ADMINISTRATIVE AND PATRIMONIAL LIABILITY OF MILITARY CIVIL SERVANTS

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Abstract

In exercising the functional attributions, military civil servants are liable for the damages caused by the actions taken, according to the law. The patrimonial liability engages in the determination of the guilt and the causal links between the actual act and the effects produced. This type of administrative accountability has in the center the material liability of the military and normative acts in which we find both the means of establishing the guilty and the way of recovering the damages in conjunction with the remedies.

Keywords: *administrative responsibility, patrimonial responsibility, military civil servant, liability, administrative guilt, damages, remedies*

1. Introduction

This Article aims to analyze the concept of administrative and patrimonial liability of military personnel in the case of state's responsibility for the damage caused by administrative acts.

Given that the military civil servants compared to civil servants are part of the whole, we consider it appropriate to analyze their administrative and patrimonial liability, especially regarding their material liability for damage resulting from the management of financial resources or with pecuniary character. We treat this subject as a distinct situation which, although approached by the doctrine of labor law, falls to accompany the administrative and patrimonial liability of military personnel not only for reasons of disciplinary unity but also for the coherence of the analysis of the institutions under discussion.

A particular case where the military personnel bears the administrative and material liability is the case when they are held accountable for deeds related to the damage resulting from the formation, administration and management of the financial and material resources, caused by the fault of the military personnel and in connection with the fulfillment of the military service or of the job duties.

Material liability of military personnel towards the public institution intervenes both for the actual damage and for the unfulfilled benefit, a legal notion similar to the material liability in the labor law, but with which it is not confused, since the recovery of the damage is carried in accordance with a special procedure provided by Ordinance no. 121 of 1998 on material liability of military personnel.

2. Military civil servants – special status civil servants

The hypothesis from which we start our approach is based on the fact that the military personnel are civil servants, according to all the rigors of the legal rules, which makes them bear the administrative and patrimonial liability as other civil servants, accepting the discipline and conduct rules specific to them.

According to the provisions of Article 16 paragraph (3) of the Constitution of Romania stipulating that public positions and dignities may be civil or military, the statute of military personnel does not fall under the provisions of the Labor Code.

We support the idea of the late Professor Antonie Iorgovan, according to which the military personnel are a category of civil servants with a special statute that are distinguished from the civil servants mainly by the valences related[1] to the discipline that guides their professional conduct. According to Article 2 of Order no. M64 of June 10th, 2013 approving the Military Discipline Regulation, published **in the Official Gazette No. 399bis of July 3rd, 2013, the military discipline represents the strict compliance of legal provisions, of the** rules of order and conduct mandatory for the maintenance of the functional status, the fulfillment of the specific missions and the smooth running of the activities by all categories of military personnel, being considered as one of the determining factors of the operational capacity. For military discipline there is a need of conscious acceptance of the rules of conduct and of a reward and sanction system, expressly regulated.

As a proposal of *lex ferenda*, to eliminate the errors of interpretation, we consider it necessary the appointment of the military personnel in Article 5 paragraph (1) of the Law no. 188/199 on the Statute of

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[1] A. Iorgovan, Tratat de drept administrativ, IVth Edition, vol. I, ALL Beck Publishing House, Bucharest, 2005, p. 592.

Civil Servants, among those public services benefiting from special statutes. In situations that do not concern military discipline and the rigors specific to this category of civil servants, the above mentioned Statute is the common law applicable to them. The statute of military civil servants, namely Law 80 of July 11th, 1995 contains provisions applicable to them, regardless of the central public authority or the autonomous authority where they work[2]: the Ministry of National Defence, the Ministry of Internal Affairs, the Romanian Intelligence Service, the Foreign Intelligence Service, the Special Telecommunications Service, the Protection and Guard Service.

The fact that military personnel are a special category of civil servants is regulated both by the Constitutional Court by Decision no. 34 of February 9th, 2016, section 26[3] and by the High Court of Cassation and Justice by Decision ICCJ-RIL no. 10 of April 16th, 2018, section 49[4].

In order to delimit the military personnel among civil servants and to eliminate mistakes or erroneous interpretations of the presumption that they are in legal employment relationship (under the Law 53/2004 on the Labor Code[5]), in our approach we started from using the notion of "military civil servants". Let us not forget that in addition to the fact that military civil servants are serving the nation[6], compared with other civil servants they are obliged by oath[7] to live for the nation in whose service they operate.

