Cristina Aragão Seia (ed.)
Daniela Nováčková (ed.)

# Modern Visions of Public Law

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# Modern Visions of Public Law

**Editors:**

## *Cristina Aragão Seia*

**Activity**
Cristina Aragão Seia, PhD, is a Professor at the Law Faculty of Lusiada University – Porto, Portugal. She has a LLM in European Law, at Law Faculty of Coimbra University and has obtain her PhD in Administrative Law (Environmental Law) at the Law Faculty of Santiago de Compostela University, in Spain. She specializes in administrative law. She is Arbitrator at the Administrative Arbitration Center (CAAD) and at Arbitration and Mediation Center of the Institute of Management and Public Administration (CAMIGAP), in Portugal; lawyer in the Portuguese Bar Association; member of Scholar Council of Law Faculty of Lusiada University; researcher of Center of Legal, Economic and Environmental Studies Center. She is also a member of ELI - European Law Institute, IPSA - International Political Science Association, LASA - Latin American Studies Association - and LSA - Law & Society Association.

**Publications**
Cristina Aragão Seia is the author of several publications, among which we mention: "Environmental liability. Study for a future amendment of European legislation", *Journal Perspectives of Law and Public Administration*, vol. 12, no. 2, June 2023; "Inteligência Artificial: Responsabilidade 3.0*"*, Thomson Reuters Aranzadi, Espanha, 2023 (in press); "The concepts of goods, digital content and digital services in the European and Portuguese goods, digital content, and digital services transactions regime", Routledge (submitted); "Inteligência artificial : uma nova era de responsabilidade civil" in Almeida, Alberto Francisco Ribeiro de, coord. (2022), *O direito na sociedade digital*, Lisboa, Universidade Lusíada; "Integridade Eleitoral e Participação Democrática: Uma Preocupação da União Europeia. O caso dos cidadãos móveis" in Actas do XI Congresso da Associação Portuguesa de Ciência Política, Covilhã, Março 2023 (in press); "Precaução, prevenção, correcção prioritariamente na fonte e poluidor-pagador: princípios basilares da responsabilidade ambiental", *Revista Lusiada. Direito*, nº 29/30, 2º Semestre 2023 (in press); *A responsabilidade ambiental. Da responsabilidade civil à responsabilidade administrativa em Portu*gal, Coimbra, Almedina, 2022; "O regime sancionatório da responsabilidade ambiental", *Polis. Revista de Estudos Jurídico-Políticos*, Lisboa, v. 2 n. 3 (Janeiro-Junho 2021); "Da aplicabilidade da limitação da indemnização no caso de mera culpa à responsabilidade pelo risco", in Estudos em homenagem ao professor António Martins da Cruz / coord. José de Matos Correia, Ricardo Leite Pinto. - Lisboa: Universidade Lusíada, 2020.

## *Daniela Nováčková*

**Activity**

Daniela Nováčková is Professor at the Faculty of Management, Comenius University in Bratislava. Prof. JUDr. Daniela Nováčková is guarantor of the Study Program „International Management". She specialises in European Economic Law. During the pre-accession phase of the Slovakia´s EU membership, she was active member of Slovak negotiation teams and participated at the transposition of EC/EU Directives into the Slovak legislation which were in scope of the Ministry of Finance of the Slovak Republic. During this period, she was an intern in several EU institutions (Luxembourg, Brussels). She is a co-author of several Slovak legislation bills (draft laws), inter alia the bill on the state aid (in 1999). She applied her expertise in international contract law in negotiation, conclusion, and adaptation of bilateral investment contracts between the Slovak Republic and other countries. She proved her expertise in European law and European affairs when she was appointed in 2003 as the first authorised forensic expert of the Ministry of Judiciary of the Slovak Republic in the field „Legal Relations to Outland – European Law ". In the application legal practice, she has been dealing with the state aid issues.

**Publications**

Prof. Daniela Nováčková is the author and co-author of some outstanding publications, including books and chapters in conference proceedings, papers, and articles in scientific journals, e.g.: *Doing business in the European Economic Area* (2013, p.184) (ISBN 978-963-7692-41-3), Palatia Nyomda and Kiadó, Publishing, Gyor; *Basics of European law for managers* (2012, p.239) (ISBN 978-80-8057-970-8) Epos Publishing, Bratislava; *International Economic Law* (2017, p.282) (ISBN 978-80-7552-530-7) Wolters Kluver Publishing Praha; *The application of transparency rules in investment arbitration as a requirement of sovereignty*. Czech Yearbook of Internationa Law: State sovereignty 2019. Hague, 2019. p. 185-202. ISSN 2157-2976. - ISBN 978-90-824603-9-1; *The impacts of BREXIT for member states.* In: Czech Yearbook of International Law: International organisations: Roč. 9. Hague, 2018. – p. 217-236. - ISSN 2157-2976. - ISBN 978-90-824603-7-7; *Use of digital technologies in business in Slovakia.* Volume 2. Cham: Springer Nature, 2021. - p. 335-355. ISBN 978-3-030-76631-3; *New rules for transparency of state aid in Slovakia* (2018), In: Socioekonomické a humanitní studie. ISSN 1804-6797; *Relationship between EU law and national law in the context of case law of judicial bodies.* (2022) In: Juridical Tribune - Tribuna Juridica ISSN (print) 2247-719; *Concepts of enterprise and economic activity in theory and judicial practice.* In: Manažment podnikania a vecí verejných ISSN (print) 1337-0510.

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# Modern Visions of Public Law

Contributions to the 6th International Conference
*Contemporary Challenges in Administrative Law from an Interdisciplinary Perspective*
May 19, 2023, Bucharest

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# Preface

*Editors*
*Professor **Cristina Aragão Seia**, Lusiada University of Porto, Portugal*
*Professor **Daniela Nováčková,** Comenius University in Bratislava, Slovakia*

This volume contains the scientific papers presented at the 6th International Conference "Contemporary Challenges in Administrative Law from an Interdisciplinary Perspective" that was held on 19 May 2023 online on Zoom. The conference is organized by the Society of Juridical and Administrative Sciences. More information about the conference can be found on the official website: https://alpaconference.ro.

The scientific studies included in this volume are grouped into three chapters:

- *Specific Interdisciplinary Interactions in the 21st Century Public Law.* The papers in this chapter refer to: administrative science or sciences? - research must remain interdisciplinary; challenges of legal regulation regarding cryptocurrencies; Government rocade - a genuine constitutional solution or an illusory, discretionary one?; problems of administration of disputes arising in connection with the public service: jurisdiction and the possibility of mediation; complementarity between civil Status acts and mitrical acts; the new trends in administrative decisions in Portugal – the Simplex program and the adequate pursuit of public interest
- *On the Vital Public Interest in Efficient, Effective and Fair Administration at All Levels of Government*. This chapter includes papers on: European Union membership and the Constitution of Romania; control over the administration in Kosovo; where next, local self-governments?; 100 years of constitutional regulation of the Romanian contentious administrative; the compensation mechanism of expropriated pursuant to Law no. 255/2010 - vulnerabilities and possible solutions; controversies regarding the withdrawal of the right of use over the land assigned on the basis of Law no. 15/2003 regarding the support given to young people for the construction of a personal property.
- *Regulatory Practice and Judicial Procedures in Public Law.* The papers in this chapter refer to: the latest legislative changes of the administrative litigation Law no. 554 of 2004; the impact of rulings relating to questions of law on administrative acts; considerations regarding the appeal to the administrative court of the individual performance appraisal report of civil servants; the administrative court system and its impact on Albanian

private enitites; authority of *res judicata* of the decision of the administrative court before the criminal court.

This volume is aimed at practitioners, researchers, students and PhD candidates in juridical and administrative sciences, who are interested in recent developments and prospects for development in the field of public law and public administration at international and national level.

We thank all contributors and partners, and are confident that this volume will meet the needs for growing documentation and information of readers in the context of globalization and the rise of dynamic elements in contemporary public law and public administration.

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# SPECIFIC INTERDISCIPLINARY INTERACTIONS IN THE 21ST CENTURY PUBLIC LAW

# Administrative Science or Sciences? Research Must Remain Interdisciplinary

Professor PhD. Habil. **Diana DĂNIȘOR**[1]

***Abstract***

*If human sciences study behaviours, administrative science mobilizes a number of disciplines, raising administration problems from a double perspective – theoretical and practical. Since the points of view of specialists in these disciplines do not overlap, one speaks of plural administrative sciences rather than of a single, unified administrative science. Administrative science is generally approached within a single discipline, even if it requires a broader approach, with no need to integrate knowledge from different disciplines that have as their object the knowledge of public administration, as it is difficult to reduce the research results from these disciplines to a common denominator. But a theory of public administration common to all administrative sciences can only be achieved through the common approach of research devoted to the current problems of public administration, research undertaken by representatives of administrative law, administrative procedure, administrative policy, sociology, history, political science, legal linguistics, etc. to focus on diverse and selective topics, to approach in a general way, but also in detail.*

***Keywords:*** *administrative science/sciences, interdisciplinary research, political science, administrative law, humanities.*

***JEL Classification:*** K23

## 1. Introduction

If humanities study the behaviour or thinking of man (alone or in a group, in the past or at present)[2], administrative sciences mobilize a series of disciplines (sociology, history, political science, law, legal linguistics, etc.), raising administration problems from a double perspective – theoretical and practical[3]. Since the points of view of specialists in these fields do not overlap, reference is made to administrative sciences, in the plural, rather than to a single, unified administrative science.

There are opinions according to which "the administrative science appears today as a set of discourses rather dispersed, layered in time and juxtaposed in space, than united in a global project and articulated around a coherent issue.

[1] Diana Dănișor - Faculty of Law, University of Craiova; associate member of the Romanian Academy of Scientists, Romania, danisordiana@yahoo.ro.

[2] Reverso Dictionnaire, https://dictionnaire.reverso.net/francais-definition/sciences+administratives, consulted on 1.03.2023,

[3] Lucie Cluzel-Métayer, *Droit administratif. Science politique*, juillet 2015, https://univ-droit.fr/unjf-cours/10534-science-administrative, consulted on 1.03.2023.

In such a way that we can legitimately wonder what exactly authorizes us to speak of a science, in the singular, but also of science simply."[4] As with the other human sciences, in order to claim to be a science, in the singular, it should meet strict criteria such as accuracy and repeatability, which would make it a unified administrative science, not a collection of administrative sciences, in the plural.[5] But is there a possibility of bringing together the knowledge of administration, of grouping the ideas aimed at the integration of all administrative knowledge in a single discipline, if we consider that the research on administration is differentiated? Even if this idea seems utopian, it is necessary to create a synthesis[6] meant to study the social phenomenon called administration and its functioning from different angles.[7] Administrative science is generally approached within a single discipline, even if it requires a broader approach, and there is no need to integrate knowledge from different disciplines having as object the knowledge of public administration, since it is difficult to bring the results of research in these fields to a common denominator.

