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# POLITICAL PARTIES' ACCESS TO ADMINISTRATIVE JUSTICE

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***Abstract:*** *A decision on interpretation issued in 2020 by the High Court of Cassation and Justice established that legal persons under private law cannot directly invoke in administrative court the infringement of a public interest, as they would replace the prosecutor, whose mission is to protect the general interests of the society and to defend the rights and freedoms of the citizens. The political parties are persons under public law. Can a political party act against an authority (most often a political opponent) in order to protect the general interests and to defend the rule of law, as well as the rights and freedoms of the citizens?*

***Key words:*** *administrative act, political party, public interest*

## 1. Introduction

In accordance with Romanian constitutional law, the political parties are associations of citizens, which propose political programs and present candidates in elections.

Article 8 para. (2) of the Romanian Constitution stipulates that the political parties contribute to the definition and the expression of the political will of the citizens, respecting the national sovereignty, the territorial integrity, the rule of law and the principles of democracy.

According to Article 1 of Law no. 14/2003, the political parties are associations with political character of the Romanian citizens with the right to vote, which participate freely in the formation and the exercise of their political will, fulfilling a public mission guaranteed by the Constitution. The political parties are legal persons under public law.

Article 2 of the same normative act provides that, through their activity, the political parties promote the national values, political pluralism, they contribute to the formation of public opinion, they participate with candidates in elections, to the establishment of public authorities.

According to Article 10 of Law no. 14/2003, the statute of the political party includes, among other elements, the express mention that the party pursues only political objectives.

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The most important goal of the political parties is to express the political will of the citizens. The political party is a subject in the relations of establishing, maintaining or exercising state power.

The parties are subjects of constitutional law, in the social relations concerning the functioning of the legislative bodies and are also involved in the exercise of certain prerogatives by the chief executive, such as the adoption of statements or messages, or the dissolution of the parliament.

We can conclude that the political parties are forms of association with a special constitutional and legal status, different from any other forms of association, such as trade unions, associations or foundations.

The goals of the political parties are, on the one hand, the formation and the expression of the citizens' political opinions, the manifestation of their political freedom, shaping and consolidating the political society and, on the other hand, obtaining the majority of citizens' votes for the conquest and the exercise of political power, by carrying out a political program.

A political party, unlike any other legal person under private or public law, pursues exclusively its political goals, namely the gain of political power through constitutional mechanisms.

In this context, we question if a political party can act, in an administrative litigation, against a public authority or institution, possibly in political opposition to that party, in order to obtain the annulment of its administrative acts.

## 2. Types of Administrative Disputes according to the Protected Interest

The notion of administrative dispute is defined by the Law no. 554/2004 on administrative disputes. Article 2 para. (1) (f) provides that an administrative dispute is a settlement activity by the competent administrative courts, according to the organic law on disputes, in which at least one of the parties is a public authority and the conflict arose either from the issuance or conclusion of an administrative act, either from the failure to resolve a request within the legal term or from the unjustified refusal to resolve a request regarding a right or a legitimate interest.

An administrative act can be annulled only if it is proved that it had caused damage to a right or a legitimate interest of a person. The legitimate interest can be both public and private.

The private interest implies the possibility to claim to the public authority to have a certain conduct favorable to the realization of a future subjective right of a person. A procedure before the administrative court which seeks to protect a private interest is also called a procedure of "subjective contentious".

The public interest implies the protection of the rule of law and of the constitutional democracy, the guarantee of the fundamental rights, freedoms and duties of citizens, fully respecting the competence of the public authorities. A procedure before the administrative court which seeks to protect a public interest is also called a procedure of "objective contentious".

## 3. The Conditions under which a Person under Private Law may Challenge an Infringement of the Public Interest

It is an easy operation to identify the category of claimants that may allege an infringement of a private interest, the category being very broad. Difficulties arise in identifying claimants who may allege a breach of public interest. These applicants can be both natural or legal persons under private law and persons under public law.

According to a constant judicial practice, the persons under private law can invoke the violation of a public interest only if the administrative act led, first of all, to the violation of their private interest. For example, a person under private law cannot request the annulment of any normative administrative act, but only of a normative act that regulates their activity and infringes their own interest.

