DISCUSSIONS REGARDING A POSSIBLE GOVERNMENT GUARDIANSHIP CONTROL OVER ADMINISTRATIVE ACTS

Constantin Claudiu ULARIU[*]

Abstract

The Government, as an emblematic and fundamental exponent of executive power within the framework of the rule of law, alongside the President of Romania, constitutes a determinant structure of representative democracy. It is the result of the Parliament's act of choice, as the supreme representative body of the Romanian people and the sole legislative body in the state.

Considering this prestigious DNA inherited by the Government, combined with the fundamental role played by this essential administrative authority in executing and organising the activities of all public institutions in Romania, it follows that it assumes a responsibility for coordination and administrative patronage over all state authorities, regardless of the level at which they operate, whether at the central or local level, and regardless of their intrinsic functionality.

In this sense, the Government must be recognized with a series of attributions for harmonisation, elaboration of strategic policies, verification, and taking of necessary measures to complete the governance program to which the Cabinet has committed, whose component elements presuppose a political and institutional strategic function from the Government's part. Only in this way can the achievement of all levels of social, economic, educational, military, investment, etc., development targeted by the Government's activity be ensured.

However, one of the fundamental questions that arises in this context is whether the Government can be recognized, within the current legislative and jurisprudential framework, with a competence to verify the legality of administrative acts issued/adopted by various state authorities and institutions, which are in various legal relationships with the Government.

Therefore, it is to be discussed whether the general control role exercised by the Cabinet over administrative activities in Romania, on various levels of their manifestation, as well as the functions of strategy, coordination, implementation, regulation, representation, and coherent administration of the country, can be objectified even in a legal authorization of legality control that this executive organ can justify at some point in the society's development and the manifestation of social relations, in an increasingly accelerated dynamism.

Although the vocation of coordination that the Government can exercise within a representative democracy can be admitted in principle, where the Cabinet is called upon to realise a strategic policy and vision regarding the country's development and all its institutions, the requirement of the incidence of essential and sufficient guarantees must also be considered to ensure the balance of powers in the state and the democratic evolution of state institutions.

Hence, a series of elements must be considered to ensure a minimum institutional and legislative coherence, which guarantees the correct and predictive functioning of all state institutions, as well as a coherent and correct coordination by the Government over administrative activity in Romania.

This objective involves a systematic analysis of the domestic normative framework and the identification of elements relevant to the domain subject to analysis through this legal initiative.

Keywords: *Government, administrative guardianship, coordination, balance, strategy*.

1. The role of the Government in Romanian society, as relevant within the current normative framework

The Government represents that authority of the central public administration that has the competence to realise an integrative vision regarding not only its own activities but also those of all public institutions of the state, an indispensable element for the optimal and integral realisation of its public policies assumed by the Cabinet through its governance program assumed before and approved by Parliament.

[*] Judge at Bucharest Court; PhD Candidate, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: claudiu_ulariu@yahoo.ro).

In this sense, doctrine has highlighted that „the Government has the task of realising the nation's policy, it is the initiator, shaper, and executor of measures for economic recovery, inflation reduction, and economic stability, responsible for public order, national defense, or the state's relations with other states it governs"[1].

From another perspective in doctrine, it has been noted that "the Government, the other pole of the bicameral executive power, has as constitutional priorities the exercise of leadership and general control over the authorities of public administration, as well as the administration of functional, economic, administrative, and social activities of Romania"[2].

Therefore, the Executive, by its very reason for existing and by its intrinsic functionality, fulfils a series of fundamental duties in society, some standardised, and others related to insidious legal detail.

This role of institutional leadership, based on the legitimate competences recognized to it by the provisions of art. 62 and following of the Constitution, grants legitimacy to the Government to carry out management, legal, and factual duties of the Romanian state institutions, leadership, coordination, as well as the elaboration of fundamental policies related to the comprehensive development of various areas of activity included in the Cabinet's governance plan.

For example, concerning the construction of the consolidated general state budget project, the Government not only represents the repository of the constitutional competence to allocate the financial resources of the state among various ministries and further among various public institutions of the state but is also authorised and, at the same time, obliged to pursue a coherent and visionary financial policy of prioritising various areas of national interest and prioritised and rational funding, thoroughly economically justified, for achieving the strategic and projected development objectives of the areas of interest from the governance plan approved by Parliament.

In this regard, it has been rightfully pointed out in French specialist literature that the strategic governance policy elaborated and followed by the Government „presupposes an arbitration power, in budgeting, between the credits requested by ministers and those that the Minister of Finance intends to grant: the difference is often significant and gives rise to close discussions. Moreover, coordination between the actions of the different ministers must be ensured: this is generally done through sectoral meetings or government seminars”[3].