However, there are also opinions according to which "administrative sciences are typically plural", the disciplines on which they rely, the approaches and research methods comprising not a unified discipline, but a "field of interconnected activities".[8] But a theory of public administration common to all Administrative sciences can only be achieved through the common endeavour of the research devoted to the current problems of public administration, research undertaken by the representatives of administrative law, administrative procedure, administrative policy, sociology, history, political science, legal linguistics, etc. focused on diverse and selective topics, which they would approach in a general way, as well as in detail.[9]

The development of administrative science and its recognition as a social science as such are confused, for the time being, due to the uncertainty of the definition of its object and the absence of an in-depth epistemological reflection on the purpose and methods of this discipline. The object of study of administrative science is "the clarification and in-depth analysis of the double contradictory aspect of the administration, at the same time specific, as a state apparatus, and

[4] Jacques Chevallier, Danièle Lochak, *La science administrative*, 2e édition, PUF, Paris, 1987, p. 5.
[5] Gavin Drewry, "Les sciences administratives à travers l'histoire (en faisant quelques détours)", *Revue Internationale des Sciences Administratives*, vol. 80, no. 1, 2014, p. 6.
[6] Jerzy Starosciak, „Le caractère interdisciplinaire des recherches sur l'administration", *Revue d'études comparatives Est-Ouest*, vol. 6, 1975, n°3, *La recherche administrative en Europe*, p. 16; doi: https://doi.org/10.3406/receo.1975.1982 https://www.persee.fr/doc/receo_0338-0599_1975_num_6_3_1982.
[7] *Ibidem*, p. 19.
[8] Gavin Drewry, *op. cit.*, p. 7.
[9] Janusz Niczyporuk (éd.), *Les problèmes théoriques de la science administrative*, Académie Polonaise Des Sciences (PAN) Imprimerie Scientifique de Varsovie (WDN), Bruxelles – Paris, 2012, p. 11.

yet linked to the set of other instituted forms"[10]. The current image of administrative science is that of a discipline in full development, but which has not managed to clearly define its object, purpose and methods. If once administrative science was a "non-science, a science in search of itself", now we find that it has become "an infra-science, a science which for the moment is content to describe and, when it wants to explain, limits itself to choosing one of the pre-existing images of the administration". What is desirable is the transition from an infra-science to an ultra-theory that goes beyond "the simple recourse to the image, even schematized, of the administration, which would release its components, constituents, elements in finite number constituting a start which would lead to the possibility of reconstructing any image of the administration".[11]

We can distinguish three currents of administrative science:

1. A juridical-political trend that aims to achieve a better knowledge of the structures and functioning of the state administration.

2. A current focused on (public or private) management, which is very close to the concerns of modern management.

3. A sociological current, which regroups all the research aimed at the knowledge of administrative phenomena with the help of the concepts and methods of sociology.[12]

## 2. Historical background

The emergence of a science involves the creation of a scientific community, which should be made up of professional researchers who recognize and identify themselves by questioning reality, by the methods they apply and by the criteria for assessing research, therefore by conceptual means, investigative tools and specific assessment devices which distinguish them from others. According to Thomas Kuhn[13], any science rests on a set of shared values, beliefs, techniques, "paradigms" that play an essential role in scientific dynamics, creating not only "a minimum of theoretical and methodological certainties" indispensable for "selection, evaluation and critics", but also authorizing "a more in-depth knowledge of the phenomena". But, within social sciences, the scientific field is not strictly

[10] Universalis, https://www.universalis.fr/encyclopedie/administration-la-science-administrative/3-problemes-actuels-et-perspectives-de-developpement-de-la-science-administrative/, consulted on 18.03.2020.

[11] Gérard Timsit, « La science administrative d'hier à demain… et après demain », *Revue du Droit Public* (*RDP)*, 1982, n° 6, pp. 929 et seq. — article taken over in *Théorie de l'administration*, Economica, Paris, 1986, pp. 52 et seq.

[12] See the classification of Danièle Loschak, "La science administrative: Quelle administration? Quelle science?", *International Review of Administrative Science*, vol. 41, 1 sept. 1995, pp. 239-252; as well as the classification in Enciclopedia Universalis https://www.universalis.fr/encyclopedie/administration-la-science-administrative/3-problemes-actuels-et-perspectives-de-developpement-de-la-science-administrative/, accessed 20.03.2020.

[13] Thomas S. Kuhn, *La structure des révolutions scientifiques*, Flammarion, 1972, p. 132.

closed, cutting out from radically distinct and cautiously hermetic paradigms. For, dealing with the same reality, they are permeable, the paradigms constructed in a particular disciplinary field tending to migrate to other fields[14].

Born in Europe with the emergence of the modern state, administrative science was then acclimatized in the United States, having slightly different characteristics, implanting itself later in the former socialist bloc and in Third World countries. Assimilated for a long time with the art of administration and considered an applied science that regroups the concrete knowledge needed by the administrator, administrative science today tends to define itself as a social science pursuing disinterested and theoretical knowledge of administrative phenomena.

Jean-Paul Payre, assoc. prof. in public law at the Faculty of Law in Grenoble says that "Administrative science, a relatively new discipline among social sciences, has very old antecedents. It is the heir to police science, developed at the beginning of the 18th century by the Frenchman Nicolas Delamare and numerous German authors called 'cameralists', the most famous being Von Justi, Putter, Von Sonnenfels, Von Stein"[15]. But it does not inherit from the latter the object, purpose and methods, because, "Once conceived as an annex, a complement of administrative law, contemporary administrative science claims its autonomy and character as a social science as such"[16]. If administrative law has the role of showing administration as it should be, administrative science is not a normative science, showing administration as it really is, a non-homogeneous one, made "*of a set of scattered, layered discourses*. There is no Administrative Science, but multiple approaches to the study of administration that form, while accumulating, the knowledge of administrative science"[17].

The development of administrative science is related to the birth of a developed system of public administration. The industrial revolution lies at the origin of the expansion and radical modernization of the administrative infrastructure, which is not, however, accompanied by any formal obligation to have technical studies for access to civil service[18]. In continental Europe, the origins of administrative science can be found in Prussia, which, at the beginning of the 18th century, created a chair of cameralism at the University of Halle in 1727, essentially related to technical training, because the king wanted his agents to also

[14] Jacques Chevallier, "La science administrative et le paradigme de l'action publique", in *Études en l'honneur de Gérard Timsit*, Bruylant, Bruxelles, 2004, p. 270. See also Cristina Elena Popa Tache, *Elemente de dinamică transdisciplinară în dreptul internațional public*, Ed. Pro Universitaria, Bucharest, 2023, p. 68.

[15] Jean-Paul Payre, „Fiches techniques de Science Administrative", in Alain Laurent, *Science administrative*, http://alain.laurent-faucon.over-blog.com/article-14641080.html, accessed on 20.03. 2023.

[16] *Idem*.

[17] Jacques Chevallier, Danièle Lochak, *La science administrative*, *op. cit.*, p. 5.

[18] Mihaela Emilia Marica, *Considerations on Disciplinary Sanctions Applicable to Employees. Elements of Comparative Law*, in „Perspectives of Law and Public Administration", Volume 12, Issue 2, June 2023, pp. 185-192.

acquire, in addition to the training in law, knowledge related to the practical aspects of the management of agricultural, forestry, mining exploitations and factories on which the prosperity of the Prussian state depended. The sketch of an administrative science coming into being can be found in France in the 17th and 18th centuries, under the name of "police science", in which the technical and pragmatic view is predominant. The most famous work of the period, Delamare's *Traité de police*, comes out between 1705 and 1710. With it, numerous police codes and administrative dictionaries are designed as empirical syntheses intended to provide information on administrative practices and in relation to the means of ensuring a good management of administrative services, having no doctrinal claims[19]. The deep nature of administrative science "has always been and still is that of relying on a wide range of subjects, skills and disciplines to improve the *quality* of administration"[20].

The history of public administration in many European countries follows the spirit of the feeling described by Alexis de Tocqueville who believed that "if jurists constitute the only enlightened class which the population does not shy away from, they are naturally called to occupy most of the public positions"[21]. As law has always been "an essential ingredient in the diversified intellectual structure that makes up the administrative sciences"[22], the continental administrator is a jurist specialized in administrative law[23]. Frank Goodnow, Woodrow Wilson, Ernst Freund and John Dickinson believed that the discipline of public administration was deeply rooted in public law. Wilson, a professor at Princeton before becoming the President of the United States, wanted to "found a school of public law in which public administration would constitute an essential unit in the bosom of this institution"[24], as a thorough and systematic executor of public law[25]. He criticized the fact that too little attention was given to administrative matters that are subordinated to political matters, predicting the development of a science of administration based on experience rather than on debilitating *a priori* doctrines, in which the image of a regulatory and integrative center capable of defending the coherence of administrative action was to be replaced by a juxtaposition of fractional and heterogeneous regulations[26].

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[19] Jacques Chevallier, Danièle Lochak, *La science administrative*, *op. cit.*, p. 10.
[20] Gavin Drewry, *op. cit.*, p. 13.
[21] Alexis de Tocqueville, *Democracy in America*, Oxford, Oxford University Press (Abridged World Classics edition), 1946, pp. 206-207.
[22] Gavin Drewry, *op. cit.*, p. 15.
[23] Charles Hubert Sisson, *The Spirit of British Administration*, Faber and Faber, London, 1959, p. 39.
[24] Phillip J. Cooper, "Public Law and Public Administration: the State of the Union", in Naomi B. Lynn, Aaron Wildavsky, *Public Administration: The State of the Discipline*, Chatham NJ, Chatham House, 1990, p. 256.
[25] Woodrow Wilson, "The Study of Administration", in *Political Science Quarterly*, vol. 2, 1887, pp. 197-222.
[26] Jacques Chevalier, Danièle Lochak, *op. cit.*, pp. 12-13.

### 3. Interdisciplinarity

There is a close correlation between the access to autonomy of a science, in our case administrative science, and the interdisciplinarity of the approaches to its object. What is the place of administrative science among social sciences? Is it an autonomous science, a frontier science or one that resorts to interdisciplinarity?[27] If until the 1960s administrative science appeared as a "frontier science"[28] that aimed, like the multidisciplinary sciences, to accumulate and synthesize as much knowledge as possible of the administrative fact, since the 1970s it has sought to achieve interdisciplinarity, i.e. the exchange of concepts, the confrontation between methods and points of view, with the establishment of a common language and concepts intended to give comparable results[29], which would lead to solving the problems of the functioning of the administration. Interdisciplinarity does not exclude the autonomy of a science which has its own concepts and methods, but means going beyond it in a constructive, innovative manner, it means an integration of other sciences[30]. One of the points of research devoted to administration is the study of its functioning and construction, based on observations, on some general standpoints relating to the rational or optimal nature of the organization of its activity[31].

