

# THE LEGALITY PRINCIPLE IN THE ACTIVITY OF THE PUBLIC ADMINISTRATION - CROSSING BETWEEN ENVIRONMENTAL PROTECTION AND POLITICAL NEGLIGENCE. A CASE STUDY

Andrea KAJCSA<sup>1</sup>

## ABSTRACT

*It is unanimously accepted that the principle of legality is paramount in the activity of the public administration, especially of the local public administration. However, there can be events in the life of a community when the political factor, driven by the desire to pursue a higher purpose, of great meaning for that community and under great scrutiny and pressure from the public opinion, as is for example the need to protect the environment and to think in terms of sustainable development, can choose to overpass the need to respect the principle of legality. Having a case-study as starting point, we analyze in our paper the role different public authorities had in adopting a local normative administrative act that does not comply with the legality principle, under the expressed wish to protect the environment. We will examine if the political factor chose the best legal solutions for pursuing environmental protection.*

**Keywords:** public law, legality principle, local public administration, environmental protection, administrative act, political factor.

## 1. Introduction

The term „source of law” („source de droit”, „Rechtsquelle”) is used by the legal scholarly literature with the meaning of an extralegal ensemble that sets the foundations for the construction and configuration of objective law *in actu*, including the natural and social existence conditions of human macro-communities as well as with the meaning of an ensemble of forms through which the content of legal provisions in force is exteriorized. The first ensemble refers to the so-called material or extralegal source of law while the second to the formal source of law. This is a classical, very general characterization that we have kept from the French theoreticians of the XIX-th century and each of these ensembles has been enriched with new components as the scholarly researches deepened in this field of legal and philosophical research. The material sources of law refers to the entirety of

---

<sup>1</sup> Teaching assistant, Ph.D., „Petru Maior” University of Tîrgu-Mureş, Faculty of Economics, Law and Administrative Sciences, Department of Law and Public Administration, Romania, andrea.kajcsa@yahoo.com

causal/historical influences that explain the existence of a particular legal provision, at a certain given place and time. Explaining the law necessarily implies identifying and explaining those factors that condition the difference in its conceptual unity, alongside a correct appreciation of their influence upon its content.

## 2. The relation between law and politics

The pursuit of the evolution and interactions of law and the social-political factor can attest the tendency of certain components of this factor (economy, politics, ideology, culture) to subordinate law and to transform it into a technique that could be used to any final end. Paul Roubier stated that law is a “science of means”. In the light of this characterization, it could be stated that politics should set the purposes of government while the law should choose the means for reaching these purposes and in this scheme the place the law has is a subordinated one<sup>2</sup>. If we are to admit the thesis according to which society is founded upon, develops and perfects within an order, this order implies a certain discipline and the role of politics is to conceive this discipline and order while the law has the task of exteriorizing it. The two phenomenon therefore seem inseparable. Politics is done within the law and the law finds in politics the means through which its legal provisions acquire efficiency<sup>3</sup>.

Analyzed under a functional aspect, politics is an activity that leads and organizes society in its entirety. Law in general, and constitutional law in particular, has the task of giving a normative shape to the political system of society, regulating through its legal provisions its organization and its perfecting<sup>4</sup>.

Specialists have defined the political power as a power that drives, a decision and coordination power that belongs to the leading state apparatus<sup>5</sup>. Political power allows those that hold it and exercise it to determine the ensemble of national policies both on national level and international level and implicitly the legislative policy. Thus, law is political first due to the procedure of its elaboration, a state procedure<sup>6</sup>. It has been stated in the scholarly literature that the state is the creator and organizer of law, the subject of law that is called to obey and apply what it has created<sup>7</sup>.

---

<sup>2</sup> Nicolae Popa, *Teoria generală a dreptului*, 3<sup>rd</sup> Edition, C.H. Beck Publishing House, Bucharest, 2008, p. 66.

<sup>3</sup> Vasile Pătulea, *Fundamentul politic și ideologic al dreptului*, in „Revista Română de Drept”, no. 11, 1973.

<sup>4</sup> Finality of law, the principles of state organization, and the solutions adopted in the economic field, labor relations, family relations, etc. cannot be explained without referencing these solutions to the political organization of the society. Vasile Pătulea, *cited*, p. 7.

<sup>5</sup> The definitions belongs to G. Burdeau, „Traité de science politique”, cited in Maria V. Dvoracek, Gheorghe Lupu, „*Teoria generală a dreptului*”, „Chemarea” Publishing House, Iași, 1996, p. 53.

