Financing Territorial Administrative Units from the Budget Reserve Fund of the Romanian Government on Political Criteria

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Abstract: Trying to explain the influence of communist ideology on the post-revolutionary Romanian legal system, we sought effective procedures, within legal boundaries, illustrating the manner in which democratic principles are compromised by old practices. One of these procedures is financing territorial administrative units from the budget reserve fund of the Romanian Government according to political criteria. This research focuses, briefly, on demonstrating the illegality of this activity and on the way to be followed so as to cancel the administrative legal acts covering allocation on political criteria, namely administrative action. The approach doesn't pretend to be exhaustive, treating all aspects implied by such an action. Therefore, we only talk about those we consider relevant. Responsibility for issuing illegal administrative acts may take different forms: political, criminal or administrative. We believe, in this case, that the best solution is to promote the application for annulment of the act of discrimination in contentious administratively even if *pedendi causa*, law enforcement, is abstract. A sustained practice in this area would undoubtedly deter excessive executive power by public authorities and strengthen democratic institutions.

Keywords: budgetary funds; discrimination; cancellation; administrative

1. A Possible Connection between the Local Administration and Government Policy

The idea of this paper springs from a natural question for most people who choose voting, maintained, to a large extent, by promises made by politicians during election campaigns, with wide coverage from the salvation of national spirit to covering with polystyrene a block of flats.

Frequently, journalists and political commentators point out that, for example, it is not the President's of Romania responsibility to build bridges or to watch the progress of work, even in exceptional circumstances, in the same way that, in principle, he should not support the electoral campaign, even declaratively, of a certain political party.

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Therefore, there must be a clear distinction between what a politician can or can not do for the people he represents, be it national policy implications, or decisions that affect the local community.

A form of the link between the local community and national officials, questionable in terms of legality, is financing territorial administrative units from the government's reserve fund. The award of funds is preferential, the members of the ruling party creating a certain advantage for the areas where the party has a good electoral score. The conclusion is that the affiliation / political support is considered as a criterion for awarding the funds, not negligible, especially in pre- and post-election periods.

I will not go into details on the conceptual boundaries, but I will try, briefly, to highlight two issues: what are the relations between parliamentary / minister and people / local community and what the potential consequences in legal terms the financing communities produce government funds according to political criteria?

2. Whom Does the Parlamentary Represent?

Representation is strictly linked to the concept of sovereignty. Concerning the sovereignty there are two relevant theories. The first, developed by J.J. Rousseau, linking the concept of sovereignty to the people. The latter, founded by E.J. Sieyès, focuses on the nation as titular of sovereignty.

The sovereignty of the people is the people's right to decide on state policy, including the control, directly or indirectly, on the work of public authorities. In an ideal society, people's will is the same as the will of the government. Sovereignty legitimizes people's right to insurrection. In this way, power can be considered inalienable and must be exercised directly, not through representatives. The governors have a binding mandate and may be dismissed for failure of the mandate.

National sovereignty means nation as a moral person, who has a will of its own, distinct from the individuals who compose it temporary and expressed by representatives appointed in accordance with established procedures. Devolution involves absolutely no choice, but can be achieved by other shapes. Nevertheless The mandate given can not be criticized anymore by members of the nation, but must obey to the decisions taken by the nation as a superior will and distinct from the sum of individual wills. National sovereignty is manifested most often as the

sovereignty of Parliament, the supreme representative body. The direct consequence is that state power is unique, inalienable and indivisible representation electoral body is however possible through specially designated assembly, which has a collective term, which prevents individual revocation of its members.

Constitution provides in art. 2 that "*national sovereignty belongs to the Romanian people, who exercise it through its representative bodies constituted through free, regular and fair, and by referendum*".

Whether elected or list on the ballot uninominal majority, after validation of the mandate, parliament represents the people's interests. This results from the interpretation of art. 69 of the Constitution, according to which, in the exercise of the trustee, deputies and senators are serving the people, any imperative mandate is void. Limits are given the mandate, while the duration of the legislature.

In parliamentary elections, the political program of the candidate (job creation, investment in infrastructure, etc.) can only have a populist value, though it noted its influence on the budget law and parliamentary control. The constitutional text [Art. 2 para. (2)] penalizes the exercise of sovereignty in the interests or in the interests of a group: "no group or person may exercise sovereignty in their own name."