Since administration is such a complex and 'topical' social phenomenon, it is impossible to study it by observing it from a single angle[32]. In the process of the growth of a science, we first witness the juxtaposition, then the integration of the disciplines from which this science is constituted. Administrative research today is characterized by the juxtaposition of the disciplines inherited by administrative science which is in the stage of pluridisciplinarity. As long as administrative science does not reach maturity, interdisciplinarity will not be possible[33]. As Jean Duvignaud[34] rightly noted, social phenomena give rise to a double reading: experimental (with the provision of the data of an empirical construction) and theoretical (with the cutting of the real according to operational concepts). In administrative matters, the fundamental research problems are not approached in

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[27] Jean-Paul Payre, *op. cit.*

[28] Georges Langrod (dir.), *Traité de science administrative*, Mouton et C", Paris, 1966.

[29] Amelia Georgeta Motoi, *Common language/specialized language - the case of external polysemy in law*, in „Reading Multiculturalism. Human and Social Perspectives", Tîrgu-Mureș, Ed. Arhipelag XXI Press, 2021, pp. 54-58.

[30] Simina Badea, "Comunicare și interdisciplinaritate în discursul administrației publice", in *Revista de științe juridice* no. 1/2021, Ed. Universul Juridic, Bucharest, 2021, p. 113.

[31] Jerzy Starosciak, *op.cit.*, p. 27.

[32] *Ibidem*, p. 17.

[33] Gérard Timsit, Yves Chapel, Jerzy Starosciak, "L'interdisciplinarité dans la recherche administrative en Europe", in *Revue d'études comparatives Est-Ouest*, vol. 6, 1975, n°3, *La recherche administrative en Europe*, https://www.persee.fr/doc/receo_0338-0599_1975_ num_6_ 3_1983, p. 32.

[34] Jean Duvignaud, *Introduction à la Sociologie*, Gallimard, coll. *Idées*, Paris, 1966.

a pluridisciplinary manner, this field being limited to an empirical reading. One can notice that there is "no definition of administrative science, no research on its methods and purpose, no attempt - above all - to build a theory of administration or public administration systems to be jointly undertaken by jurists, sociologists, etc."[35], because the jurist, if he is only a jurist, cannot account for the administrative phenomenon by himself, the administration being subject to political power, which is also dealt with by political science, as an instrument tasked "to achieve the social aims of society"[36]. Administration is also a social phenomenon that must be captured in its environment, by sociology, but also by economics, as a factor and stake in the economic system, psychology being essential, in turn, because it helps to understand the relationships between public agents, but also between administrators and agents. Likewise, history, demography, the science of public finance contribute to the study of administration, allowing the redefinition of power relations within the administration. Consequently, administration is a global social and human phenomenon that is not reduced to a system of rules, as its study cannot be strictly limited to administrative law[37], interdisciplinarity being introduced by the "man in the situation"[38].

In the framework of administrative research, interdisciplinarity can be assigned a double objective: to allow the exploitation of "border regions" and to reach the "hybridization"[39] of the knowledge of administrative matters[40]. There are many border regions where interdisciplinarity can be useful to administrative research[41]. Interdisciplinary research must entail "the multiplication of new branches of knowledge born from the conjunction between neighbouring disciplines, but which in fact establish new goals that have an impact on the mother sciences, enriching them".[42] The integration of these sciences, and not their simple juxtaposition will give birth to administrative science which, starting from the privileged sciences, "law, economics, sociology, history, etc., would be progressively constituted and would contribute to the enrichment and reorientation, to a certain extent, of studies and research carried out in these different disciplines"[43]

[35] Gérard Timsit, Yves Chapel, Jerzy Starosciak, *op. cit.*, p. 36.
[36] André Molitor, *Les sciences sociales dans renseignement supérieur: Administration publique*, Rapport élaboré par l'Unesco à la demande de l'Institut International des Sciences Administratives, Unesco, 1958, p. 53.
[37] Gérard Timsit, Yves Chapel, Jerzy Starosciak, *op. cit.*, p. 33.
[38] Pierre de Bie, "Introduction" au numéro spécial de la *Revue Internationale des Sciences sociales* sur la « Recherche orientée multidisciplinaire », vol. XX (1968), n° 22, p. 717.
[39] Jean Piaget, "Problèmes généraux de la recherche interdisciplinaire et mécanismes communs", in *Tendances principales de la recherche dans les sciences sociales et humaines. Première partie: Sciences Sociales*, Mouton/ Unesco, 1971, p. 624.
[40] Gérard Timsit, Yves Chapel, Jerzy Starosciak, *op. cit.*, p. 41.
[41] Ibidem, p. 42.
[42] Jean Piaget, *op. cit.*, p. 624.
[43] Gérard Timsit, Yves Chapel, Jerzy Starosciak, *op. cit.*, p. 42.

which are capable of a truly interdisciplinary production[44].

As for the relationship between ***administrative science and administrative law***, contrary to the claims of researchers in the United States, administration cannot be understood by ignoring the law that organizes it. However, studying administration could not be reduced to studying the law that governs its organization and functioning[45]. For a long time, in France, the view of administrative phenomena was essentially legal, because law occupied an important place in the functioning of administration, the legal approach enabling the best understanding of certain phenomena (administrative control, decentralization, etc.), and offered a methodological apparatus that facilitated conceptualization. But the relationship can also be the other way around, as law can be the object of administrative science which studies, in the field of administrative litigation for example, the types of appeal, the matters it deals with, the types of appellants with reference to their social situation, profession, geographical location, as well as to the administrations in question, the duration of the disputes, the effectiveness of judgments, etc.

Public action passes through the channel of law, taking the form of legal norms that are imposed on administrators with a binding force. It is bound by the observance of higher legal norms that enable it to act, but it occupies an essential place in the legal production, drawing the framework and defining the limits of its action, exercising "an action of configuring and normalizing behaviours"[46]. Bound by law, the administration issues rules, its mediation being indispensable to translate the legal device in terms of concrete legal obligations for the administrated ones, by issuing regulatory and individual acts[47].

The 20th century gives way to a non-legal reflection on the administration, administrative science and administrative law, knowing a separate, but parallel development, illustrated by the members at the top of the administration, but also by the law professors who become aware of the insufficiency of the legal approach, in order to give an account of the knowledge of public administration, and advocates the teaching of administrative science to future officials[48]. "Law is 'normative' and structuring; administrative science is 'operational'. For it, law is among the multiple constraints to which the action must adjust. In philosophical and critical terms, Law deals with 'facts' - i.e. known, proven factors, raised to the rank of concepts –, while Administrative Science deals with 'phenomena' - i.e. conjunctural, specific factors, at a certain time and in a certain place, variable in themselves, uncertain, mobile. The legal approach makes compliance with the 'norm' an end in itself; the approach to Administrative Science is only satisfied

[44] Jean-Louis de Brouwer, Hugues Dumont, "Réflexions sur le dialogue noué entre la science du droit public interne, la sociologie politique et les sciences administratives", in *Revue interdisciplinaire d'études juridiques*, vol. 8, no. 1, 1982, pp. 145-171.
[45] Gérard Timsit, Yves Chapel, Jerzy Starosciak, *op. cit.*, p. 32.
[46] Jacques Chevallier, "La science administrative et le paradigme de l'action publique", *op. cit*., p. 276.
[47] Ibidem.
[48] Jacques Chevallier, Danièle Lochak, *op. cit.*, p. 11.

with the objectively ascertained 'reality'. Ultimately, Administrative Science feeds on life and brings living matter to legal conceptualization."[49]

Correlatively, administrative science tends to be treated as a useless accessory, as the attempts to establish an administrative science that goes beyond the single legal point of view and integrates the body of knowledge useful to administrators fail, faculties of law generally remaining hostile to the introduction of a perspective other than the legal one in the curriculum of future administrators. Administrative science is reduced to administrative law with which it is confused. "Taking its place among legitimate legal knowledge, administrative law takes advantage of this recognition in order to establish its monopoly over administrative knowledge, rejecting and invalidating competing viewpoints, on which the development of social sciences could, however, confer new authority."[50]

Administrative science asks questions about the nature of the action, about the exhaustive collection of the necessary information, appreciates the relevance of the methods used, tries to understand the decision-maker's motivation, its specificity being essentially methodological, organizational, functional and behavioural. Its object is a clearly identified corpus, constituted by the "administrative fact". Without leaving law, administrative science feeds on many other sciences, being at the crossroad of most other sciences[51]. Going beyond law and integrating all the specific methodologies of organization, financing, personnel, relationship with the user and the client, relying on reality, respecting law, administrative science strives to master, concretely, each of these specificities in terms of organizational, financial, accounting, commercial "management", etc., integrating them all, rigorously and coherently, to ensure the pertinent "management" of the whole. "Within and with the observance of the constraints of all kinds that exist at a given time in a given place, administrative science deals with the action of administering, therefore the decision, a major act prior to action."[52]

The doctrinal debate on the relationship between ***administrative science and political science*** is divided into two categories: if some believe that they are two distinct social sciences, others treat them as the two sides of the same reality, the administrative tasks not being clearly distinguishable from the political ones[53], their relationship having to be thought of in terms of partial overlapping[54].

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[49] Louis Boulet, "De la science administrative à la Gestiologie", in Janusz Niczyporuk (éd.), *Les problèmes théoriques de la science administrative*, Académie Polonaise Des Sciences (PAN) Imprimerie Scientifique de Varsovie (WDN), Bruxelles – Paris, 2012, p. 28.

[50] Jacques Chevallier, "Le droit administratif entre science administrative et droit constitutionnel", in CURAPP, *Le droit administratif en mutation*, Presses universitaires de France, Paris, 1993, p. 16.

[51] Louis Boulet, *op. cit.*, p. 24.

[52] *Ibidem*, p. 30.

[53] Bernard Gournay, Maurice Duverger and Marie-Cristine Kesler make administrative science a mere branch of political science.

[54] Jacques Chevallier, « La science administrative et le paradigme de l'action publique », in *Études en l'honneur de Gérard Timsit*, Bruylant, 2004, pp. 267-292.

The question of the independence of administrative science arises not only from law, but also from political science: "we could discuss endlessly whether administrative science is only a branch of political science"[55], but affirming the radical separation between the two fields leads, while "ignoring their political dimension, to the amputation of an essential part of the substance of administrative phenomena[56], in the framework of political science research an important place being occupied by the relations between state administration and politics[57].