Indeed, the Government has a wide range of competencies and responsibilities, which confer it a preemptive role in the national institutional framework and, on the other hand, provide it with credibility and efficiency in the legal measures it is required to undertake, aiming at achieving macroeconomic and institutional policies or the current management of „public affairs”.

Additionally, the Government has broad discretionary power regarding the nature of public services it intends to enhance and prioritise financing, as well as regarding the „personnel policies” it intends to undertake. In this regard, except in cases of proving an abusive and illogical attitude on the part of the Cabinet, no other public institutions can exercise any opportunity control over how the Government intends to expand or, conversely, restrict the personnel structure within the state's public institutions.

Any restructuring policy by the Executive of the number of public servants, especially if such a proactive management approach is carried out through the issuance of Government decisions, cannot be censured even by Parliament[4].

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[1] A. Iorgovan, *Drept administrativ*, vol. 2, IVth ed., All Beck Publishing House, Bucharest, 2005, p. 358.

[2] M.-C. Cliza, C.-C. Claudiu, *Drept administrativ. Partea generală*, C.H. Beck Publishing House, Bucharest, 2023, p. 477.

[3] A. Legrand, C. Wiener, *Le droit public. Droit constitutionnel. Droit administratif. Finances publiques. Institutiones Européennes*, La documentation française, Paris, 2017, p. 37.

[4] Regarding this aspect, the constitutional court ruled that „parliamentary control over government decisions in terms of approval/rejection/modification does not appear among the constitutional mechanisms established to regulate relations between public authorities within the system of separation and balance of powers in the state, and government decisions constitute - as specified - the expression of the government's original competence, by excellence of an executive nature. By approving/modifying measures adopted by government decisions, Parliament ends up accumulating legislative and executive functions, a situation incompatible with the principle of separation and balance of powers in the state, enshrined in art. 1 para. (4) of the Constitution. Parliament's interference in a specific government act, intended to implement the law, signifies an intrusion of the legislative power into the secondary regulation for the execution of laws, which belongs exclusively to the government. However, Parliament cannot exercise its competence as a legislative authority arbitrarily, anytime and under any conditions, by adopting laws that would encroach upon the constitutional competences that belong exclusively to other branches of the state" – CCR dec. no. 251/2014, published in the Official Gazette of Romania, Part I, no. 376/21.05.2014, para. 50, and no. 672/2021, published in the Official Gazette of Romania, Part I, no. 1030/28.10.2021.

Furthermore, a simple or emergency ordinance, in this area, cannot be the subject of a criminal investigation by competent authorities unless the commission of an illicit, concrete, and effectively individualised act related to this legislative initiative delegated by the Government is called into question[5].

Regarding this aspect, it has been noted that, „in principle, the state has discretionary power to create public services. The Constitutional Council clearly reminded this in Decision no.86-207 DC of June 26, 1986, the Law authorising the Government to take various economic and social measures (the so-called 'privatisation' decision, Rec. p. 61). The Council specifies that 'if the need for national public services arises from principles or rules with constitutional value, the determination of other activities that must be established as a national public service is left to the discretion of the legislator or the executive authority, as the case may be"[6].

Therefore, the Government is the one called upon to realise economic, social, educational, security policies, etc., which means that it must manifest an active role not only in elaborating these coherent policies but also in manifesting a diligent attitude in verifying all institutional factors involved in implementing these policies.

In French specialist literature, it has been noted that „power is exercised at the intersection of heterogeneous logics: that of totalization and that of individualization, that of collective action and that of distributive action, that of dualisms of power and that of power differences, that of centralization and decentralisation"[7].

Regarding the role of verifying the implementation of the government program, it has been noted in Romanian doctrine that the Government fulfils „an administrative role, which materialises in exercising general leadership of public administration; from this point of view, the Government establishes three types of relations with other authorities of public administration, namely:

- subordination relations, as a higher hierarchical body, towards the prefect, ministries, and other central bodies subordinate to it;
- collaboration and coordination relations with autonomous central authorities;
- administrative guardianship relations towards autonomous local bodies, which operate at the level of administrative-territorial units based on the principles of autonomy, decentralisation, and deconcentration of public services"[8].

Regarding these competencies to verify how public policies are implemented, in French doctrine, the term „administrative police" has been conceptualised.

In this regard, it has been highlighted that „this area covers activities aimed at maintaining public order. This, according to old laws that have determined the holders of general police power, includes three components: security, health, and public peace"[9].