The public perception is often distorted. We illustrate in an article published in a local daily paper, which is a reflection on the work of an MP. History journalism that denounces MEP elected "*without the slightest emotion, became invisible to the inhabitants of the area which should represent*." Indignation Mayors electoral college where he was elected MP was generated by non-involvement in supporting administrative units and installation of advertising posters across localities without paying taxes and without authorization. On the second aspect, the method chosen were identified by direct negotiation with landowners. Following his behavior, deputy mayor would have been warned never to appear in front of local authorities and voters if "he does not come with funding."

3. Government Reserve Fund

The practice of orientating funds to local communities through adjustments in particular to the government's reserve fund may be interpreted as a form of attracting voters or one reward for votes got during the election. We illustrate this by two examples of different government practice, both politically and in terms of time.

According to art. 30 para. (2) of Law no. 500/2002 on public finance (Official Journal of Romania, Part I no. 591 of 13.08.2002; text containing the definition was subsequently amended) budget reserve fund available to the Government is intended to finance urgent or unforeseen expenditures of authorizing The main credit of the state budget and local budgets, arising during the budget year.

In 2011, it was issued the Government Emergency Ordinance no. 26/2011 (Official Journal of Romania, Part I no. 195 of 21.03.2011) that, notwithstanding the art. 30 para. (2) of Law no. 500/2002, the budget reserve fund could be allocated to the Government by the end of 2011, by Government Decision, amounts and payment arrears.

Budget Reserve Fund was increased about 10 times during the pre-election financial year 2011.

The largest amounts were received by the counties of Mures 9.196 thousand (4.46%), Hunedoara 8.830 thousand (4.28%), Timis 7.984 thousand (3.87%), Neamt 7.885 thousand (3, 82%) and Prahova 7.185 thousand (3.48%) and the lowest Vrancea, they received 1,495 thousand (0.72%) and Ialomita 1,600 thousand (0.77%). The government was composed of representatives of the Liberal Democratic Party. In counties where consistent funds have been allocated, the party has achieved good results in the election, while other counties were discriminated against Social Democratic strongholds.

Checking reserve fund formation and allocation of funds to local communities from the Fund, the Court found that: Budget Ministry of Finance - General Actions was oversized, a situation that allowed providing additional resources to the budget reserve fund available to the Government; Government reserve fund available feeds received through transparent surrendered and was also used in a non-transparent manner, through government decisions without parliamentary control, functioning like a parallel budget; groundless character of the allocations from the budget reserve fund available to the Government in 2011, with no further control over how they were used; there was no substantiation for the allocation of funds, the general destination.

A few years later, the Ministry of Regional Development has allocated about 40 million lei in 2014 for Prahova county, through the National Local Development. Only subprogram "Romanian village modernization" of PNDL were allocated about 29 million lei (6.4 million euros). In a substantial proportion (12.3 million), funding allocations have directly benefited Cornu, one of the 90 communes of the

county, and indirectly the ruling party personalities or their families. Although the allocated amounts don't belong to the Reserve Fund of the Government, the situation seems similar.

Realizing potential unlawful aspect of finance, representatives from Iasi National Liberal Party decided to promote a criminal complaint against the minister of regional Development because of bribing the voters and abuse of office. Former Deputy would be used "influence or authority to obtain for himself or for another person money, goods or other undue benefits", an offense under Law no. 78/2000 on preventing, detecting and punishing corruption. Liberals accused that during 2014, the Ministry of Development contracted 114 new works in the county common, but shared exclusively led by mayors members of parties in power. In addition, the law had been violated and the state budget, funding permitting only works already underway. According to representatives of PNL, 50 million would be allocated directly to such common, the only criterion taken into account the political affiliation. Furthermore, a total of 17 investment projects proposed by the County Council earlier this year, totaling 6.6 million, were rejected by the funding.

As a practice, the Government amended frequently the destination of the reserve fund, introducing eg: ensuring consistent operation budgets of the people responsible of spending the state budget; balancing local budgets by paying current and capital expenditures; reducing arrears (art. 29 of the Government Emergency Ordinance no. 83/2014, Official Journal of Romania, Part I, no. 925 of 12/18/2014).

The conclusion is that, observing the central authority behavior, the hypothesis that law changing and then allocation made taking into account the requests of "electoral areas" seems to be confirmed. Not coincidentally, after the parliamentary elections and Governement, local officials tend to "migrate" to the ruling parties.