Private legal persons whose activity is the protection of human rights or the monitoring of the activity of public administrative services, such as non-governmental structures, trade unions, associations, foundations may also invoke the violation of public interest by an administrative act.

The law on administrative disputes makes no distinction for non-governmental structures: may they challenge any administrative act?. According to the mandatory decision no. 8/2020 of the High Court of Cassation and Justice, there must be a link between the object of activity of the non-governmental structures and the administrative dispute: the activity of such persons must be to protect the rights which had been infringed by the challenged administrative act. The Court considered that these persons under private law can invoke in the administrative court the violation of a public interest only subsequent to a private interest. The Court also stressed that a non-governmental person, even if it acts in order to protect the rights of persons under private law, cannot have wider prerogatives than the prosecutor. According to the law on administrative disputes, the prosecutor cannot challenge any administrative act, but only a normative administrative act and submit that the authority had infringed the public interest.

## 4. The Conditions under which a Person under Public Law may Challenge an Infringement of the Public Interest

There is also an area that has not been frequently addressed in judicial practice, namely the administrative disputes of the legal persons under public law vs. the public authorities. Article 1 para. (8) of Law no. 554/2004 provides that the prefect, the National Agency of Civil Servants and any subject of public law may act in administrative courts, "under the conditions of this law and of the special laws". Article 1 para. (4) of Law no. 554/2004 stipulates that the prosecutor may appeal in the administrative court when it considers that a normative administrative act infringes on the public interest.

The prefect, the authority that issued the act, the prosecutor or the National Agency of Civil Servants are persons under public law and they act in the "objective" contentious procedure and always defend a public interest. According to Article 2 para. (1) (r) of Law no. 554/2004, the protection of the public interest entails the protection of

the rule of law, of the constitutional democracy, the guarantee of the fundamental rights, freedoms and duties of the citizens, the fulfillment of duties by the public authorities.

A special analysis is required regarding the abstract phrase "any subject of public law", which the legislator uses in Article 1 para. (8) of Law no. 554/2004. Any other person under public law (other than the prefect, the issuing authority, the prosecutor or the National Agency of Civil Servants) may appeal the administrative act either to protect their own interest or a public interest. We will focus on the appeal of persons under public law in defending a public interest.

Article 1 para. (8) of Law no. 554/2004 provides that in administrative disputes an administrative act can be appealed by any person under public law. With regard to the political parties, the equation "plaintiff-public interest", would seem simple at first sight, since the special legislation on the political parties recognizes their quality of "subjects under public law". If so, they have the procedural quality to challenge an administrative act. However, the procedural quality is not sufficient to bring the proceedings before the court and the quality must be linked to the condition of the interest to act.

We note that Article 1 para. (8) of Law no. 554/2004 links the access to the administrative court to the conditions regulated by the "present law" and by the "special laws". We consider that Article 1 para. (8) of Law no. 554/2004 subordinates the quality to take legal action on condition that the person under public law complies with its attributions or competences. The competence of a person under public law involves its attributions established by the Constitution and/or by the law. The attributions are the rights and the obligations, provided by the Constitution and/or by the law, to carry out a certain activity. It follows that there is a direct relationship between the competence of the persons under public law and the principle of legality, the competence being exercised only within the limits provided by the Constitution and/or by the law that regulates the person's activity. When a legal action is undertaken to protect a general public interest (e.g. for the annulment of a normative administrative act), any subject under public law must act within the limits of their own competence.

The persons under public law, plaintiffs in administrative contentious, nominated in Article 1 para. (8) of Law no. 554/2004 - the prefect, the issuing authority, the prosecutor or the National Agency of Civil Servants, act within the limits of their competences as follows:

- the public authority that issued the act can only challenge the issued act, and not any administrative act. This means that the issuing authority acts within the limits of their competence, established by Law no. 554/2004,
- the prefect does not challenge any administrative act, but only those issued by the local public authorities controlled by the prefect. Therefore, the prefect addresses the court within the limits of his competences established by Law no. 554/2004 as well as in accordance with the Administrative Code.
- the National Agency of Civil Servants does not challenge any administrative act, but only the act that infringes upon the legislation on civil service. Therefore, the National Agency of Civil Servants acts within the legal framework of its competences established by Law no. 554/2004.