„By its Labonne decision of August 8, 1919, the Council of State defined the general police power of the Prime Minister, which is exercised to preventively fight against the threat of public order disturbance, 'outside any legislative delegation and by virtue of [its own] powers [of the executive]' (CE, August 8, 1919, Labonne, Rec. p. 737)"[10].

[5] The Court held that „regarding the control of compliance with the procedure for adopting a government emergency ordinance or ordinance, and the normative content thereof, from the perspective of opportunity, the Court notes that the primary regulatory act (law, government emergency ordinance, and ordinance) as a legal act of power, is the exclusive expression of the will of the legislator, who decides to legislate according to the need to regulate a certain area of social relations and its specificity (...) The Court notes that the assessment of the opportunity of adopting a emergency ordinance, from the perspective of legislative decision-making, is an exclusive attribute of the delegated legislator, which can only be censored under the conditions expressly provided by the Constitution, namely only through parliamentary control exercised in accordance with article 115 paragraph (5) of the Constitution. Therefore, only Parliament can decide the fate of the government normative act by adopting a law of approval or rejection. During parliamentary debates, the supreme legislative body has the competence to censor the government emergency ordinance, both in terms of legality and opportunity, the provisions of article 115 paragraph (8) of the Constitution stating that, through the law of approval or rejection, the necessary measures will be regulated, if necessary, regarding the legal effects produced during the application of the ordinance. Considering the constitutional provisions invoked, the Court finds that no other public authority, belonging to a power other than the legislative one, can control the government normative act from the perspective of the opportunity of legislative action". CCR dec. no. 68/2017, published in the Official Gazette of Romania, Part I, no. 181/14.03.2017, para. 86, 89, and 90.

[6] M. Houser, V. Donier, N. Droin, *Le droit administratif aux concours*, La documentation française, Paris, 2015, p. 34.

[7] M. Lazzarato, Le *gouvernement des inégalités. Critique de l'insécurité néolibérale*, Éditions Amsterdam, Paris, 2008, p. 101.

[8] M.-C. Cliza, C.-C. Claudiu, *op. cit.*, 2023, p. 478.

[9] A. Legrand, C. Wiener, *op. cit.*, 2017, p. 116.

[10] M. Houser, V. Donier, N. Droin, *op. cit.*, 2015, p. 41.

The role of administrative control exercised by the Government must be one carried out within constitutional and legal limits; it must be one that is conforming and balanced, coherent, and proportional, so as to avoid any excess of power in this area of extremely important social relations.

The verification carried out by the Government falls within the institution of „administrative control", which „is a form of control carried out by the authorities of public administration within the same organisational and functional system within the competence provided by law. This form of control is divided into internal control and external control. Internal administrative control is carried out by officials within the public authority and has a general or specialised character. General control is the result of hierarchical subordination. In the case of specialised control, persons or structures are appointed who have training and qualifications in the areas subject to control. External control is carried out by higher hierarchical public administration bodies and by bodies of specialised public administration in the case of external control"[11].

From the reiterated considerations above, it can be assumed that in any modern society, a prominent coordinating role of the Government over the authorities of public administration must be recognized, stemming from the need.

2. Administrative guardianship exercised by the prefect and the ANFP, within the current internal normative framework

Regarding the legal expression of „administrative guardianship", it designates a requirement to safeguard the principle of legality and that of opportunity in issuing/adopting administrative acts, through control carried out, under the law, by a public administration authority over other bodies, authorities, or administrative institutions, from the perspective of the procedure and form of adopting an administrative act, the intrinsic content of that act, which must be correlated with the principle of the hierarchy and force of normative acts, as well as the inherent effects of these legal acts.

In this regard, in judicial practice, it has been noted that „administrative guardianship represents a limit imposed on local administrative authorities, for the purpose of safeguarding legality and defending the public interest. Therefore, this form of control of administrative acts has been considered as specific to administrative litigation objective (... ref.) Administrative guardianship consists of a special administrative control, different from hierarchical control, the limit of which arises from its specificity, namely the fact that administrative guardianship control is carried out between public authorities that do not have hierarchical subordination relations"[12].

In other words, administrative guardianship represents a control carried out by central public administration authorities over the legality of acts issued by local public administration authorities, between which there is no hierarchical subordination[13].

It is noted that, generally, from the provisions of art. 3 para. (1) and (2) of Law no. 554/2004, the administrative guardianship exercised by the prefect or by the ANFP is optional and not mandatory regarding the administrative acts issued[14].