With regard to the relationship between ***administrative science*** and ***human sciences***, we can say that the understanding of administrative phenomena requires reference to numerous human sciences such as economics, ethnology, demography, linguistics, history, philosophy, etc., the last allowing the questioning of the purposes of administration, of the nature of its activity and its role in social processes. The human sciences that have made a significant contribution to administrative science are sociology and psychosociology, which allow both the study of social reality in its entirety and the analysis of smaller groups, to specify the place and role of administration in society[58], and the explanation for the political and social value of the various legal solutions brought to the problems of the administration.[59]

### 4. Conclusions

Administrative science is, according to Bernard Gournay[60], "the branch of social science which tends to describe and explain the structure and activities of the bodies which, under the authority of political power, constitute the apparatus of the state and public collectivities". Being a positive discipline, it notices the behaviours, bearing on the opinions, attitudes and conduct of the people and groups that make up the bureaucratic machine or have to do with it (applies to administration for a better understanding of the administrative phenomenon[61]), while administrative law comments the rules. It studies the opinions and conduct of individuals or groups who make up or deal with the bureaucratic machine. "Administrative science is to administrative law what political science is to con-

[55] Gournay Bernard, Kesler Jean-François, Siwek-Pouydesseau Jeanne, *Administration publique*, coll, "Thémis", Presses Universitaires de France, Paris, 1967, p. 7.
[56] Jacques Chevallier, Danièle Lochak, *op. cit.*, p. 47.
[57] Jerzy Starosciak, *op. cit.*, p. 17.
[58] Within the sociological current, the most famous work, whose methodology is exemplary, is that of Michel Crozier, *Le phénomène bureaucratique*, Seuil, Paris, 1963.
[59] Jerzy Starosciak, *op. cit.*, p. 16.
[60] Bernard Gournay, *Introduction à la science administrative. Les administrations publiques dans les sociétés contemporaines*, A. Colin, Paris, 1966, p. 23.
[61] Rolland Drago, *Science administrative: caractères généraux de la science administrative, les structures administratives*, Ed. Les cours de droit, Paris, 1973, p. 41.

stitutional law, or rather, administrative law comments on rules, while administrative science notices behaviours"[62].

In scientific research, the greatest needs and the greatest possibilities for discoveries and new proposals are to be found at the crossroad of various branches of science. The solution to the problems of administration lies in interdisciplinary studies, carried out by interdisciplinary teams, to elicit new answers to the questions raised by social practice on administration.[63] "In the bosom of a system of society organized in the state, the administration is connected to the society by such diverse ties, with such universal influence, that it can and must be studied from different perspectives, since the development of a complete picture of the administration cannot be undertaken by a unique branch of science. The studies carried out by different scientific disciplines, the confrontation and exploitation of these studies according to the rules of interdisciplinary research, are indispensable."[64] Absolute monodisciplinarity in administrative research does not exist.[65] But true interdisciplinarity does not yet exist either. Research is actually reduced to a simple "academic kleptomania"[66] by the juxtaposition of disciplines, the ideal to be achieved being the realization of an administrative science which, through interdisciplinarity, integrates them[67]. "Interdisciplinarity is, therefore, the condition of administrative science"[68] which will lead to the realization of systems of concepts, theoretical structures and methods common to it, thus to the integrated systemic objective unity.

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[62] Bernard Gournay, *op. cit.*, p. 21.
[63] Jerzy Starosciak, *op. cit.*, p. 27.
[64] *Ibidem*, p. 24.
[65] Gérard Timsit, Yves Chapel, Jerzy Starosciak, *op. cit.*, p. 35.
[66] Howard Becker, *Modern sociological theories in continuity and change*, New York, Dryden Press, 1957, quoted by Georges Langrod, in *Traité de science administrative, op. cit.*, p. 111.
[67] Gérard Timsit, Yves Chapel, Jerzy Starosciak, *op. cit.*, p. 38.
[68] *Ibidem*, p. 43.

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# Challenges of Legal Regulation Regarding Cryptocurrencies

PhD. student **Costin Răzvan CHIRIȚĂ** [1]

***Abstract***

*Being one of the essential cells of society, law adapts to the rhythm in which the economic, social, and political environment evolves. Through the lens of technological advances, new challenges arise for states and practitioners in regulating and understanding the mechanisms applicable to new technologies. It is undeniable that one of the biggest challenges is generated by cryptocurrencies, their mode of operation, their legal qualification, regulation, and transmission from a legal perspective. From this consideration, we consider it useful to look for the answers to the identified problems and, where appropriate, to analyze the solutions required for the regulation of this field so that we can ensure a legal framework that meets practical needs. Starting from these premises, we will analyze the way in which European legislation and Romanian legislation respond to the challenges both from the point of view of legislation and by analyzing the way in which it relates to the issue of civil capacity, identification of persons by ensuring a legal framework that subsumes the existing legal system.*

***Keywords****: cryptocurrency, regulation, Romania, European Union, MiCA.*

***JEL Classification:*** K22, K23

## 1. Introduction

Cryptocurrencies have gained popularity worldwide, offering a digital and decentralized alternative to traditional currencies. In Romania, interest in cryptocurrencies has grown significantly in recent years, and the state had to develop adequate legislation to regulate and manage this new form of financial asset. This essay will explore the evolution and key aspects of cryptocurrency legislation in Romania and the European Union, highlighting the impact and prospects for users and investors in this ever-expanding industry.

The challenges generated by the new alternative payment methods represent one of the major concerns at the state level from the point of view of ensuring a legal framework that provides fair regulation in terms of several components. On the one hand, we identify challenges regarding platform registration and approval, compliance obligations, consumer protection, taxation, supervision, and regulation[2]. On the other hand, benefits such as anonymity of transactions, security of transactions, and to some extent, the speculative element are

[1] Costin Răzvan Chiriță - Doctoral School of Law, Faculty of Law, Bucharest University of Economic Studies, Romania, costin.chirita@drept.ase.ro.

[2] Alina Popescu, *Particularities of the consumers' right to information in electronic commerce,* in „Juridical Tribune - Tribuna Juridica", Volume 8, Issue 2, June 2018, pp. 477, 478.

also causes of concern from a legal point of view. In addition, the possibility of supporting criminal activity through these new technologies is also a cause of immediate concern for the state.

From this perspective, even though it is no longer an absolute novelty, cryptocurrencies have begun to have a much greater utility, accessibility, and notoriety. These elements turn the subject into a topical discussion both from a social point of view and from a legal point of view. Therefore, it is essential to find a common regulatory framework at the international level that refers to the national legal systems and all the parties involved, starting from the name to the users[3].

Due to their decentralized character, cryptocurrencies are not controlled by any central authority, which gives them great freedom of movement, but also a level of unpredictability[4]. These attributes have led to several legal challenges related to their regulation. Questions about how to tax cryptocurrency transactions, protect investors, and prevent the usability of cryptocurrencies from being used in illegal activities are just some of the issues facing authorities.

Moreover, the anonymity offered by cryptocurrency transactions can be leveraged for illegal purposes, such as money laundering or terrorist financing. This type of possible scenario makes it necessary to create a legislative framework that protects both consumer interests and national security. In addition, the volatility of digital currencies can lead to significant financial losses for investors, and even more, the lack of knowledge about blockchain technology can lead to abuse and fraud.

Therefore, it is essential to have a balance between promoting innovation and protecting the public's interests. This involves a multi-disciplinary approach that needs to include perspectives from law, technology, economics, and politics.

An important legislative amendment appeared regarding MiCA (Regulation of The European Parliament and of the Council on Markets in Crypto-assets and Amending Directive EU 2019/1937). This legislative proposal, adopted on April 20, 2023, by the European Parliament, is the first and only legislation in the world regarding the entire spectrum of the previously identified problems. MiCA is designed to provide a harmonized regulatory framework for crypto assets, such as cryptocurrencies, tokens, and stablecoins, across the European Union[5]. Its

[3] See Cristina Elena Popa Tache, *Public International Law and FinTech Challenge*, „Perspectives of Law and Public Administration", Volume 11, Issue 2, June 2022, pp. 218-226 and Chaowei Xu, Jin Banggui, *Digital currency in China: pilot implementations, legal challenges and prospects*, „Juridical Tribune - Tribuna Juridica", Volume 12, Issue 2, June 2022, pp. 177-193.

[4] Robert Slade, *Danger: Metaverse Ahead*!, „ISSA Journal", vol. 20, issue 9, september 2022, p. 5.

[5] Cristina Elena Popa Tache, *O corelare a cripto-activelor cu dreptul internațional al comunicațiilor și al noilor tehnologii / A Correlation of Crypto-assets with International Law of Communications and New Technologies*, „Revista de Drept Bancar și Financiar", no. 1/2023 (January-June), Ed. Rosetti, online.

main objectives include improving investor protection, promoting market integrity, and promoting financial innovation in the crypto-asset sector[6]. We will analyze the form adopted by the European Parliament as we believe it will outline the future of cryptocurrencies under the legislative aspect for the next period, not only at the European level but also at the international level[7].

In terms of national legislation, it is still uneven with regard to cryptocurrencies, with legal provisions in special laws but no express law dealing separately with this subject. Legislation regarding cryptocurrencies in Romania has been the subject of a gradual evolution as the state understood the need to create an adequate legal framework for these digital assets. In 2018, the National Bank of Romania issued a statement drawing attention to the risks associated with the use of cryptocurrencies and warning that they are not currencies of exchange or legal means of payment in Romania[8]. However, the same statement acknowledged the importance of blockchain technology and its possibilities for innovation. Later, in December 2019, the Romanian Parliament adopted the Law on Electronic Payment Services, which transposed the European Directive on Payment Services (PSD2) into national legislation through Law 209/2019 and Law 210/2019.

Finally, legal provisions regarding cryptocurrencies can also be found in Law 129/2019, on the prevention and laundering of money, as well as in Law 30/2019 on the amendment of the Fiscal Code. It is expected, however, that with the MiCA vote, the national legislation will see significant improvements, either through transposition in full, or through adaptation to the realities of Romanian societies. Furthermore, education and awareness will be a must that will play a central role in promoting the responsible use of cryptocurrencies.

## 2. Definition of terms

Important for any field of research is, of course, the definition of terms. Therefore, we will try to go through what cryptocurrency and the derivatives of this new technology mean by referring to the specific national and European legislation.

[6] Delia-Raluca Șancariuc, *Economic Regulation, Institutions and Entrepreneurship: Perspectives from the Experience of States in Transition*, in „International Investment Law Journal", Volume 2, Issue 1, February 2022, p. 73.

[7] See Nina Gumzej, *Data protection for the digital age: comprehensive effects of the evolving law of accountability*, in „Juridical Tribune - Tribuna Juridica", Volume 2, Issue 2, December 2012, pp. 82, 83.

[8] *Poziția Băncii Naționale a României în legătură cu monedele virtuale* available online https:// www.bnr.ro/page.aspx?prid=14338, accessed on 12.04.2023.

### 2.1. National legislation

According to the provisions of Law 129/2019 for the prevention and combating of money laundering and the financing of terrorism, as well as for the modification and completion of some normative acts, art. 2 letter $t^2$), *virtual currencies mean a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily linked to a legally established currency and does not have the legal status of currency or money, but is accepted by natural or legal persons as a medium of exchange and can be transferred, stored and traded electronically*[9]. In accordance, it is necessary from the beginning to draw a difference, from a legislative and practical standpoint, between virtual currency and electronic currency. Electronic currency is defined by art. 4 para. (1) letter f) from Law 210/2019 regarding the activity of issuing electronic money.

