, p. 70; Dacian Cosmin Dragoș, *op. cit.*, p. 180.

[28] Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public [Administrative law. Fundamental issues of the public law]*, C.H. Beck Publishing House, Bucharest, 2016, p. 503.

[29] Ion Dragoman, *op. cit.*, p. 266.

made the distinction between the "discipline of convictions" which is "moral mandatory rule, which forms, step by step, within a cultural harmonious development" and the "discipline of movements" or the "discipline of military operations" which "appears to coordinate the actions of the service members towards that unique purpose: victory"[30].

From this perspective, it is obvious that the command acts of military nature cannot enforce tasks or obligations to the civil population to the purpose of reinforcing military order and discipline. Such an act might result in restraint of citizens 'liberties and rights. According to art. 53 from the Constitution of Romania of 1991, amended in 2003, the exercise of rights or liberties may be restrained only by law, in conditions of necessity and proportionality, to legal purposes, restrictively specified: defence of national security; defence of order, health or of public moral, of citizens' rights and liberties; prevention of natural calamities consequences, of a disaster or any other extremely severe affliction[31].

Exceptionally, the classic doctrine accepted the possibility of establishing certain obligations and tasks also to the civilians during wartime, when, on the combat operation theatre, the military commands "may take any measures enforced by the necessity of battle and ensure victory"[32]. Currently, this opinion must be accepted in dependence on the conditions of the legal procedures of the state of war established by the provisions of Law no. 355/2009[33]. In accordance with art. 2 from this regulatory act the state of war means "totality of extraordinary measures to be taken, mainly, in political, economic, social, administrative, diplomatic, legal and military fields, to the effect of exerting the inherent right of the state to individual and collective self-defence".

The state of war is declared by decision of the Romanian Parliament which is immediately published in the Official Journal of Romania, Part I. This decision must cover inclusively "the fundamental rights and liberties whose exercise is restrained, in compliance with the constitutional provisions, during mobilization or state of war" [art. 8 paragraph (1) e)] and it shall be transmitted to the "Government or to the other public authorities with responsibilities in the field of national defence or national security, competent to put the provisions of the same into application" [art. 8 paragraph (2)]. The special measures which may be taken, by military ordinances, the military authorities (Ministry of National Defence and the Chief of Staff, the military commanders in the counties and the garrison commanders) are rigorously specified in art. 20 from the O.U.G. [Government Emergency Ordinance] no. 1/1999[34] and art. 3 from Law no. 355/2009.

Consequently, the idea that, during the state of war, the military authorities may enforce interdictions and obligations to the civilians but not in an arbitrary manner, justified by the mandatory need to obtain victory must be accepted. Such acts of the military authorities must be considered command acts of military nature as well, being excepted from the legal control, reason for which we agree to the opinion expressed in the doctrine, in the meaning of the need to supplement the legal definition with regard to "other decisions, made in relation to other legal matters, for military reasons and for the protection of military values"[35].

4. The judicial control on command acts of military nature

Due to their special judicial nature, the command acts of military nature are excepted to the control of the administrative courts. From the moment of their regulation, it has been emphasized that the reason for this exception is grounded "on the necessity to consolidate the discipline spirit of the subordinates in relation with the prestige and the authority of the higher military ranks, as well

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[30] Gheorghe Ion Ganea, *op. cit.*, pp. 98-100.

[31] Dan Constantin Mâță, *Securitatea națională, Concept. Reglementare. Mijloace de ocrotire [National security, Concept. Regulation. Means of protection]*, Hamangiu Publishing House, Bucharest, 2016, pp. 120-126.

[32] Constantin G. Rarincescu, *op. cit.*, p. 313.

[33] Law no. 355/2009 regarding the conditions of the partial or partial mobilization state of the armed forces and of the state of war, published in the "Official Journal of Romania", Part I, no. 805 of November 25th, 2009.

[34] The Government Emergency Order no. 1/1999 regarding the conditions of the state of siege and of the state of emergency, as from time to time amended, published in the "Official Journal of Romania", Part I, no. 22 of January 21st, 1999.

[35] Verginia Vedinaș, *op. cit.*, p. 252.

as the conditions of energy, unity, capacity and rapidity that are necessary in order to carry out military operations"[36].

The actions excluded from the control of the administrative courts can be brought before the courts of civil law, based on the provisions of article 21, paragraph (1) and (2) of the Constitution, according to which any person can take this into justice in order to defend his/her rights, his/her liberties and his/her legitimate interests because no law should hinder the exercise of this right. The courts of civil law cannot pronounce regarding the annulment of these acts, they can only pronounce regarding the solicited settlements for the prejudices produced when the public legal entities are getting responsible for the actions of their authorities[37].