Regarding the nature of the legal acts covered by administrative guardianship, the following have been retained in jurisprudence: „According to textual interpretation, the provision of art. 3 para. (1) of Law no. 554/2004 stipulates that the prefect can only challenge typical infra-legislative acts in court, without being able to intervene on this legal basis to request judicially the obligation of local public authorities to put on the agenda of the meeting and to take note of the automatic termination of the mandate of a local councillor before the term"[15].

Therefore, the legal regime of the administrative guardianship institution is particular and well-characterised in the current administrative litigation legislation. However, the question arises whether an extension of the legal hypotheses established by the provisions of art. 3 para. (1) and (2) of Law no. 554/2004

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[11] A. Cazacu, *Controlul asupra activității administrației publice*, *https://www.juridice.ro/716597/controlul-asupra-activitatii-administratiei-publice.html*, accessed on 20.03.2024.

[12] CA Bucharest, cont. adm. and fisc. s., dec. civ. no. 2738/21.12.2023, *https://www.rejust.ro/juris/ded52d6d4*, accessed on 29.03.2024.

[13] Bucharest Trib., cont. adm. and fisc. s., sent. civ. no. 279/07.02.2024, *https://www.rejust.ro/juris/4e8336678*, accessed on 29.03.2024.

[14] CA Timișoara, cont. adm. and fisc. s., dec. civ. nr. 5458/24.09.2015, *https://www.rejust.ro/juris/3693e2d4*, accessed on 29.03.2024.

[15] HCCJ, dec, CDCD no. 26/2016, published in the Official Gazette of Romania, Part I, no. 996/12.12.2016.

can operate by recognizing a true administrative guardianship competence in favor of the Government regarding the various types of administrative acts issued by the institutions with which the Government is in legal correlation.

3. Administrative guardianship exercised by the Government, reality or legal fiction?

Regarding the Government's competence in coordinating public activities in Romania, the provision of art. 102 para. (1) of the Constitution is emblematic, according to which „The Government, according to its program of governance accepted by Parliament, ensures the implementation of the country's internal and external policies and exercises general management of public administration”[16].

In connection with this attribution, specialised doctrine has highlighted that „in the current Romanian constitutional system, the Government is in the following administrative relations: of superiority over ministries (or other specialised bodies with ministerial rank), of collaboration with autonomous administrative authorities, and administrative supervision over the deliberative authorities elected at the territorial level. Thus, the Government has a general material competence”, so that „public administration is entirely under the influence and control of the executive power”[17].

In connection with these doctrinal remarks, it should be noted that, according to the provisions of art. 14 para. (2) of the Administrative Code, the Government is recognized as an integrative and synergistic role in relation to other administrative authorities, ensuring „balanced functioning and development of the national economic and social system.”

As a preliminary note, it should be emphasised that for there to be genuine specific control specific to administrative guardianship, it is necessary, as can easily be distinguished from the mere title of the institution in question, that the object of legality control must target an administrative act, and furthermore, one of typical nature, in the sense of the provisions of art. 2 para. (1) letter c) of Law no. 554/2004 on administrative litigation.

In this context, judicial practice has established that „administrative guardianship is limited to those acts that can be challenged before the administrative courts and does not target legal acts belonging to other branches of law”[18].

Regarding the exhibition of a possible supervisory role of the Government regarding the activity of public administration authorities, particularly in its main form of activity, namely the issuance/adoption of typical administrative acts, it should be noted that there are a series of legal norms regulated by the provisions of the Administrative Code, which at least formally raise the question of a possible apparent control of legality that the Executive can exercise over the activity of a series of administrative authorities.

For example, in accordance with the provisions of art. 15 letter f) of the Administrative Code, a provision with extremely precise content, from the perspective of the specialty study, the Government exercises „the function of a state authority, ensuring the monitoring and control of the application and observance of regulations in the field of defense, public order and national security, as well as in the economic and social fields and the functioning of institutions and organisations that carry out their activity under the authority of the Government.”

It can be observed that this legal provision establishes a general principle of structural organisation of the determining institutions in the Romanian state, in the sense that it recognizes to the Government only a coordinating role over the activity of public institutions under its direct or indirect subordination or coordination of the Executive.

However, from the recognition of a coordinating and supervisory competence over the activity of public administration authorities and to the establishment of an administrative guardianship competence, manifested in the recognition in favor of the Government of procedural legitimacy in administrative litigation, aiming at the annulment action of administrative acts issued by various public institutions in a functional relationship with the Government, there is a very long way to go.