<sup>6</sup> Vasile Pătulea, *cited*, p. 5.

<sup>7</sup> Radu I. Motica, Gheorghe Mihai, „*Teoria Generală a Dreptului*”, All Beck, Publishing House, Bucharest, 2001, p. 190.

Law is political also due to its finality, that of accomplishing state policy, meaning a line of conduct corresponding to a plan of action foreseen in order to reach a certain goal. Hence, each state has, and each political power, a different and specific economic policy, financial policy, commercial policy, diplomatic policy and naturally a legal policy.

It has been stated in the scholarly literature by some authors that politics, compared to other extralegal sources or material sources of law, has the most direct action upon law, with the most relevant weight on the dynamic of law itself in general and upon positive law in particular<sup>8</sup>.

The case study we wish to analyze in the present paper, and that has actually represented the starting point of it, draws a perfect picture of the way in which politics influences law, at times even against it and by violating it. The analyzed case regards the legislative activity of local public administrative authorities, in particular the local council of a city.

### **3. The adoption of a local council decision in the field of environmental protection**

In our case, as a result of a normative legislative initiative of 2 members of a local council<sup>9</sup>, a *Local Council Decision* is adopted, *regarding the protection of the environment, of population health and biodiversity*<sup>10</sup>. This Decision imposed an additional condition to be fulfilled for the authorization of those activities that were enumerated and included in Annex 1 to Law no. 86/2000, on the territory of the city in question. The additional condition provided by this Decision consisted in the expressed desire of the majority of the citizens having the right to vote and residing in the city for the authorization of an activity of the kind provided in Annex 1 of Law no. 86/2000. In other words, the condition imposed represented in fact a mandatory referendum to be organized where the citizens enjoying the right to vote would express their desire to authorize or not authorize a commercial/industrial/agricultural activity that had a certain risk environmental-wise. More so, this condition was imposed through the provisions of the Decision even for obtaining the building permit.

In the stages preliminary to the adoption of this administrative normative act, in the light of the provisions of art. 44, paragr. (1) of Law no. 215/2001 of local public administration, according to which all local council decision projects on the

---

<sup>8</sup> See for a detailed presentation of different theories regarding the relation between law and politics Genoveva Vrabie, „*Considerații privind raportul dintre politică și drept*”, in „*Revista Română de Drept*”, no. 3, 1974.

<sup>9</sup> The legislative initiative right is provided by art. 45, paragr. (6), Law no. 215/2001 of local public administration.

<sup>10</sup>[http://www.primariareghin.ro/index.php?id=228&tx\\_ttnews\[swords\]=%20&tx\\_ttnews\[date0\]=4&tx\\_ttnews\[date1\]=2015&tx\\_ttnews\[pointer\]=2&tx\\_ttnews\[tt\\_news\]=6127&tx\\_ttnews\[backPid\]=226&cHash=3b8b4bdaae](http://www.primariareghin.ro/index.php?id=228&tx_ttnews[swords]=%20&tx_ttnews[date0]=4&tx_ttnews[date1]=2015&tx_ttnews[pointer]=2&tx_ttnews[tt_news]=6127&tx_ttnews[backPid]=226&cHash=3b8b4bdaae)

agenda of the council session cannot be debated unless they are accompanied by a report drawn up by the specialized structure from the mayors' apparatus, the Legal compartment elaborated a specialty report in which concluded on the illegality of the decision project. Furthermore, taking into account the provisions of art. 48 of Law no. 215/2001 that state that in those situations when the secretary of the administrative-territorial unit considers that a decision is illegal, will not countersign the decision in question and will draw up in writing as well as expose to the members of the local council its motivated opinion, the secretary of the city from our case issued a Note stating that it would not approve the decision project, Note that was delivered to all the members of the city council. This opinion of the secretary was also verbally exposed before the decision project was debated by the members of the city council during the council session. Despite all these intercessions consisting of technical-material operations<sup>11</sup> that, certainly, do not cause any sort of legal effects on their own but do underlie from an intellectual point of view the administrative act that does produce legal effects, the local council, an exclusively political authority, has decided to adopt the administrative act in the form submitted by its initiators. Therefore, we can conclude that the political factor decided, after being informed correctly and having been exposed and explained all the legal arguments that are meant even by the law to support the members of the city council in their legislative activity, to completely ignore the law and, as a consequence, to implicitly alter its substance by introducing into the legal circuit an administrative normative act that was vitiated from the perspective of the exigencies of the legality principle.