At the same time, Law 129/2019 for the prevention and combating of money laundering and the financing of terrorism, as well as for the amendment and completion of some normative acts, by means of art. 2 letter $t^2$) also defines the digital wallet provider, this being *an entity that offers safekeeping services of private cryptographic keys on behalf of its customers, for the holding, storage, and transfer of virtual currency*. Indirectly, Law 129/2019 art. 2 letter $t^2$) also defines the digital wallet, this being, by interpretation, a set of cryptographic keys for holding, storing, and transferring virtual currency.

Interpreting the aforementioned legal provisions, we can understand that the Romanian legislator tried to define the term, "cryptocurrency", by considering the distinctive elements. Referring to the text of art. 2 letter $t^1$) of Law 129/2019 shows that it is decentralized and, consequently, is not issued or guaranteed by the central bank or a public authority. The economic value of cryptocurrency is solely related to the value that users place on it. From this point of view, we can consider that, in practice, this virtual currency is difficult to regulate by corresponding application of the basic banking legislation, or even of the electronic currency legislation.

Another important element of Law 129/2019 refers to the digital wallet provider. This aspect was important to be able to create traceability of transactions in this area. As can be seen from the very title of the normative act analyzed, it looks more at a criminal side, being sources of public law rather than private law, as it has in mind, the fight against money laundering and the financing of terrorism. From this point of view, we understand why the legislator needed to define the terms considering the serious threats that may appear against the background of the anonymous nature of transactions in this field. The concrete elements that the legislator understood to regulate, and the authorities involved in the process will be developed in the following paragraphs.

[9] Published in Official Monitor of Romania 589 on 18.07.2019.

However, we appreciate that in terms of form, the definition of the terms will acquire new values that will automatically lead to the unification of the legislation in this aspect. It is undeniable that the space of cryptocurrencies cannot only lead to a criminal environment, being a series of private civil situations that should find coverage at the legislative level.

### 2.2. European legislation

Unlike national legislation, European legislation through the newly approved Regulation of the European Parliament and of the Council on crypto asset markets and amending Directive (EU) 2019/1937 tends to an exhaustive definition to include all the elements that are part of the new technology based on blockchain or DLT (Distributed Ledger Technology). This type of technology is also defined by Art. 13 para. (1) of the Regulation of the European Parliament and of the Council on crypto-asset markets and amending Directive (EU) 2019/1937 as a type of technology that supports the distributed recording of encrypted data[10].

According to Art. 13 para. (2) of the Regulation of the European Parliament and of the Council on cryptoasset markets and amending Directive (EU) 2019/1937 "*cryptoasset" means a digital representation of value or rights that can be transferred and stored electronically, using distributed ledger technology or a similar technology*[11]. With this definition, the European Parliament has in mind an extremely important element which, until now, is not defined in the national legislation. Therefore, a part-whole relationship is created for the first time. Thus, according to this definition, by identifying the concrete elements in society, the crypto asset is defined as a whole, and part of this whole being, among others, cryptocurrencies[12].

Further through paragraphs (3)-(5) art. 13 of the Regulation of the European Parliament and of the Council on crypto-asset markets and amending Directive (EU) 2019/1937, the definitions of the asset-related token, the token assimilated to the electronic currency and the utility token are presented. The definition found within these three lines is important to understand the difference between crypto assets and to identify their practical applicability.

Art. 13 para. (3) of the Regulation of the European Parliament and of the Council on crypto-asset markets and amending Directive (EU) 2019/1937 identifies the asset-related token *as a type of crypto-asset aimed at maintaining a sta-*

[10] Regulation of the European Parliament and of the Council on cryptoasset markets and amending Directive (EU) 2019/1937 available online https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52020PC0593 accessed on 12.05.2023.

[11] Ibid.

[12] *Demystifying cryptocurrency and digital assets*, available online https://www.pwc.com/us/en/tech-effect/emerging-tech/understanding-cryptocurrency-digital-assets.html, accessed on 12.05.2023.

*ble value, by reference to the value of several fiat currencies that have legal tender status, of one or more commodities, or of one, or more crypto-assets or a combination of such assets.* This type of cryptocurrency is a virtual currency that is related to external elements. More precisely, this type of currency tries to maintain stability and credibility by referring to other elements such as fiat currencies (for example, the dollar or euro), which are legal and enjoy credibility, or other goods or resources (for example, gold) to be able to offer less price fluctuation[13].

Art. 13 para. (4) of the Regulation of the European Parliament and of the Council on crypto-asset markets and amending Directive (EU) 2019/1937 provides that token assimilated to electronic currency means *a type of crypto-asset whose main purpose is to be used as a medium of exchange and which aims to maintain a stable value, by referring to the value of a fiduciary currency that has legal tender status.* Perhaps one of the most interesting legislative approaches is the legislation of the token assimilated to electronic money, since by Directive 2009/110/EC of the European Parliament and of the Council of September 16, 2009, on access to the activity, the conduct and prudential supervision of the activity of institutions issuing electronic money, amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC already regulates electronic money. However, through this Regulation of the European Parliament on crypto-asset markets and amending Directive (EU) 2019/1937, a new regulatory area is created. Basically, from the interpretation of the new provisions, we understand that any token assimilated to electronic currency can be considered as electronic currency, but not all electronic currencies can be assimilated to tokens assimilated to electronic currency. All these delimitations consider the elements of a practical nature analyzed and studied, widely present in the statement of reasons that were the basis of the Regulation.

Finally, art. 13 para. (5) tends to merge all other types of crypto assets under one roof, from NFTs (non-fungible tokens) to Bitcoin, other cryptocurrencies, or products, these being represented by the utility token, *a type of crypto asset that is intended to ensure digital access to a good or service, available on DLT, and which is only accepted by the issuer of the respective token.* The utility token is a type of product through which the user is given access to a product or service that has not yet been launched, broadly speaking, digital coupons for the company's service. They can also have a different utility and are not just a means of paying in advance or reserving products. We consider the possibility of being used as a cryptocurrency for a certain platform and offering the possibility to open access to the holder to certain features of the platform as well as many others.

We can see that through this regulation, the aim was, first, to identify and

[13] Dell'Erba, Marco, *Stablecoins in Cryptoeconomics. From Initial Coin Offerings (ICOs) to Central Bank Digital Currencies (CBDCs)* (February 23, 2019). „New York University Journal of Legislation and Public Policy", Forthcoming, Available at SSRN: https://ssrn.com/abstract=3385 840, p. 7.

then delimit all the crypto assets identified up to this point by the European legislator. However, we appreciate that, even though it represents a legislative innovation, it does not cover the entire spectrum of crypto assets. However, it certainly represents the cornerstone of how the national legislation of all member states will be shaped and, why not, a template that can be transposed internationally. The only unknown aspect of this legislation is when it will become effective.

After being submitted to the Council of the European Union, this Regulation will be published in the Official Journal of the European Union and will be effective within 20 days. In principle, according to art. 126 para. (3) of the Regulation of the European Parliament on crypto-asset markets and amending Directive (EU) 2019/1937, it will apply within 18 months of its adoption. This transition period allows the states the opportunity to put in place the necessary framework for implementation.

### 3. Regulated areas

As we have shown before, the difficulties in regulation related to cryptocurrencies and crypto assets are more about how they relate to issues such as registration and approval of platforms, whether we consider the issuer of crypto assets, whether we consider the trading space, their taxation or supervision markets, viewed from an administrative point of view. However, we consider it pertinent to also analyze elements such as quality, i.e., whether their holder can be both natural persons and legal persons, and then to identify to what extent real means of control over the legal capacity of natural persons can be ensured to be able conclude documents regarding the transfer of ownership rights over them.

We can observe from the previous chapter that Law 129/2019 for the prevention and combating of money laundering and the financing of terrorism, as well as for the modification and completion of some normative acts, creates the premises for the regulation, as a novelty, of virtual currencies, which is why it is necessary to analyze it in its entirety of this normative act in order to discover to what extent it provides the legal framework for the regulation of this new technology.

Thus, in addition to the definition, we discover, through art. 301 para. (1) from Law 129/2019 for the prevention and combating of money laundering and the financing of terrorism, as well as for the amendment and completion of some normative acts that *the authorization and/or registration of providers of exchange services between virtual currencies and fiduciary currencies and providers of digital wallets carried out by the Commission provided for in art. 30 para. (1)*[14]. We therefore understand that there is a triple regulation regarding authorization and registration in the field of virtual currencies. The authority responsible for

[14] Published in Official Monitor of Romania 589 on 18.07.2019.

issuing these documents is the Foreign Exchange Activity Authorization Commission under the Ministry of Public Finance. However, it is not the only institution found in the approval procedure, according to art. 301 para. (3) of the same Law 129/2019, *the Authority for the Digitization of Romania also has powers in the field, which will issue a technical opinion for the service providers* mentioned in art. 301 para. (1) from Law 129/2019.

Even though the normative act has been in force since 18.07.2019, these services are still impossible to provide on the territory of our country. Considering that according to art. 301 para. (4) from Law 129/2019, *the authorization and/or registration procedure, as well as the procedure for granting and withdrawing the technical approval is established by a Government decision, developed by the Ministry of Public Finance together with the Authority for Digitization of Romania and the Office, with the opinion of the Ministry of Internal Affairs and the National Authority for Consumer Protection*, and, at the same time considering that, until now, there is no such Government Decision, the regulation is purely theoretical, its applicability being non-existent. It is true that according to public data, on 12.05.2023, the draft Decision was put up for public debate on the website of the Ministry of Public Finance, but the date of its approval is still unknown[15].

Continuing the analysis, we can identify another normative act with applicability in the field, this time the national legislator has in mind the establishment of a tax regime for the income obtained on the territory of Romania from transfers involving virtual currencies. According to article 116 paragraph (2) of Law 227/2015 on the Fiscal Code, *the earnings from the transfer of virtual currency in the case of the income provided for in art. 114 para. (2) lit. m), is determined as the positive difference between the sale price and the purchase price, including the direct costs related to the transaction. Earnings below the level of 200 lei/transaction are not taxed, provided that the total earnings in a fiscal year do not exceed the level of 600 lei. (N.R. applicable starting with the tax income for the incomes made in 2019)*[16].

Regarding this normative act, it mentions that taxation is carried out by another state institution, namely the National Tax Administration Agency. It is obvious that it is the only one in a position to follow the declaration and collection of taxes from this type of activity. As for the tax rate, it is in the amount of 10% of the value of the gain calculated by determining the positive difference between the sale price and the purchase price. From this point of view, however, we can see that a regulatory measure of cryptocurrencies was not pursued, but rather the

[15] Draft Decision for the approval of the procedure for authorization and/or registration of providers of exchange services between virtual currencies and fiduciary currencies and providers of digital wallets, as well as the procedure for granting and withdrawing the technical approval available online, https://mfinante.gov.ro/static/10/Mfp/transparenta/proiecthotcripto_11052023.pdf, accessed on 12.05.2023.