Therefore, the special legal norm does nothing but reiterate, in a more extensive and detailed formulation, the fundamental attribution of the Government, established by the provisions of art. 102 para. (1) of the

[16] D. Apostol Tofan, *Organizarea administraţiei publice româneşti în context european, http://www.rsdr.ro/Art-6-1-2-2008.pdf*, accessed on 29.03.2024.

[17] M.-C. Cliza, C.-C. Claudiu, *op. cit.*, 2023, p. 426.

[18] CA Cluj, cont. adm. and fisc. s., dec. civ. no. 27/16.01.2020, *https://www.rejust.ro/juris/88245624*, accessed on 29.03.2024.

Constitution, in the sense that it manages the administrative-economic activity of the country, in which it can elaborate synoptic policies.

By no means can it be interpreted from the cited legal provision that the Executive could justify a certain procedural legitimacy in administrative litigation to obtain judicial control over certain administrative acts that it considers illegal.

A different conclusion cannot be reached even from the perspective of the provisions of art. 26 para. (2) of the Administrative Code, norms according to which, „in exercising the control provided for in paragraph (1), the Government may request the revocation of illegal, unfounded, or untimely administrative acts issued by the authorities provided for in para. (1) that have not entered into civil circulation and have not produced legal effects and that may prejudice the public interest."

This legal text must be interpreted integrally and teleologically, by correlation with paragraph 1 of the same article, an important exegetic step, which reveals, however, that the Government only performs a specialised control, which targets the manner of fulfilling the duties of the ministries and specialised bodies under its subordination, as well as of the prefects, as an evaluation factor of the activity of these public law bodies.

It cannot be inferred from these legal norms that the Prime Minister or the Government as a whole could initiate legal proceedings against these institutions to provoke a legality control and, ultimately, to determine the annulment of administrative acts issued/adopted by these administrative bodies.

However, the competence of the Government, in the context of hierarchical control exercised over administrative bodies under its direct or indirect subordination, to request these entities to revoke administrative acts considered illegal or untimely, exceeds the meaning of the phrase „administrative guardianship" and translates into the competence of the Cabinet to impose a mandatory conduct of respecting the supremacy of the Constitution and laws, in implementing the provisions of art. 1 para. (5) of the Constitution, and, if necessary, to impose to the issuing authorities the retraction of their own administrative acts issued in conditions of disregarding the laws and general principles of public law.

It should be noted that, in accordance with the legal norm of art. 26 para. (2) of the Administrative Code, the Government cannot recognize any specific and explicit competence to revoke the administrative acts issued/adopted by the aforementioned authorities, but only to request and impose the retraction of these legal acts by their issuers.

Of course, this legal reality cannot lead to the extreme and legally unjustified conclusion that the Government could exercise in any context an administrative guardianship role in Romania, in the sense of referring the competent judicial authority to annul a certain administrative act deemed illegal.

This legal authorization is circumscribed by the special provisions of art. 3 para. (1) and para. (2) of Law no. 554/2004 exclusively to the prefect and to the National Agency of Civil Servants.

This conclusion is confirmed by judicial practice, which has established that „the notion of 'administrative guardianship' is expressly regulated by art. 3 of Law no. 554/2004 and concerns exclusively actions initiated by the prefect or by the ANFP, as it has been established, with compulsory character, both in the CCR and HCCJ jurisprudence, which means that it cannot be applied, for identity of reason, in other hypotheses"[19].

4. Conclusions

Although the Government is recognized to have a competence of coordination, structuring, filtering, verification, and implementation of a comprehensive strategy for implementing its governance program, which also implies a genuine role of verification and control over the activities of various authorities under its subordination or coordination, however, this does not in any way entail the justification in favor of this central executive authority of a role of administrative guardianship, based on which the Executive would have an active role in administrative litigation, to determine an objective and full judicial control over any administrative act issued/adopted by these authorities, even in cases where the Government's activity is not targeted and does not harm it in any way.

Therefore, the role of institutional patronage of the Government does not translate into a genuine function of administrative guardianship, capable of engaging in a specific administrative litigation.

[19] Bucharest Trib., cont. adm. and fisc. s., sent. civ. no. 279/07.02.2024, *https://www.rejust.ro/juris/4e8336678*, accessed on 29.03.2024.

As a consequence, the Government cannot bring a lawsuit to court to request a principle control over administrative acts.

Such an action would be rejected due to an obvious lack of procedural legitimacy justification of the Cabinet, and on the other hand, because of the Cabinet's failure to justify a specific and particular interest in bringing the case to court, which would add to a generic goal of protecting the public interest, purportedly pursued by the Government.

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