It is without a doubt true that the specialty report is nothing more than a preparatory act through which the public administration presents its conclusions on a particular issue that it has to examine, containing the factual and legal aspects that shed light and are necessary for the adoption of an administrative act by another body. The report of the specialty compartment is therefore a material-technical operation that does not produce any legal effects<sup>12</sup>. It has by nature a consultative character. It must exist, but the conclusions contained in it are not mandatory for the city council and are not mandatory to be assimilated *tale quale* by the city council and the final decision belongs to the city council as deliberative authority of the local public administration.

---

<sup>11</sup> See for a detailed examination of this category Lucian Chiriac, *Drept administrativ. Activitatea autorităților administrației publice*, Hamangiu Publishing House, Bucharest, 2011, p. 36 and the following.

<sup>12</sup> We have to notice that the provisions of Law no. 215/2001 do not impose any imperative condition regarding the content of this specialty report. We cannot find any express provision referring to the fact that these specialty reports have to be favorable to the decision project. The sole condition imposed by the law is for these reports to exist for every decision project in order for that project to be debated and this condition was fulfilled in our case.

#### 4. Exigencies of the legality principle

The main arguments exposed in both the specialty report and the opinion of the secretary on the illegality of the decision were: violation of the legality principle, violation of the competence of the city council, the decision added to the law by introducing additional conditions to those settled by the laws adopted by the Romanian Parliament.

The legality principle, provided by art. 2, paragr. (1), Law no. 215/2001 of local public administration, entails that all local public administrative authorities, both the deliberative ones – as is the local council – and the executive ones – as is the mayor – exercise only those competences that the law expressly provides for and attributes to them. The principle of legality of the administrative act implies therefore that the administrative act must be adopted and issued in complete compliance with normative acts having a superior legal force, not allowing one authority to substitute itself to another or for provisions contrary to the law or that add to the law to be issued. Normative administrative acts (such as the case of local council decisions) cannot exist outside the framework created by the law, in the light of compliance with the principle of hierarchy of acts. A normative act cannot have as effect making inoperative the provisions of another normative act enjoying a superior legal force as well as an inferior normative administrative act cannot add other general, mandatory provisions. Administrative acts enjoy a legality presumption, but this legality presumption is a relative legal presumption (*iuris tantum*) and not an absolute legal presumption (*iuris et de iure*) and therefore this presumption can be overturned either through the illegality exception or the annulment action in front of the specialized courts.

Returning to the aspects of the studied case, it is important, we consider (utopic) to mention that the decision in question, once adopted, complying with the legal provisions concerning the exercise of the control typical to the administrative control regime, was sent to the Institution of the Prefect in order for this authority to exercise its legality control. The Institution of the Prefect did not point out any illegality elements of the decision, the local authority was not notified to remedy any legality vices and the decision of the local council was not subject to the legality control of the specialized courts at the initiative of the Prefect. More so, the Institution of the Prefect mentioned *expressis verbis*, following a written notification to this end that it did not discover any illegality aspects of *City council Decision regarding the protection of the environment, of population health and biodiversity*.

#### 5. The legality control of the courts regarding the City council Decision

The specialized court, in front of which proceedings were initiated by a private company that carried out industrial activities in the city in question, proceedings based on the grounds of Law no. 554/2004 of administrative court proceedings,

considered, however, that the local council decision is illegal and annulled the illegal administrative act<sup>13</sup>. The illegality reasons retained by the court were the violation of the competences of the local council and the violation of a normative act with a superior legal force, in other words the violation of the legality principle. On the issue of violation of the competences of the local council, the court appreciated that according to Law no. 215/2001 of local public administration the local council has initiative and decides, in the conditions of the law, in all issues of local interest excepting those attributed by the law in the competence of other local or central public administration authorities and this condition was not complied with. The court states that local autonomy cannot be invoked in order to justify the violation of legal provisions with a higher legal force and that the principle of local autonomy must be respected within the limitations imposed by the law itself. On the second argument that the court based its decision of illegality of the local council decision, the violation of a normative act with a higher legal force, the court concluded that the basic general law regulating the issue of urbanism acts is Law no. 50/1991 regarding the authorization of construction works execution. This law is the one establishing the content of the documentation based on which the building permit is issued. The condition of having the acceptance of the citizens that inhabit a city for receiving a building permit is not provided for either by law no. 50/1991 nor by law no. 86/2000. In addition, the analyze of the provisions of law no. 3/2000 regarding the organization of referendums, leads to the conclusion that the local authorities have indeed the right to organize a referendum concerning local interest problems but this referendum has a consultative nature and cannot be transformed into a mandatory condition for obtaining a building permit. Furthermore, Law no. 24/2000 on legislative technique norms sets in art. 80 that the normative acts of local public administrative authorities are adopted and issued for regulating certain activities of local interest, with compliance to the limitations set through the Constitution and the law and only in those areas where the local authorities have competences. It results once more that the decision of a local council cannot add to the law or provide different from the law.