A special analysis is required with regard to the prosecutor in administrative disputes. According to Article 131 para. (1) of the Romanian Constitution, the prosecutor is the only public authority that defends the general interests of the society, defends the rule of law, as well as the rights and freedoms of the citizens. Therefore the prosecutor is the only person under public law that may challenge any administrative normative act that infringes upon the public interest.

## 5. May a Political Party Challenge any Normative Administrative CCT if it Infringes upon the Public Interest?

We wonder if a political party may challenge any normative administrative act, for any reason of illegality. The question arises as, according to the law, the political parties aim to promote the national values and interests, political pluralism, they contribute to the formation of public opinion, participate in elections and in the formation of public authorities. In other words, given the general purpose of promoting national values and interests, it can be considered that a political party may challenge any normative administrative act, from any field of activity, even if it is not applicable and does not affect its own activity or the activity of other political parties?

Prior to the decision no. 8/2020 of the High Court of Cassation and Justice Judicial, the judicial practice generally adopted the conclusion that a political party, in its capacity as person under public law, has a wide leeway to challenge any administrative act. The opinion was based on Article 1 para. (8) of Law no. 554/2004 on the administrative disputes, which enables any subject of public law to attack any administrative act in the procedure of the "objective" contentious. The decision no. 8/2020, however, for the first time, asked the question whether a person under private law in order to protect the rights of the other private persons can challenge in administrative justice in the same way as the prosecutor.

Decision no. 8/2020 does not address the issue of the persons under public law and a judicial practice on this issue, subsequent to the decision, could not be identified so far. We consider that, from the perspective of Article 131 para. (1) of the Constitution, a conclusion that any other subject of public law, except for the prosecutor, may challenge any normative act for infringement of a public interest, cannot be validated. The legislator mentioned quite vaguely in Article 1 para. (8) of Law no. 554/2004 that *any subject* of public law can also challenge an administrative act and thus we may suppose that the legislator left a wide leeway to the persons under public law to access the administrative justice. Does this mean that the administrative court can conclude that any subject of public law can challenge any normative administrative act that infringes on the public interest, in the same procedural conditions in which, very permissively, the prosecutor can act? The promotion of national values and interests - as an objective established by law underlying any political party - could be the aim to defend the general interests, to defend the rule of law and the rights and freedoms of the citizens?

We can easily observe an almost overlapping between the elements of the legal definition of public interest in Article 2 para. (1) (r) of Law no. 554/2004 and in Article

131 para. (1) of the Constitution: both texts aim, in essence, at defending the rights and freedoms of citizens, of the rule of law and of the general interests of the society. This normative context justifies our conclusion that the prosecutor can be, through his competences established by the Constitution, as the only authority - person under public law - to ask the court for the annulment of an administrative normative act which is deemed harmful to the public interest.

It cannot be disputed that the sphere of interest of a political party naturally concerns the electorate which it addresses. A political party may even intend to challenge harmful acts on civil rights and freedoms issued by its potential opponents on the stage of the political duel. That objective of a political party, to promote national values and interests, however noble it may be, it cannot be confused with the mission of the prosecutor in a democratic society, to defend the general interests of the society and to defend the rule of law, such as the rights and the freedoms of the citizens.

In this context, we underline that the political party promotes the national values and interests only through its legal competences, i.e. through participation in elections, acquiring political power and, subsequently, through the establishment of public authorities. Therefore, similar to the considerations of the mandatory Decision no. 8/2020, we consider that the access to administrative justice is conditional on a direct link between the infringement of a public interest by the public authorities and the purpose and objectives of the applicant – namely the political party.

## 6. Conclusions

With regard to the constitutional construction of the public authorities, especially of the public prosecutor, it is quite problematic to state, without any reasonable doubt that a political party, from the perspective of its competences, can challenge any administrative act, in order to defend the public interest, such as the rights and the freedoms of the citizens. It is up to the judicial practice to outline the admissibility criteria when challenging a normative administrative act. In other words, it is to the administrative courts to clarify whether a political party can challenge any administrative act detrimental to a public interest or only the acts that may affect the interest of the complaining political party, of the persons intending to form a political party or of any political parties in general, for example, by violating their rights or interests to participate in elections, to acquire political power and to participate, after the elections, in the establishment of the public authorities.

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