In the specialty doctrine, the following opinion is conveyed: if trying to interpret the provisions of art. 126, paragraph (1) of the Constitution of Romania of 1991, amended in 2003, would result that the wish of the constituent legislator would be that the command acts of military nature should escape the justice general control and not only the control of the administrative courts[38]. In this context, and taking into consideration the physical limits of revising the constitutional text, it was said that "the revision of the constitutional text regarding the command acts of military nature from the new article 126, paragraph (6), the first phrase, *in fine*, seen as the prohibition of the access to justice, in the sense that the command acts of military nature harm the legitimate rights and interests, is unconstitutional"[39].

Also, it has been shown that "the new constitutional solution represents the expression of some obsolete juridical concepts and can be considered as being reactionary and contrary to the principles of democracy, to the rules of the constitutional state and the separation of powers"[40]. In this sense, it has been emphasised the lack of concordance between the text of article 126, paragraph (1) of the Constitution, regarding the command acts of military nature and the norms of the European Convention on Human Rights regarding the right of access to a Court (article 6, paragraph 1) and the right to an effective remedy, in case the rights and freedoms as set forth in the Convention are violated (article 13)[41].

These disagreements are not to be encountered in the present[42], with respect to the other categories of administrative documents issued by the military authorities, which refer to the human resources management and which can be the subject of a lawsuit in the administrative court, where their cancellation and the grant of damages can be requested[43]. These documents can represent the subject of a direct action in the situation they take the form of a typical administrative act, but also in the situation in which the will of the public authorities manifests as an unjustified denial to solve a request referring to a legitimate right or interest, or by not replying to the solicitor within the legal term[44].

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[36] Constantin G. Rarincescu, *op. cit.*, p. 311.

[37] Cătălin-Silviu Săraru, *op. cit.,* p. 500; Anton Trăilescu, Alin Trăilescu, *Legea contenciosului administrativ, Comentarii și explicații [Administrative Proceedings Law, Comments and explanations],* 3rd ed., C.H. Beck Publishing House, Bucharest, 2017, p. 128.

[38] Corneliu-Liviu Popescu, *Exceptarea actelor de comandament cu caracter militar de la contenciosul administrativ, potrivit revizuirii constituționale, în lumina dreptului de acces la o instanță judecătorească [The exception made by the command acts of military nature to the administrative dispute, according to the revision of the Constitution, in the light of the right of access to a court of law*], published in „Curierul Judiciar", no. 11, 2003, pp. 107-108.

[39] *Ibidem*, p. 108.

[40] *Ibidem*, p. 110.

[41] *Ibidem*, pp. 110-116.

[42] We mention that in the system of the Law on administrative proceedings no. 29/1990 some orders issued by the military authorities on the career of the military personnel were considered to be command acts of military nature. For example, by means of Decision no. 118, from March 23, 1992, of the Supreme Court of Justice, The Administrative Dispute Section, it was established the fact that "the command acts of military nature – excepted to the judicial control of the administrative dispute – contain, among other, the orders of the Minister of the National Defence regarding the appointments, releases, demoting's, relocations, delegations, discharges, returns to the active military personnel and other that refer to the military situation of the military stuff". Later on, starting 1997, the Supreme Court reconsidered this jurisprudence, by emphasizing that even the above mentioned documents should be places under the judicial control of the administrative dispute. Please check on the Sentence no. 103 of the Constitutional Court from October 1st, 1996 (quoted *supra*); Valentin I. Prisăcaru, *Contenciosul administrativ român [Romanian Administrative Contentious]*, 3rd ed., Național Publishing House, Bucharest, 2003, p. 198; Rodica Narcisa Petrescu, *Drept administrativ [The Administrative Law]*, Hamangiu Publishing House, Bucharest, 2009, p. 480.

[43] O. Puie, *op. cit.*, pp. 606-607.

[44] Emilia Lucia Cătană, *Drept administrativ [The administrative Law]*, C.H. Beck Publishing House, Bucharest, 2017, p. 341.

The jurisprudence regarding the command acts of military nature is extremely reduced. In general, the administrative courts have been notified regarding cases of military administration documents annulment, and in this context, they have been analysed the characteristics of the command acts of military nature.