[16] Published in Official Monitor of Romania no. 44 on 17.01.2019.

taxation of some sources of income.

Precisely in consideration of this aspect, the definition of virtual currency is not found in the Fiscal Code but is applied by correspondence from Law 129/2019. It is obvious that the national legislation at the moment is extremely deficient on this subject. Conceptually, the definition of many elements that we will try to analyze by considering the entire legislative system are missing. What is certain is that, at the time of the first half of 2023, the only regulation applicable to cryptocurrency is that of taxation. However, this reality only partially answers the challenges that have arisen as a result of new technologies.

Starting from the Fiscal Code, we note that it does not differentiate between natural persons of age or natural persons who are minors in terms of their capacity as taxpayers. However, the following question arises, to the extent that a person who has not reached the age of 18 pays tax on the income obtained from transactions with virtual currencies, to what extent is he to own the property of such instruments, and more so in what measure, he can make acts of disposal, respectively their acquisition and subsequent alienation.

According to the provisions of art. 37 of the Civil Code, *the capacity of exercise is the person's ability to conclude civil legal acts on his own*, and according to art. 38 Civil Code, *the full exercise capacity is acquired on the date when the person becomes legal*[17]. Going further, art. 41 of the Civil Code stipulates that minors who *have reached the age of 14 have limited exercise capacity* and *can make minor acts of disposition*. Or since the Fiscal Code does not tax the income made from the virtual currency of below 200 lei, in adversity, it taxes all other income regardless of the value and regardless of the taxpayer, extending to taxing income earned by minors, with or without the ability to exercise, be it full or limited.

Going further with the reasoning, we try to understand the legal character of virtual currencies. Since the provisions of Law 129/2019 expressly differentiate between virtual currency and electronic currency, we can conclude that virtual currency cannot be considered a means of payment. As a consequence, it is necessary to analyze what type of goods they are in order to be able to determine whether the civil exercise capacity is necessary to be able to transact. The immediate next conclusion would be that these are intangible goods, i.e. economic values that have an abstract existence, taking the form of securities. Even if the doctrine presents securities and trade effects[18] in this category, we appreciate that the only possible classification at this moment can be made exclusively by the proximity of cryptocurrencies to this category of goods.

Or suppose we can reason in this direction. In that case, it is unequivocal that depending on their value, trading is subject to the rules regarding legal capacity, so if acts of disposal are carried out, respectively their alienation, as a

[17] Published in Official Monitor of Romania no. 505 on 15.07.2011.
[18] Gabriel Boroi, *Drept Civil. Partea Generală,* Ed. Hamangiu, Bucharest, 2012, p. 83.

consequence, the natural person will have to have the civil capacity to full exercise. A contrary interpretation may lead to non-compliance with the mandatory provisions of the Civil Code. It is true that from the perspective of the special that derogates from the general, we are in the ratio of special norm Fiscal Code, general norm Civil Code, but this interpretation only appears as a result of the legislator's silence on this subject.

It is obvious that since there is no regulation even regarding trading institutions, we cannot apply by correspondence other legal norms in similar fields. For example, we cannot analyze the operating and trading rules of the Bucharest Stock Exchange to be used by correspondence in the case of cryptocurrency trading. Being an effectively unregulated market, trading with this type of virtual currency is not recognized as having any limitations. However, trading conditions on the Bucharest Stock Exchange for individuals can only be done with the obtaining of full legal capacity. Therefore, we appreciate that it is useful for the legislator to adopt legal norms that it will define on the quality and capacity of the people. Currently, most means of trading virtual currencies are found in the online environment, through applications, their security criteria being extremely easy to overcome. We are referring here, of course, to authentication, but especially user identification.

Equally interesting is the statute of the legal entities in terms of capacity and quality. By referring to the legal provisions adopted, we understand that the purpose of a commercial company is to make a profit, and the profit-generating activities are limited to CAEN codes. Starting from this premise, by referring to the amendments brought to the Fiscal Code by Law 30/2019 we can observe that the legislative innovation regarding cryptocurrency concerns exclusively the taxation of sources of income, *per a contrario* the sources of profit will not be taxed.

From this perspective, we can observe that in terms of the quality of holder of crypto assets, national legislation excludes commercial companies *ab initio*. They are not allowed to trade, and consequently, they are also not allowed to profit from this type of source. However, practical necessity should lead the legislator to a solution in this direction as well. It is unequivocal that the current regulation places legal entities in a disadvantaged position. From a fiscal point of view, taxation does not exist, and even more, from a quality point of view legal entities are in a gray area.

Another sensitive area regarding the trading or use of virtual currencies concerns consumer protection policy. Furthermore, in the national legislation there is no specific regulation to ensure protection against abuses or pyramid schemes, piracy, or any other element that can bring significant harm to users, information campaigns being lacunar. The cryptocurrency market's volatility in terms of trading is currently known, this phenomenon being doubled by all the previously discussed elements.

However, to date, no significant steps have been taken in terms of regulation. As we have shown in the previous paragraphs, the service providers were

legally unable to authorize themselves as the state did not offer a real possibility to register in public registers. The National Bank of Romania is the only institution in Romania that regularly transmits, through its public communications, alarm signals regarding the volatility and risk to which those interested in these virtual currencies are subject[19]. Even though it does not have direct attributions in the field, this institution is able to assess the degree of risk regarding investments or transactions with these types of products[20].

We consider it useful and pertinent to also mention the direction that the European Union gives to regulation in the field through the Regulation of the European Parliament and of the Council on crypto-asset markets and amending Directive (EU) 2019/1937. Although, as I mentioned, this rule is not yet in force, it must be taken into account as it will shape the future of crypto assets in all member states. In addition to a coherent definition of the terms, an attempt is also made to regulate the following aspects:

a) authorization and supervision of crypto asset issuers, service providers, and trading platforms. They will be required to obtain an authorization from the competent national authorities to be able to operate within the EEA;

b) the introduction of minimum requirements to be able to operate, such as capital limits for operation, cyber security conditions, administration traceability, compliance with the legislation on money laundering, abuse of dominant power, and conflict of interests;

c) investor protection, such as requirements to provide a white paper containing detailed information about the crypto asset;

d) regarding the asset-related token, stricter rules will be implemented for issuance and operation, including additional guarantees and scarcity, not only declared by referring to a specific asset or to a fiduciary currency that can still file to create the appearance of stability.

e) implementation of a system to ensure a single regulatory framework at the level of the European Union to allow crypto-asset issuers and service providers to operate in member states using a passport-like mechanism which would make entry much easier on the market, but also the traceability of cross-border operations within the Union.

## 4. Conclusions

We can understand from the brief presentation of innovation at the legislative level proposed by the Regulation of the European Parliament and of the

[19] Press release regarding the position of the National Bank of Romania in relation to virtual currencies dated 15.04.2021 available online https://www.bnr.ro/page.aspx?prid=19236, accessed on 12.05.2023.

[20] See Diana Maria Ilie, Ionel Didea, *Restructuring Practice is Now Growing Worldwide Post-Covid Insolvency*, in „International Investment Law Journal", Volume 2, Issue 1, February 2022, p. 22.

Council on crypto-asset markets and amending Directive (EU) 2019/1937 that the trend is to respond to the challenges identified during the study. However, it is imperative that all these mechanisms come into operation in the near future.

The European legislator, as well as the National legislator, focus on regulating the providers and issuers of crypto-assets. From our point of view, it is equally important to find legislative solutions regarding the user also. This regulation indeed attempts to introduce concepts and create institutions that can ensure a minimum protection for consumers through all the previously presented elements, but we cannot help but notice that minimum elements regarding the identification of individuals are completely missing.

If the current regulation is the one that will decide the future of crypto-assets we can undeniably conclude that it is flawed. Despite the volatility, this sector is a profitable one, and limiting the quality of the user to individuals is at least curious in the national legislation from several perspectives. First of all, from the perspective of the volume of transactions, we deduce that legal entities, being associations of persons, can much more easily increase the number of those who operate in this field, automatically increasing financial turnover, aspects that can be extremely beneficial for the budget state by identifying means of charging and taxation. Secondly, we consider the character of permanence that seems to be taking shape with regard to this type of goods, the new technologies based on DLT (Distributed Ledger Technology) are still in the pioneering years, but they are elements that will be part of daily life; therefore, the legislative vacuum and the legislator's silence cannot remain indefinitely. As I mentioned, the law should be the mirror of society, and following this principle, the intervention of the state is imperative. Finally, we cannot imagine that legal entities do not already operate in this field as users, the problem being that they operate, at least in Romania, in a gray area.

We understand that there is real progress for the regulation of the field of crypto assets. There is no doubt that these technologies will continue to advance and in addition to the problems identified in this study there will be several new challenges as well as opportunities. In this sense, it is necessary to identify some legal mechanisms through which to achieve a balance between regulation and innovation.

Under this aspect, we believe that the benefits can overcome the challenges as legislation inclined towards stimulating innovation and technology can lead to the creation of competitive advantages in relation to other legislations. Attracting new investments can turn any country into a hub for blockchain technology. Identifying how these benefits can be implemented are extremely varied, from the allocation of considerable sums from the state budget for research, to fiscal facilities for the actors involved in this sector. The legislative trend appears in this idea as a whole set of legal norms through which the state can support the development of the future in a real and sustainable way. If, at present, it took four years for substantial legislative changes, we believe that in the future, by means

of a constructive dialogue, the periods of legislative silence can be reduced.

It is essential that crypto-asset legislation remains up-to-date and adapted to the rapid changes in the industry. Authorities should constantly monitor and analyze technological developments and cryptocurrency market trends to identify potential regulatory gaps and take appropriate action accordingly. A close collaboration between the relevant actors in the field is equally important, whether we are talking about the authorities, the industry or the communities of users and investors. Through this dialogue, diverse perspectives can be gained, and the experience and expertise of different parties involved can be considered. Thus, more comprehensive, and effective legislation can be developed that addresses the needs and concerns of all concerned.

In conclusion, we show that national legislation on virtual currencies indicates significant progress towards the proper regulation and management of this ever-expanding industry. Through a consistent set of rules and a balanced approach, Romania can create an environment conducive to innovation and development in the field of cryptocurrencies, while ensuring the protection of users and investors. At the same time, much more important steps have been taken at the European level and, as we mentioned in the previous paragraphs, it seems that the future of crypto assets is taking shape very strongly in the direction drawn by the Regulation of the European Parliament and of the Council on crypto asset markets and amending the Directive (EU) 2019/1937. Even if this is also incomplete, we believe that it is the responsibility of the member states to identify and apply legal rules to complete it and to respond to the specific challenges of each country. However, we cannot fail to emphasize that the relevant decisions in the field can transform any of the member states into technological hubs with substantial benefits.