This hypothesis is based on both the constitutional provisions[8] of Article 16 and their role in society, keeping in mind that "the military personnel have to observe the most important social values, if not the essential ones for the existence and proper functioning of a society, in the current political context of Euro-Atlantic country, being engaged in a compendium of activities, including:

- Collective defence as the main common goal of Romania and the North Atlantic Organization (N.A.T.O.)[9].
- European security and defence, according to the Common Security and Defence Policy of the European Union[10];
- National security and defence of Romania and its interests in the field of internal and external information[11];
- The defence of public order, of citizens' fundamental rights and freedoms, of public and private property[12];
- Fire prevention and extinction[13];
- The protection of Romanian and foreign dignitaries working in Romania[14].

Military civil servants vested with the exercise of public authority are found both within the central administrative authorities and within the autonomous administrative authorities, such as: the Ministry of National Defence (MapN), the Ministry of Internal Affairs - (MAI), the Romanian Intelligence Service (S.R.I.), the Foreign Intelligence Service (SIE), the Special Telecommunications Service (STS), the Protection and Guard Service (S.P.P.), having among the general duties: ensuring the defence needs of

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[2] According to Article 3 of Law 80 of 1995 on the Statute of military personnel, they can be in the following situation: without military position but they meet the conditions provided by the law for military service in reserve and *if necessary, as military men in activity; in retirement, when, according to the law, they can no longer be called for military service.*

[3] Section 26. *Further, analyzing for the same purpose other legal texts, the Court finds that, according to Article 85 paragraphs (1) and (2) of Law no. 188/1999 on the Statute of Civil Servants, which represents the general framework for civil servants (the military personnel being a special category of civil servants): "(1) The repairing of the damage to the public authority or institution in the situations referred to in Article 84 a) and b) is ordered by issuing a decision or a imputation order by the head of the public authority or institution, within 30 days of the finding of the damage or, as the case may be, by undertaking a payment commitment, and in the situation stipulated in section (c) of the same article, on the basis of the final and irrevocable judgment. (2) The civil servant concerned may file an appeal against the decision or the imputation order before the administrative court". It follows from the combined interpretation of the abovementioned legal provisions that the imputation order is an administrative act, since the litigant can address the administrative court against the contested act.*

[4] 49. *Since neither Law no. 80/1995 nor other normative acts do not specify the court with jurisdiction in work conflicts of military personnel, the cases are constantly solved by the administrative courts. At the present stage of the legislation, the solution was judged to be judicious because, according to the Constitution of Romania (Article 16 paragraph (3)) both public positions and public dignities are, as appropriate, civil and military. So, in essence, the military personnel (whose statute is governed by Law 80/1995) are all civil servants. Thus, it is natural that, having regard to Article 1 of the Law no. 188/1999, jurisdiction should belong to administrative courts, according to Article 109 of the same law. It has been concluded that the military personnel (in service) are a variety of the civil servants, a variety which has imposed on them the adoption of a special statute (Law 80/1995), a statute which, where appropriate, complements the statute of civil servants (Law 188/1999), general regulation in the matter* [*Article 1 paragraph (1) of the aforementioned law].*

[5] Law 24/2004 with subsequent amendments and completions.

[6] Article 2, paragraph 2 of Law no. 80 of July 11th, 1995 on the statute of military personnel, with subsequent amendments and completions.

[7] Decree-Law no. 119 of 14 April 1990 regarding the contents of the military law published in the Official Gazette no.21 of February 8th, 1990.

[8] Constitution of Romania, republished.

[9] Article 5 of the North Atlantic Treaty, signed in Washington DC on April 4th, 1949.

[10] European Union Military Committee (EUMC) set up by Council Decision 2001/79/PESC of 22 January 2001.

[11] Article 1 of Law no.1 of January 6th, 1998 on the organization and operation of the Foreign Intelligence Service, published in the Official Gazette no. 511 of October 18th, 2000, with subsequent amendments and completions. Article 1 of Law no. 14 of February 24th, 1992 on the organization and operation of the Romanian Intelligence Service, published in the Official Gazette no. 33 of March 3rd, 1992.