For example, in the practice of the supreme court it has been specified: "In order to enter the category of the command acts of military nature, the document should be issued by a public authority having the characteristics of a military commission (military troops under the command of a leader), the document content should be of a military nature and the act should induce the idea of an order, a command or the idea of discipline. Therefore, within the notion of the command act of military nature we have: the order and the military instructions that refer to the army preparatory measures such as mobilization, concentration, exercises and military operations of the troops. In other words, we continue to consider to be typical administrative documents the appointment acts, the promotion ones, the penalization ones and the discharge ones, which means all the documents that refer to «the human resources management». As a consequence, the High Court considered that the discharge order of a military represents a typical administrative act, which can be censored by the administrative court and not a command act of military nature"[45].

In another cause, the High Court of Cassation and Justice established that: "According to the provisions of article 5, paragraph (1), letter b) of Law no. 554/2004, before the administrative court cannot be brought the command acts of military nature, which represent those administrative acts that refer strictly to the military activities of the army that allow the military commanders to give orders to their subordinates regarding the matters that refer to leading the troops, in peace or in wartime, or, if the case, the matters that refer to fulfilling the military service. Any other documents issued by the military authorities, which have no connection with the proper necessities of the military actions, such as the discharge orders, do not represent command acts of military nature, in the legal sense, and they can be censored by the administrative courts"[46].

Rather recently, the jurisprudence domain entered in a new phase, regarding the command acts of military nature, once the action for annulment of the Romanian President Decree no. 1331/2018 on the mandate of the Chief of Staff of The Army was rejected as inacceptable[47]. By means of this Decree, the term of the Chief of Staff of The Army was prolonged with one year for the person appointed by the Decree no. 950/2014[48], taking into account the lack of an appointment proposition for a new Chief of Staff and also considering "the need to ensure the continuity of the Army's leadership, in the conditions in which the regional and international security environment is constantly changing".

My means of Sentence no. 79 from March 29th, 2019 of the Bucharest Court of Appeal – the 9th Section – Administrative and Tax Court, the case filed by the representative of the National Ministry of Defense was rejected concerning the annulment of Decree no. 1331/2018. The court considered the case as "inadmissible in relation with the judicial control of the administrative courts over the command acts of military nature regulated by the provisions of art. 2, paragraph (1), letter l) of Law no. 554/2004"[49]. This Sentence is not final but its delivery, and, mostly its motivation represents an important landmark within the evolution of the judicial aspects of the administrative

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[45] Decision no 4662 of the High Court of Cassation and Justice – the Section of Administrative Dispute and Tax from November 29, 2007 *apud* Antonie Iorgovan, Liliana Vişan, Alexandru Sorin Ciobanu, Diana Iuliana Pasăre, *Legea contenciosului administrativ (cu modificările şi completările la zi), Comentariu şi jurisprudenţă [Administrative Proceedings Law (amended and supplemented). Comments and jurisprudence]*, Universul Juridic Publishing House, Bucharest, 2008, p. 156.

[46] Decision no. 532 of the High Court of Cassation and Justice – the Section of Administrative Dispute and Tax from February 15, 2006 *apud* Gabriela Bogasiu, *Legea contenciosului administrative. Comentată şi adnotată, Cuprinde legislaţie, jurisprudenţă şi doctrină*, *[Administrative Proceedings Law. Comments and Annotations. Comprises legislation, jurisprudence and doctrine]*, 4th ed., Universul Juridic Publishing House, Bucharest, 2018, pp. 191-192.

[47] Published in the "Official Journal of Romania", Part I, no. 1117 from December 29, 2018.

[48] Decree no. 950 from December 29, 2014 regarding the appointments of the Chief of Staff, published in "Official Journal of Romania", Part I, no. 954 from December 29, 2014.

[49] Sentence no. 79/2019 of Bucharest Court of Appeal – the 9th Section of the Administrative Dispute and Tax was given in the file no. 180/2/2019 (http://portal.just.ro/2/SitePages/Dosar.aspx?id_dosar=200000000369544&id_inst=2, consulted on May 8, 2019).

law on the command acts of military nature, being the first rejected case for inadmissible reason, based on the provisions of art. 5, paragraph (1), letter b) of Law no. 554/2004.

5. Conclusions

The analysis of the juridical regime of the command acts of military nature offers the image of a traditional institution of the Romanian law with a direct connection with the administrative court. The use of a constant denomination from the interwar period up to the present days, taking into account also the interval dominated by the communist regime, should not give the impression of a stiffened juridical institution. In reality, during these decades, this notion suffered a series of significant transformations regarding the material content and the possibility to bring these actions before other courts than the administrative ones. Lately, to these we add the interpretations determined by the need to respect the general relations established between the international and national rules in the matter of human rights. The interest of the doctrine on the command acts of military nature has been rather modest compared with the one manifested by other institutions of the administrative courts area. This situation is explained by the lack of a consistent jurisprudence in this matter, but we presume that the recent events will change this perspective.

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