## 6. Conclusions

The court by its intervention in this case, has removed from the legal circuit a normative local administrative act with serious legality vices. Through this process however it has been revealed in a pertinent manner how the political factor has influence the law, showing also the incapacity of public authorities to manifest themselves politically within the framework of law and general principles of law. We have highlighted, by presenting all the steps previous and posterior to the adoption of this local council decision, how the political factor, completely and

---

<sup>13</sup> Decision no. 1376/2015 of Mureş County Court, Administrative Specialized Section.

persistently informed on the illegality of a legislative procedure, had made a purely political decision to ignore all these considerations and forced the limits of law by willingly introducing into the legal circuit an illegal normative administrative act. The public authority that exercise the administrative control over the local administrative authorities, the Institution of the Prefect, has similarly acted in a political manner, we appreciate, and did not discover any illegality aspects of any kind in a situation where the illegality issues we believe to be flagrant. Hypothetically, if the administrative act had not been attacked in court proceedings and annulled as a result of the legality control exercised by the courts, this illegal act could have produced legal effects and implicitly make liable under all forms both the adopting authority and the one that would have put it into execution<sup>14</sup>.

It is undeniable that the political power is subject to pressure actions coming from the social body, and these pressure action will orient the legislative policy of the political power towards the ends imposed by the social body. The pressure exercised by the social body over the political power is based upon mentalities and the mores that influence the social behavior and its effects reverberate all the way to the law. The evolution of mores will determine those that govern to adopt those measures claimed by the social body in different areas, ecological ones in our case. At the moment the local council adopted this decision there existed a strong pressure coming from the social body, of the population of the city, determined as a reaction to the intention of a private company to build a factory that would carry out production activities with a potential risk upon the environment and the human health. This pressure, exercised by numerous street marches and meetings, can explain the decision of the members of the local council to decide politically and not legally.

The premise of our paper was the following: law is not set outside a certain causal determination, of an ensemble of factors that leave their print, directly or indirectly, with different degrees, on the process of law configuration, both in content and shape. Law must not be analyzed as existing outside causal, objective or subjective, determinations. Any theoretical analyze of the sources of law implies a much broader horizon then a strictly technical one for it involves sociological, anthropological, geographical, biological and other considerations. Positive law responds to all these „material sources“. The case studied in the present paper proves, if any further demonstration would be considered necessary, how the material, extra-legal sources of law act and influence both the content and shape of the law.

---

<sup>14</sup> Local authorities from neighboring territorial administrative units have adopted decision identical in their content to the one we analyzed in our paper and these were also not subject to the control exercised by the Prefect and are still in force to this day.

---

**BIBLIOGRAPHY**

- [1] **Radu I. Motica, Gheorghe Mihai**, *Teoria Generală a Dreptului*, All Beck Publishing House, Bucharest, 2001
- [2] **Maria V. Dvoracek, Gheorghe Lupu**, *Teoria generală a dreptului*, „Chemarea” Foundation Publishing House, Iași, 1996
- [3] **Lucian Chiriac**, *Drept administrativ. Activitatea autorităților administrației publice*, Hamangiu Publishing House, Bucharest, 2011
- [4] **Nicolae Popa**, *Teoria generală a dreptului*, 3<sup>rd</sup> edition, C.H. Beck Publishing House, Bucharest, 2008
- [5] **Vasile Pătulea**, *Fundamentul politic și ideologic al dreptului*, in „Revista Română de Drept”, no. 11, 1973
- [6] **Genoveva Vrabie**, *Considerații privind raportul dintre politică și drept*, in „Revista Română de Drept”, no. 3, 1974
- [7] **Andrei Sida**, *Introducere în teoria generală a dreptului*, „Vasile Goldiș” University Press, Arad, 2002
- [8] Law no. 215/2001 of local public administration
- [9] Law no. 86/2000 for ratifying the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed at Aarhus in 1998
- [10] Law no. 50/1991 regarding the authorization of building works execution
- [11] Law no. 24/2000 on legislative technique norms.