[12] Article 1 of Law no.550 of November 29th, 2004 on the organization and operation of Romanian Gendarmerie, with subsequent amendments and completions, published in the Official Gazette no. 1175 of December 13th, 2004.

[13] Article 1 of Law no.121 of October 16th, 1996 on the organization and operation of the Military Firefighters Corps, with subsequent amendments and completions.

[14] Article 1 of Law no.191 of October 19th, 1998, on the organization and operation of the Protection and Guard Service, with subsequent amendments and completions.

Romania, preventing and counteracting actions that constitute, according to the law, threats to the national security; preventing and fighting terrorism; management of the special telecommunication domain for the public authorities in Romania; the defence of public order, the defence of life, bodily integrity and freedom of the person, public and private property, the legitimate interests of the citizens, the community and the state; ensuring the protection of Romanian and foreign dignitaries and of their families during their stay in Romania, etc.

Particular attention and increasing interest are observed on the responsibility of the military resulting from the inherent risks of a social organization. The focus is particularly on ensuring that the risks inherent imposed by the general interest are not manifested, among those risks we mention those arising from exceptional situations in terms of devastating effects on society in general and on the individual in particular (damage to persons who fall victim to acts of terrorism, war, warfare, insurgency, riots; compensation for persons who have fallen victim to crimes whose author is unknown; victims of natural disasters or air, naval, terrestrial traffic accidents, etc.).

We could add numerous situations of devastating effects resulting from military actions and operations:

- public exhibitions of military equipment of military forces;
- handling dangerous weapons from a constructive and operational point of view for both handlers and third parties;
- the movement of the technique in the area of responsibility, during tactical maneuvers or during logistic support;
- accidents resulting from military training;
- explosives resulting from work with explosives during various pyrotechnical drills;
- defusing suspicious packages on public space;
- performing bomb squad works in the interest of various communities, etc.
- performing secret missions, etc.

3. Definition, features and principles of administrative and patrimonial liability

The Constitution of Romania of 1991, revised and republished in 2003 has various articles subject to a right of compensation for the damages caused by the public authorities by administrative acts, by their delay in handling the citizen's petition or by remaining silent with regards to the latter.

Analyzing the constitutional provisions, we found various articles describing such a fundamental right: Article 44 The right of private property, Article 52 The right of a person aggrieved by a public authority, Article 73 Classes of laws. From their analysis and interpretation, it turns out that we have one of the following actions[15]:

1. An action brought exclusively against public authorities;
2. An action brought exclusively against the actual civil servant;
3. An action brought exclusively against both the public authority and the civil servant.

These actions are regulated by Law no. 554 of December 2nd, 2004 on administrative litigations, with subsequent amendments and completions, where in Article 52 paragraph 1, by way of an extinctive interpretation, the expression administrative acts includes also the administrative contracts drawn up by virtue of its public law legal capacity (procurement contracts[16], service contracts, etc.).

The administration's responsibility is recognized as manifesting itself under three forms: responsibility for fault, responsibility for risk and responsibility for job error[17].

Among the definitions of the administrative and patrimonial liability, we remember the opinion of professor Anton Trăilescu, according to which: "administrative and patrimonial liability is that form of legal liability consisting in requiring the state or, as the case may be, territorial and administrative divisions to compensate for the damage caused to individuals by an unlawful administrative act or by the unjustified refusal of the public administration to solve a petition for a right recognized by the law or for another legitimate interest"[18].

The constitutional principles upon which is based the liability of public authorities and their civil servants (of state) for the damage caused, are listed in a research paper, as follows[19]:

a) Patrimonial liability belonging exclusively to the state as a result of the damage caused by judicial errors (with the possibility of seeking legal remedy or redress against the civil servants *who have exercised their office in bad faith or with serious negligence*).

The constitutional base of this principle is described in Article 52 paragraph 3 of the Constitution, developed by Article 96 of Law 303/2004 on the Statute of Judges and Prosecutors, stipulating in paragraph 2 "the joint liability of the state and judges and prosecutors for the exercise of their office in bad faith or with serious negligence.