4. Legal Acts Allocating Funds

As a principle, allocation is done by the State Budget Law, adopted by Romanian Parliament at a Government initiative. State Budget Law regulates the amount constituting the reserve fund of the Government. The correction of the amount can be made by law or ordinance, norm adopted by the Government in the legal field. The Government prefers the emergency ordinance (art. 115 of the Constitution). Subsequently, the allocation of the money from the government's reserve fund is

made by government decision. These acts are administrative and not directly subject to parliamentary scrutiny, as it occurs with ordinances. Indirectly, when the members of the Parliament qualify such acts as abusive or illegal, they can start a motion. Other funds may be allocated by order of the minister, as in the second case detailed at section 3.

Especially after 1996, the transitional governing has often occurred by ordinances, avoiding the Parliament; ordinances are normative acts issued by the government in the legal field. While simple ordinances require an empowering law from the Parliament, emergency ones are justified by exceptional situations and they don't need prior approval of the Parliament.

Due to the fact that socio-economic transition involves a legal vacuum that must be filled, urgency of regulation generated Government abuse concerning this power conferred by the Constitution.

Especially before amending the Constitution in 2003, the parliamentary procedure for adopting laws was very difficult. In addition, the instability of the ruling coalition (1996-2000), with all the divergences among the constituent parties, made almost impossible the majority in political decisions, necessary for ratifying laws in the Parliament. Consequently, in order to comply with the government program an impressive number of emergency ordinances were issued. The practice has been taken up and developed by subsequent governments.

The government was often backed up so as to avoid in advance elections. The vote of censure against the Government by adopting a censure motion or negative vote as far as a political program responsibility or a (package of) law(s) is concerned, so normal when setting up another parliamentary majority, leads to the formation of a new cabinet. The President must appoint a Prime Minister, after consultation with political parties. He sets up the government and he submits it for approval, together with its ruling program, to the Parliament. If Parliament rejects twice the team and the program, the President may dissolve the Parliament and call for early elections.

The members of the Parliament are elected, at least in theory, based on a political program. After the election and the validation of mandates, they are obliged to keep in touch with citizens, but especially with the electorate made up of individuals in their right to choose and having full legal capacity. Government members can be MPs or not. According to the Constitution, the Parliament is the representative body of the people and exercises control over the government. In practice, often, effective parliamentary control over the Government is missing,

confining at most at questions and interpellations (art. 193 and 201 of Regulation Chamber of Deputies, the Official Journal of Romania, Part I, no. 437 of 06.18.2015). Moreover, according to the party hierarchy, those in leadership positions are members of the Government. In such situations, decisions, most often, are taken at the party and "imposed" to the Members of the Parliament. The Government control is compromised.

One conclusion, related also to the arguments in section 2, is that if from a political point a view a parliamentarian elected in a particular college can exercise control over the negative discrimination made by the Government in assigning insufficient funds/non-assigning to a Community, in terms of legal action his action has no purpose.

Thereof, the question arises concerning the legal means to sanction discretionary acts and for whom they are available.

5. Abusive Allocation of the Reserve Fund can be Subject to Judicial Control?

In terms of rigors of a genuine rule of law, control levers must be ways to verify the implementation of some activities, to put legislation into practice, the results of decisions, both positive and negative.(Iovănaş, 1997, p. 95). *Lato sensu*, evokes the notion of control activity of verifying compliance with certain values of certain activities usually those enshrined in law rules (Vedinaş, 2014, p. 10).

Although the law establishes several ways of control, direct or indirect, of which I have already mentioned the parliamentary control and the one exercised by the Court, we will focus on the control of the courts, established by art. 52 and Art. 126 para. (6) of the Constitution.

Starting from the premise that local government can be considered particularly in relation to General, represented the central government, we enunciate, summary, two approaches: in countries with a consolidated democracy and in countries with nascent democracy, still influenced by centralism reflexes. In this context, we can not ignore principles of decentralization and devolution.

In some states, such as France, this control is considered as dangerous, considering (Ricci & Debbasch 1999, p. 2) that, in a democratic state of law and there is a risk of exercising judicial control over the acts of the administration, the only one able

to define the public interest. It means that the judge, outsider of the administration, may be tempted to constantly prioritize the interests of individuals over those of the Administration, the public interest, diluting the general interest in favor of the particular interest, subjective one. Administration, which feels too closely controlled, becomes devoid of courage and risks to opt for inertia.

On the contrary, Romania knows, as far as courts are concerned, a trend of favoring the central government in contentious relations.