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# Government Rocade - A Genuine Constitutional Solution or an Illusory, Discretionary One?

Lecturer **Oana ȘARAMET**[1]

***Abstract***

*Democracy is also about majority, a majority that is increasingly difficult to achieve as a result of holding an election to appoint representatives to Parliament. However, the governance of a state must be ensured, which is why the constituent legislator has the difficult task of finding constitutional solutions to build such a majority. However, such majorities will always be fragile, and those who form them will try to find the most surprising solutions to ensure their survival. One such solution could be the governmental rocade envisaged by the current parliamentary majority in Romania? Can the constitutional rules on the formation of a government be interpreted and applied in a discretionary manner? Through this study we aim to identify possible constitutional solutions for such a governmental rotation, their viability, including by analysing the jurisprudence of the Constitutional Court, but also the constitutional rules concerning the formation of government in countries with a political regime similar to ours, such as Portugal, Finland, as well as the limits of a possible discretionary power in the implementation of such a rotation.*

***Keywords:*** *government formation, government rotation, parliamentary majority, constitutionality, discretionary power.*

***JEL Classification****:* K10

## 1. Introduction

The writing of this paper was prompted by the current situation on our political scene, at the level of the current government.

Last year, at the time of the formation of the coalition currently in government[2], a novelty was introduced for coalitions formed to obtain a parliamentary majority and secure government, namely the "governmental rocade".

Setting up a parliamentary majority is more than a challenge, it is the

[1] Oana Șaramet - Faculty of Law, "Transilvania "University of Brașov, Romania, oana.saramet@ unitbv.ro.

[2] The current governing coalition, made up of the Social Democratic Party (PSD), the National Liberal Party (PNL), the Hungarian Democratic Union of Romania (UDMR) and the Parliamentary Group of National Minorities in the Chamber of Deputies (GPMN), was formed following the conclusion, on 25 November 2021, of a Political Agreement between the aforementioned parties, in order to ensure government for the period 2021-2024. This agreement can be consulted at the following link: http://www.udmr.ro/upload/dokumetumok/Acord_politic_PNL_PSD_UDMR_2021.pdf, consulted on 12 May 2023.

result of negotiations, Machiavellian even, sometimes at least, when each parliamentary party will want to grab a seat at the governing table. The reality of parliamentary elections in recent years[3] in our country and in other countries[4] has shown us, on the one hand, a rather low turnout of citizens[5] and, on the other hand, a diversity of electoral choices expressed by voters. This diversity of opinions expressed through votes is beneficial because it can confirm that most citizens who exercised their right to vote identified the political party or group that best expressed their wishes and political interests. However, it is by no means desirable to have such diversity in terms of the percentages obtained following the elections and in terms of the number of seats held in the two chambers of Parliament, as it is difficult, or even very difficult, to ensure peaceful, comfortable government for the entire duration of that Parliament's term of office. The more uncertain the outcome of the elections, as reflected in the percentages obtained by political parties and political groupings following the elections, which cross the electoral threshold[6], the greater the difficulty of achieving a parliamentary majority. Moreover, when a parliamentary majority is formed after many long and tiring negotiations and shaky compromises, the peace will be only apparent, interrupted quite often by less or more consistent disagreements, followed by new efforts to reach a new compromise until the compromise cannot be reached and the coalition that secured the parliamentary majority breaks up.

Thus, in multi-party systems, it is increasingly difficult for a party or an alliance of parties to obtain a majority of the votes cast in elections, a majority which should also be present in Parliament and which would allow it to give a

[3] See in this regard, for example: the minutes of the final results of the Senate and Chamber of Deputies elections drawn up by the Central Electoral Office for the 2016 parliamentary elections, as well as for the 2020 elections, which can be consulted at the following links: for 2016: https://parlamentare2016.bec.ro/wp-content/uploads/2016/12/3_RF.pdf, and for 2020: https://parlamentare 2020.bec.ro/wp-content/uploads/2020/12/pv_1640.pdf, respectively, consulted on 12 May 2023.

[4] See, in this regard, the results of the last parliamentary elections held in Bulgaria this year (these can be viewed at the following link: https://www.statista.com/statistics/1376719/bulgaria-parliamentary-election-results/, consulted on 12 May 2023), or those in Finland, also held in 2023 (these can be viewed at the following link: https://vaalit.yle.fi/ev2023/tulospalvelu/en/, consulted on 12 May 2023)

[5] For example, the turnout in the 2016 Romanian parliamentary elections was 39.49% of eligible voters (see: https://prezenta.bec.ro/parlamentare2016/, consulted on 12 May 2023), and in the 2020 elections it was only 31.89% (see in this regard: https://prezenta.roaep.ro/parlamentare06122020/romania-countiesconsulted on 12 May 2023).

[6] According to Art. 94 para. 2, sentence 2 of Law no. 208/2015 on the election of the Senate and the Chamber of Deputies, as well as on the organization and functioning of the Permanent Electoral Authority, as amended, the electoral threshold is the minimum number of valid votes required for parliamentary representation, calculated as follows: (a) 5% of the total valid votes cast nationally or 20% of the total valid votes cast in at least 4 constituencies for all electoral contestants; (b) in the case of political alliances and electoral alliances, to the 5% threshold laid down in point (a) shall be added, for the second member of the alliance, 3% of the valid votes cast throughout the country and, for each member of the alliance, from the third onwards, a single percentage of the valid votes cast in all electoral constituencies, not exceeding 10% of these votes.

vote of confidence to the proposed government. This is true in constitutional systems where the vote of Parliament plays a key role in the procedure for appointing the government. As the desire to govern and, above all, to govern as much as possible is particularly intense, the parties and/or political parties that make up the parliamentary majority will accept any solution that meets their wishes. In such a context, we believe that this is also the solution identified by the coalition currently in government in our country, as we have identified it in footnote 1 of this paper. The solution identified was no longer confined to a specific division of the various posts in the Government, such as those of deputy prime ministers or ministers, the heads of public authorities and institutions in the sphere of public administration, prefects, etc., but also took into account the office of prime minister. Thus, it was decided that this office would be held in turn by the leaders (appointed or about to be appointed) of each of the two parties in the coalition[7], the parties with the largest percentages in the parliamentary majority[8]. This rotation, rotating, governmental rotation should happen very soon, at the end of May this year.

Could this be the first time such a change has taken place - a rotation of prime ministers?

Between October 1895 and December 1916, this system of governmental rotation was used[9], a system introduced by King Carol I and "whereby the two major parties of Romania in the modern period, namely the National Liberal Party and the Conservative Party, alternated in government every four years"[10]. This was an attempt to ensure the stability of political life in order to modernise the state[11], which, in our opinion, was achieved at that time. This system of governmental rotation was abandoned because of the First World War, the subsequent political upheaval, including following the Great Union of 1918, and the establishment of the dictatorship of Charles II. Taking into account the practice at that time, we consider it inappropriate, even incorrect, to use the term 'governmental rotation' to identify the current agreement initialled by the governing coalition. However, we believe that it is possible to use the term "governmental rotation" because, although the holders of certain government positions change, even the person holding the position of Prime Minister, these changes occur within the

[7] Therefore, until 25 May 2023, the position of Prime Minister will be held by the PNL, through Mr Nicolae-Ionel Ciucă, and then until the general elections in 2024, it will be held by "the second candidate from the PSD". See the Political Agreement between the above-mentioned, to ensure the government for the period 2021-2024, *op. cit*, p. 1.

[8] See in this regard the distribution of parliamentary mandates in the current legislature of our Parliament as mentioned on the website of the Chamber of Deputies, link being: https://www.cdep.ro/pls/parlam/structura.gprespectively on the Senate website, link being: https://www.cdep.ro/pls/parlam/structura.gp?leg=2020&cam=1&idg=&poz=0&idl=1, both consulted on 12 May 2023.

[9] See in this regard *Rotativa guvernamentală* in the *Encyclopaedia of Romania*, accessible at http://enciclopediaromaniei.ro/wiki/Rotativa_guvernamental%C4%83, accessed on 12 May 2023.

[10] Ibid

[11] See, *Rotativa guvernamentală* in the *Encyclopaedia of Romania, op. cit.*

same coalition, the composition of which is not affected[12].

But is such a political agreement in line with the constitutional rules in force concerning the procedure for appointing the Government? If we analyse the relevant constitutional provisions[13], namely those of Article 103 in conjunction with Article 85 of the Constitution of Romania, republished, we will obviously observe that there are no constitutional provisions that expressly allow or prohibit such conduct by parliamentary parties. Moreover, there are no express provisions by which the President of Romania, the Romanian Parliament or the Constitutional Court can act directly to stop such actions by parliamentary parties or formations.

Consequently, if such a governmental rocade is not prohibited, *expressis verbis*, by constitutional rules, does it mean that it would be allowed?!

## 2. Issues concerning the appointment of a government

In this context, we find ourselves in a situation where a political will must find a constitutional solution, which we will have to look for in the provisions concerning the procedure for appointing the Government, as well as those concerning the termination of its mandate.

Thus, summarizing the provisions of Article 85 in conjunction with those of Article 103 of the Constitution, we can mention that, on the one hand, it is the President of Romania who initiates the procedure for appointing the Government, by designating the candidate for the office of Prime Minister, but it is also he who closes it by appointing, by decree, the Government that has received the vote of confidence from the Romanian Parliament. The Government and each of its members will exercise their mandate from the date of swearing in before the President of Romania, in a ceremony organised for this purpose[14].

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[12] We support this point of view by taking into account the definition given to the notion of rocade by the Explanatory Dictionary of the Romanian Language, according to which the rocade is "[a] move in chess that can be made only once during a game and that consists in bringing one of the rooks next to the king and in the king passing over it, keeping the colour of the starting field", but by this we can also understand "mutual inversion of the position occupied by two elements". See in this sense: https://dexonline.ro/definitie/rocad%C4%83, consulted on 12 May 2023. On the other hand, we believe that if this phrase - "rocada guvernamentală" - is to be enshrined in the literature through the practice established by the current governing coalition, in order to remain within the limits imposed by the above definition, there can only be one such movement within a coalition and the composition of the coalition should not be changed.

[13] These provisions are synthetically confirmed by the provisions of Article 16 of the Administrative Code, as subsequently amended and supplemented (Government Emergency Ordinance No. 57/2019, as subsequently amended and supplemented), and are developed, with particular reference to procedural aspects, by the Rules of Procedure of the joint activities of the Chamber of Deputies and the Senate, through Articles 87-98.

[14] In order to accurately reproduce this procedure, it should be mentioned that, according to Article 103 in conjunction with Article 85 of the Constitution of Romania, republished, the President appoints, following consultation with the party which has an absolute majority in Parliament or, if there is no such majority, with the parties represented in Parliament, a candidate for Prime Minister.