A particular situation is that of the military prosecutors and judges working in the military courts,

[15] Antonie Iorgovan, Tratat de drept administrativ, Vol. II, 4th Edition, All Beck Publishing House, Bucharest, 2005, p.459

[16] Doina Cucu, Procedures for the procurement of public property rights. The legal nature of public works contracts, CKS 2018, University Nicolae Titulescu of Bucharest;

[17] Elenna Emilia Ștefan, Răspunderea Juridică, privire specială asupra rîspunderii în Dreptul Administrativ, Peo Universtitaria Publishing House, Bucharest, 2013.

[18] Anton Trăilescu, Drept administrativ. Tratat elementar, All beck Publishing House, Bucharest, 2002, p.367.

[19] Antonie Iorgovan, Tratat de drept administrativ, Vol. II, 4th Edition, All Beck Publishing House, Bucharest, 2005, p.461

with jurisdiction in criminal cases involving military civil servants, having extended material jurisdiction since the introduction of the New Criminal Procedure Code compared to the old regulation that was strictly limited to job offenses committed by them. Although there have been many discussions about the necessity of military courts, we continue to support them, as a result of the rigor and discipline specific to any form of military organization, conduct and deontology that must be observed throughout the military trial based on the presumption of innocence. It might be said that these courts have a dual coordination: from the administrative point of view, they are managed by the Ministry of National Defence through the Military Courts Division, and from the point of view of the separation of powers, they are part of the judiciary.

b) Patrimonial liability of public authorities as a result of the damage caused *both by administrative acts causing damage and as a result of not solving within the legal term a petition made under the law (there is the possibility that the civil servant guilty of violating the law be brought in the proceedings);*

The administrative act was defined in a research paper of the interwar period as *a manifestation of will by a competent administrative body, creating a general or individual legal situation governed by the rules of public law, in which we find the idea of domination and command*[20].

Current definitions describing with precision and concision the contents of the administrative act are given by the famous professor Antonie Iorgovan and by the distinguished lady Ph.D. professor Verginia Verdinaș, a disciple of the late "spiritual father of the Constitution", retelling the last author: *the administrative act is the main legal form of the public administration activity consisting of an express and unilateral manifestation of will subject to a public power regime and of the legality control of courts, issued by the administrative authorities or private persons authorized by them, under which collateral*[21] *obligations and rights arise, are amended or are paid off.*

Administrative acts causing damage are those administrative acts issued that affect a person's patrimonial or non-patrimonial interests (including moral damages that hurt the honor, prestige and reputation of a person). Consequently, we are in a situation in which a person has suffered a material or moral loss caused by the issuance of the administrative act in question, which implies the accountability of the state, respectively of the guilty public authorities and civil servants.

Also, the administrative and patrimonial liability is involved both for failure to answer a petition within the time limits and for the failure of the administration to answer or to respond. The statement is supported by Article 51 of the Constitution regarding the citizen's right of petition and by the provisions of Government Ordinance no. 27/2002 on the regulation of the activity of solving petitions.

c) Joint patrimonial liability of public authorities and civil servants for damage caused to the public domain as a result of a faulty *functioning* of public services.

The public domain, that community of goods forming the object of public property – domain assets, is given by its owner and the different legal regime, these features being the object of property ownership. The manner of procuring public property rights is regulated by Article 863 of the new Civil Code, which lists the possible forms[22], as follows: *expropriation on grounds of public utility, donation or legacy, onerous convention, the transfer of an asset from the private domain to the public domain, other manner provided by the law*.

The damage caused to the public domain entails the administrative and patrimonial liability of the state if a person's legitimate right or interest is damaged, ensuring fair compensation within the limits set by the law.

We consider that the faulty functioning or the poor functioning as it is termed in a pejorative manner or the unsatisfactory functioning of public services can be assessed objectively only in the light of the effects of the administration of public affairs and their judgment in terms of efficiency and effectiveness as well as with regards to the satisfaction of the beneficiaries. In other words, we are interested in the perspective of the administration's performance and the relationship of the public administration with those whose public affairs are being administered[23]. The right to good governance is already enshrined as a fundamental right[24], defined in the doctrine as *the right of every person to have his or her affairs handled impartially, fairly and within a reasonable time by the Community institutions and bodies*[25].