All disputes between public authorities on one hand, and those injured in their legitimate rights and interests, on the other hand, deducted from typical administrative actions or similar, considered illegal by the administrative departments of competence of courts governed by public law prevailing legal regime can be subject to litigious actions in administrative courts. (Vedinaş, 2014, p. 70)

Doctrine has largely analysed the excess of administrative power exercised by public authorities. We will not go into details, but we will focus on the main defining features of this type of conduct at public authorities (Andreescu, 2007, p. 292):

- measures adopted do not pursue a legitimate aim;
- public authorities' decisions are not appropriate to the facts or the legitimate aim pursued, as they go beyond what is necessary to achieve that purpose;
- there is no rational justification of the measures imposed, including situations in which a different legal treatment is settled for identical situations or identical legal treatment for different situations;
- by the imposed measures, state authorities restrict the exercise of some fundamental rights and freedoms without any rational justification to represent, in particular the existence of a proper relation between these measures, the facts and the purpose.

Taking into consideration the features listed above, politically discretionary allocation can be classified as excess of power. The dispute is emerging *debendi causa* and can be triggered before the administrative courts.

It should be remembered that there is a category of administrative acts that are excluded from judicial review, such as those regarding relations between public authorities and parliament or those on international relations (negotiation and

conclusion of international treaties; application of treaties, international politics, war). The governing acts theory is based on the distinction between management and governance, difficult to seize from a theoretical perspective and, therefore in practice too. This difficulty made French authors assert that "there is no criterion of acts of government, there is only a list of such acts." (Vedinaş, 2014, p. 201). However it is not the case of administrative acts ruled by government or ministers when allocating sums from the reserve fund for administrative territorial units.

The entitled with the right of litigious administrative action can be, according to art. 1 para. (1) of Law no. 554/2004 (Official Journal of Romania, Part I, no. 1154 of 07.12.2004), "any person who considers himself harmed in its right or a legitimate interest by a public authority". Public Ministry, defender of the interests of society, is conferred also locus standi, as reflected in paragraphs (4) and (5) of the legal text quoted above. The injured person means any individual or group of individuals, holders of subjective rights or legitimate private interests, injured through administrative acts "[Art. 2 para. (1) a)].

The administrative-territorial unit is a public legal person, with full legal capacity and its own assets [Art. 21 para. (1) of Law no. 215/2001, Official Journal of Romania, Part I, no. 123 of 20.02.2007].

In an exhaustive interpretation of the law, we can appreciate that the simple citizen on their behalf or in a group of people with permanent residence in a territorial unit, might consider themselves injured by the preferential allocation administrative act, considering the political criterion. This might be so particularly since, the Charter of Fundamental Rights of the European Union has recognized the right of citizens to good administration applicable, at least as a principle of interpretation citizens in relations with Member States.

The law enshrines the right of administrative-territorial units to funds from the state budget in order to balance local budgets vertically and horizontally, according to criteria established by the local public finance law and budget law (art. 30 of Law no. 195 / 2006 Official Journal of Romania, Part I, no. 453 of 25.05.2006). Responsibilities awarded to local authorities by decentralization must be accompanied by corresponding budgetary allocations.

Political affiliation of community dignitaries representing the electorate or the political choice across administrative territorial unit are not listed among the legal criteria (art. 33 of Law no. 273/2006, Official Journal of Romania, Part I, no. 618

of 18.07. 2006, as amended). Moreover, discrimination is prohibited by art. 16 para. (1) reported in art. 4 para. (2) of the Constitution.

One of the issues that could be problematic in court is justifying an interest, general requirement to file a legal action.

Interest means practical benefit, material or moral, aimed by the one who files the action and it must be legitimate, personal, vested and actual. This requirement must be fulfilled both when filing the action and throughout the whole process.

In the case of total or partial cancellation of the government decision which allocated, following political criteria, funds to a territorial administrative unit, the applicant will not be able to ask for an allocation of those funds, the result being only non-collection / return of amounts. If he wants to claim a redistribution of the amounts, the applicant must be within the same category, namely administrative territorial unit of the same rank. Even if this requirement is fulfilled, it is debatable whether the court will be able to value the extent to which expenses are unforeseen or urgent in order to decide how to award the funds, while this assessment is the responsibility of public administrative authority. The court can not, in this case, nothing more than an auditor.

May be the most important corollary of public law is the respect of the law as a purpose itself. Not incidentally, the principle of legality is expressly enshrined in the Constitution - art. 1 para. (5). This purpose alone can constitute an interest to justify such an action. Transitory democracy may forget such a purpose. The persons natural or juridical, usually follow a concrete target, direct or mediated. In this context, respecting the law may seem too abstract, even for the specialists in law.

One of the features of the administrative act is the opportunity, at the discretion of the public administrative authority, if it acts within the law. The administration "has the discretion to consider whether the measure to be taken is convenient, which varies depending on the type of act and limited by legislative rules when it comes to the recognition of individual rights, but not limited when we talk about so called discretionary acts, when there is no right recognized by an objective norm." (Apostol Tofan, 1999, p. 173)

Without going too much into the opportunity theory of the administrative act, we believe that opportunity can be appreciated related, firstly, to extra-judicial finality

of the administrative act and, secondly, to possible legal criteria that configure the optimal way to achieve the aim.

The judicial review of the government decision concerning the allocation of different amounts from the reserve funds means, in the case of an action decisively motivated by discrimination on political criteria, first of all, an assessment of appropriateness. In Section 3 we showed that the destination of the funds, from a normative point of view, is established by law. Opportunity has two components: the exceptional situation and legal and the compliance of legal criteria.

If the administrative act fulfills the two conditions, the court should relate the facts to a term of comparison, in this case the situation of an administrative-territorial units of the same rank, which should have presented a request for allocation from the reserve funds for the same reason, except that local government bodies are made up of members of an opposition party or the parliamentarian who was elected in the electoral college has a political orientation differing from the ruling party. This aspects has to do with legal facts.

Reporting should be done on the principle of equality and proportionality, although these two are not in the Law no. 215/2001 on local public administration (art. 2). The regulation is constitutional, with reference to the fundamental rights and freedoms of citizens. However, the scope of applicability can be expanded. Nevertheless we should consider a differentiated equality, taking into account all aspects of the alleged discrimination. Moreover, the applicability is also justified by indirect violation of rights, such as the right to good administration or the right to a decent standard of living.

Once confirmed the award of amounts from the reserve funds of the Government on political criteria, the right of other administrative-territorial units to get financed from the same fund is implicitly considered as violated.

6. A Brief Summary

Education for democratic values that Romania aims to is difficult to achieve after 45 years of centralism policy, class hatred and benefiting those devoted to the single party. Otherness rights, in a game of conciliation between freedom and equality, are difficult to be complied with. The democratic exercise, in a first phase, may mean imposing majority, legitimized by vote, often violating the fundamental rights of the minority. Moreover, another consequence of communism

was struggling to maintain privileges, even when they are no longer legally justified in any way.

Another recurring aspect is the people state's dependence. Creating a strong middle class, able to maintain economically the community by creating jobs and contributions to the budget, represented only a very small proportion of the project the Romanian political class promoted.

The care for power propagation determined the use of budget resources for electoral purposes. The people sovereignty is exercised by democratically elected representatives. The electorate does not yet have a clear representation of the vote's significance, so that preferential funding to communities thanks to an agreement between parliamentarians and government members, even illegal, is seen more as a positive thing. It is unlikely that citizens entitled to vote will elect a candidate for legislative initiatives or for the effective exercise of parliamentary control over the executive. Instead, he will be easily voted when the mayor have supported him because he obtained funding for the community or shared any gifts when celebrating something. Collusion between parliamentarians and ministers is determined following several criteria, among which: belonging to the same political party; government support; interest in obtaining funds for the district / college where the Parliamentarian has already or will offer/ed his candidacy. From the constitutional point of view, this complicity / instigation may be considered as an exercise of national sovereignty for a personal or groupal interest, expressly prohibited by the fundamental law.

Criteria listed are apparently legal. But when funds are distributed on political criteria, leading to serious discrimination, a checking is required to restore legality.

Parliamentary oversight often turned out to be ineffective because, theoretically, the government enjoys parliamentary support, administrative acts issued by violating the law should be censored; the best way to achieve this censorship is the judiciary one, independently from the legislative and executive, law enforcement being its main role.

As we have proved, there are quite some reasons which limit the filing and processing a request of cancelling the government decision that allows allocating amounts to the administrative units from the reserve funds on political criteria. However, we believe that the only way to strengthen democratic state institutions is effective exercise of rights, even if getting the result, in case of public law, law compliance, requires considerable time resources. Cancellation of legal documents

from the mentioned category would discourage discriminatory practices by public authorities and would essentially contribute to a culture of respect for democratic institutions.

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