Among the situations of faulty functioning of "military public service" we find: breach of the obligation to motivate the administrative acts issued, both those concerning its own employees and those concerning other individuals, in other words, the lack of motivation of the administrative acts, the lack of transparency in the taking of individual measures by not hearing the person concerned, the failure to grant or allow a person the access to his or her own file taking into account the intervention required by the law regarding the observance of the legitimate interests related to confidentiality, secret of service, state secret,

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[20] P. Negulescu, Drept Administrativ, vol. I, IV Edition, E.Marvan Publishing House, Bucharest, 1934, p. 304;

[21] Verginia Verdinaș, Drept administrativ, X Edition, revised and updated, Universul Juridic Publishing House, Bucharest, 2017, p. 328;

[22] Adelin Zăgărin, Expropriation on grounds of public utility, Revue Europeenne du Droit Social, Vol. XLI, ISSUE 4, year 2018, p 94, Bibliotheca Publishing House, Târgoviște, 2018.

[23] Mureșan Florina, ″ Corelația bună administrare-bună guvernare în contextul integrării României în Uniunea Europeană″,ADJURIS – International Academic Publisher, mai 2018.

[24] Article 41 of the Charter of Fundamental Rights of the European Union, entitled The right to good administration

[25] Verginia Vedinaș, Deontologia vieții publice, Universul Juridic Publishing House, 2007, p. 224.

professional and/or trade secret. Failure to observe such conditions by the central public authorities, respectively the autonomous administrative authorities where military civil servants work may entail suspension or annulment of the administrative act by the court[26].

d) Exclusive patrimonial liability of public administration authorities for limits of public service.

Conclusions:

Administrative and patrimonial liability of military personnel is subject to Law no. 554/2004 on administrative litigations, completed by the other rules of administrative law and the civil procedure provisions, where Article 28 provides that the law mentioned is completed with the civil procedure provisions, provided that they are not incompatible with the procedure set by the law, the specificity of the authority relationship between the public authorities, the legitimate rights or interests of the aggrieved parties.

In the administrative law treaty of Professor Antonie Iorgovan in 2005, Vol. II, it is stated that the compensation for damage is conditioned by the annulment or the establishment of the unlawful nature of the administrative act in question, respectively the establishment of the failure to answer a petition within the time limits or the unjustified refusal to answer. Both aspects presented are associated with a violation of a legitimate interest, so the actions for damages and annulment are filed at the same time.

According to the law of administrative litigations, the aggrieved person may file a petition for summons of the military civil servant guilty for failing to answer a petition within the time limits, for unjustified refusal, for issuing an unlawful administrative act. According to Article 16 of the reference law, the latter can make a claim against his hierarchical, if he received a written disposition to issue or not to issue the act in question.

The law of administrative litigations describes the preliminary procedure on Article 7, as a preliminary administrative appeal before filing an action for annulment in conjunction with an action for damage before the administrative court. Further it describes the time limits for filing the preliminary complaint, differentiated according to the administrative act under discussion: for individual administrative acts, the time limit for filing a preliminary complaint is 30 days of the time the aggrieved person became aware of the contents of the act, accepting the exception that, for good reasons, the complaint may be filed within a period of up to six months; for normative administrative acts the complaint can be filed at any time and for administrative contracts the time limit is 6 months. It must be stated that those time limits are limitation periods and, after the preliminary procedure, at the judicial stage, the grounds invoked in the request for annulment of the act are not limited to those invoked in the preliminary complaint lodged with the issuing or hierarchically superior authority.

For military public authorities organized on the principle of hierarchy, the request is lodged with the entity hierarchically superior to that issuing the damaging act, as an example, if the act was issued by the Inspectorate of Gendarmerie within the Ministry of Internal Affairs, the preliminary complaint may be addressed directly to the minister. Note that, according to Article 7 paragraph 5, the preliminary stage is mandatory, except for actions initiated by the prefect, the ombudsman, the Public Ministry, the National Civil Servants Agency related to claims by persons aggrieved by orders or parts thereof, as well as cases against administrative acts that cannot be revoked because they entered the civil circulation and produced legal effects, cases concerning the unlawfulness and cases of unjustified refusal to answer a petition regarding a legitimate right or interest, respectively failure to answer the applicant within the legal time limit.

We consider as lex ferenda the introduction of provisions obliging military public authorities to submit annual reports or to highlight in their annual activity reports the stage of responding petitions, their number, the way of settlement and closing, etc. given the importance of this fundamental right constitutionally enshrined.

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