With regard to the appointment of a government, we consider it necessary to mention that the diversity of political regimes enshrined in modern constitutions does not allow us to identify a uniform way of setting up governments, a uniform applicable model. However, common elements can be identified if we differentiate between the ways in which governments are set up according to the political system enshrined in the constitution of each state.

Thus, in a presidential regime, the formation of the government takes place after the presidential elections because either the head of the government is appointed by the head of state[15], without the need for an agreement or an opinion of the legislature, or the head of state and the head of government are one and the same person[16]. Thus, even if the appointment of the head of government and ministers is made with the advice or consent of the legislature, unlike in countries with a parliamentary system, the formation of the government is not conditional on the legislature seeking and granting a vote of confidence.

However, in parliamentary regimes, the formation of the government takes place, in principle, only after the parliamentary elections, with the focus on either the prime minister or the government team. Where the procedure for appointing the government is centred on the appointment of the Prime Minister, we can see that the constituent legislators had various constitutional options in mind. Thus, the Prime Minister can be elected by the legislature[17], appointed by the

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This candidate shall, within 10 days of nomination, seek a vote of confidence by Parliament on both the programme and the whole list of the Government. The vote of confidence in the Government is preceded by a debate by the Chamber of Deputies and the Senate, meeting in joint session, on the programme and the list of the Government proposed by the candidate, and by a vote by a majority of deputies and senators, i.e. an absolute majority. On the basis of the vote of confidence granted by Parliament, the President of Romania appoints the Government by presidential decree, and subsequently the Prime Minister, the ministers and the other members of the Government will individually take the oath provided for in Article 82 of the Constitution. See regarding the investiture procedure of the Government: Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 603-605.

[15] For example, Article 99(7) of the Argentine Constitution states that the President of the Argentine Nation appoints and removes from office, on his own responsibility, both the Head of the Cabinet and the Ministers. This constitution was consulted at: https://www.constituteproject.org/consti tution/Argentina_1994?lang=en, on 12 May 2023.

[16] Under Article 2(2)(2) of the Constitution of the United States of America, the President [of the federal state] has the power to appoint "such other Ministers as are not otherwise provided by this Constitution," and therefore also Secretaries of State, but such appointments are subject to the advice and consent of the U.S. Senate. For more details, see also James Q. Wilson, *American Government. Institutions and Policies*, D.C. Heath and Company, Lexington, Massachusetts. Toronto, third edition, 1986, pp.330-331. The US Constitution has been consulted at: https://www.constitute project.org/constitution/United_States_of_America_1992?lang=enon, 12 May 2023.

[17] According to Article 63 (1) and (2) of the Basic Law of the Federal Republic of Germany, although the proposal for the Federal Chancellor comes from the Federal President, the election of the Federal Chancellor is made, without debate, by the Bundestag. The candidate who receives a majority of the votes of the Bundestag shall be appointed by the Federal President, and the ministers who, together with the Federal Chancellor, will form the Federal Government shall be appointed and dismissed, in accordance with Article 64(1), by the Bundestag on the proposal of the Federal

head of state[18] or a candidate[19] can be proposed by the head of state.

The Romanian constituent legislator was inspired in the configuration of the political regime by the 1991 Constitution, an approach maintained after the constitutional revision of 2003, especially from the semi-presidential regime enshrined in the Constitution of the French Republic. However, taking into account the constitutional provisions concerning the formation of our Government, as well as those of countries where we find presidential, parliamentary or semi-presidential regimes and, above all, their various forms and adaptations to the specificities of each state, to their needs, we consider that the political regime conceived by the Romanian legislator is closer to a semi-parliamentary regime[20], not a semi-presidential regime as enshrined in the French constituent legislator[21] .

Thus, although it may seem paradoxical, the way in which our Government is appointed, as well as the situations in which its mandate may cease, confirm the support of a French doctrinal[22] according to which the government is parliamentary by origin and governmental by its functions because the Romanian Government cannot exist and function, in other words it cannot govern, without the confidence granted by Parliament. However, even if in the complex procedure

Chancellor. The Constitution (Basic Law) of Germany was consulted at: https://www.constitute project.org/constitution/German_Federal_Republic_2014?lang=enon 12 May 2023.

[18] Thus, according to the combined provisions of Articles 92, 93 and 94 of the Italian Constitution, the President of the Republic appoints the President of the Council of Ministers, who will also appoint the ministers on the President's proposal. The assumption of office is subject to the swearing in of an oath before the President of the Republic and the granting of a separate vote of confidence by the two Houses of Parliament. The Italian Constitution has been consulted at: https:// www.constituteproject.org/constitution/Italy_2020?lang=enon 12 May 2023.

[19] Thus, the Estonian Constitution, according to Article 89, gives the President of the Republic the right, within 14 days of the resignation of the Government, to appoint a candidate for Prime Minister to form a new government. This candidate has a further 14 days in which to present to Parliament the basic principles on the basis of which he will form his Government, and Parliament is obliged, without negotiation and on the basis of an open vote, to confer or not to confer on this candidate the authority to form the new Government. If the solution adopted by Parliament is in favour of the candidate, he/she will have to submit the composition of the Government to the President of the Republic within 7 days, and the President will have to approve it within 3 days. The Constitution of Estonia was consulted at: https://www.constituteproject.org/constitution/Esto nia_2015?lang=e non, 12 May 2023.

[20] The doctrine states that by "comparing the formation of the Romanian government with the formation of the governments of other EU Member States, we see that Romania also falls within the more or less parliamentary regime of the majority of these states". Ioan Muraru, Elena Simina Tănăsescu, coordinators, *Romanian Constitution, Commentary on Articles*, C. H. Beck, Bucharest, 2022, p. 879.

[21]Thus, according to Article 8 of the French Constitution, it is the President of the Republic who appoints the Prime Minister, and on the latter's proposal appoints the other members of the Government, and according to Article 9, presides over the Council of Ministers. The Constitution of France was consulted at: https://www.constituteproject.org/constitution/France_2008?lang=en, on 12 May 2023.

[22] André Hauriou, *Droit constitutionnel et institutions politiques*, Ed. Montchrestien, Paris, 1967, p. 211.

of the investiture of the Government, the decisive role is attributed to the Parliament whose "decision is principal and essential"[23], the role of the President of Romania should not be ignored, who, through his appointment decree, although with a "complementary subsidiary" value[24], formally finalises this procedure. Therefore, the formation of the Government, through the investiture procedure, is the expression of the will of the two authorities elected on the basis of the vote of the electoral body, the Parliament and the President of Romania[25].

In contrast to the procedure for appointing[26] our government, the Finnish constituent legislator has set up a procedure which, in our opinion, brings this regime closer to the French semi-presidential one. Thus, according to Art. 61 para. (1) and (2) of the Finnish Constitution[27], before the election of the Prime Minister, the parliamentary groups negotiate the political programme and the composition of the Government, and the President of the Republic, on the basis of the outcome of these negotiations and after hearing the opinion of the President of the Parliament and the parliamentary groups, shall notify the legislature of the name of the candidate for Prime Minister. This candidate, if supported by more than half of the votes cast openly in Parliament, will become Prime Minister after being appointed to the post by the President of the Republic. The President of the

[23] Ioan Santai, *Administrative Law and Administration Science*, vol. II, Risoprint Publishing House, Cluj-Napoca, 2000, p.178

[24] Ibid

[25] Mihai Constantinescu, Ion Deleanu, Antonie Iorgovan, Ioan Muraru, Florin Vasilescu, Ioan Vida, *Romanian Constitution - commented and annotated*, Regia Autonomă "Monitorul Oficial" Publishing House, Bucharest, 1992, p. 229.

[26] A similar procedure for the appointment of the Government to the one provided for in our Constitution is that provided for in the Constitution of Croatia in Article 109. The Constitution of Croatia was consulted at: https://www.constituteproject.org/constitution/Croatia_2013?lang=enon, 12 May 2023.

[27] This Constitution was consulted at: https://www.constituteproject.org/constitution/Finland_2011?lang=enon 12 May 2023. A similar procedure for setting up the government is also provided for by the Portuguese constituent legislator. Thus, according to the provisions of Article 133 (f), (g), (h) in conjunction with those of Articles 186, 187, 192 and 195, "the President of the Republic appoints the Prime Minister after consulting the parties that have representatives in the Assembly of the Republic and on the basis of the election results", and "on the proposal of the Prime Minister, the President of the Republic appoints the other members of the Government". However, "within 10 days of its appointment at the latest, the Government shall submit its programme to the Assembly of the Republic for consideration, by means of a statement made by the Prime Minister, the rejection of which shall result in the resignation of the Government. The Government also resigns in other situations, namely: at the beginning of a new legislature, when the President of the Republic accepts the Prime Minister's resignation, when the Prime Minister dies or becomes physically incapacitated for a long period of time, when a motion of confidence is rejected, or when a motion of censure is passed by an absolute majority of all members in office. However, according to Article 195 para. (2) of the Constitution, the President of the Republic may dismiss the Government only if this becomes necessary to ensure the normal functioning of democratic institutions and after prior consultation of the Council of State (according to Art. 141 of the Constitution, this Council is "the political body which advises the President of the Republic"). The Constitution of Portugal was consulted at: https://www.constituteproject.org/constitution/Portugal_2005?lang=en, on 12 May 2023.

Republic appoints the other ministers in accordance with the proposals made by the Prime Minister[28]. Moreover, according to Article 64 of the same Constitution, the President of the Republic not only accepts, upon request, the resignation of the Government or a minister, but will also dismiss the Government or a minister if he or she no longer enjoys the confidence of Parliament, even when no such request is made.

A brief analysis of the provisions of some of the constitutions regarding the procedure for the formation and appointment of a government, as well as the situations in which it ceases to function[29], shows that, as is also clear from our constitutional provisions, the solution of "governmental rotation" is a predominantly political one, which must also have a constitutional application.

### 3. Possible constitutional options for a governmental bypass

From the above, we can conclude that for the formation of a government there must be a good understanding, a genuine mutual support between the President of Romania and the coalition that is thus determined to form and give the vote of confidence to the candidate for Prime Minister and the list of members of the Government, as well as the government programme. We believe that such

[28] According to para. (3) of Section 61 of the Constitution of Finland, "if the candidate does not obtain the required majority, a new candidate for the office of Prime Minister shall be nominated according to the same procedure. If the second candidate does not obtain the support of more than half of the votes cast, Parliament shall elect the Prime Minister by open ballot. In this case, the person with the highest number of votes is elected".

[29] According to the provisions of Article 104(4) of the Constitution of Romania, republished, the mandate of the Government in its entirety, as well as of each individual member, begins on the date of swearing in before the President of Romania and ends on the date of validation of the general parliamentary elections. Corroborating the provisions of Article 63 with those of Article 104(2) and Article 103, we can state that the duration of this mandate is 4 years, the Government being in full exercise of its prerogatives only during the aforementioned period because, although it will continue its activity after the date of validation of the mandates of the deputies and senators and until the formation of the new Government, during this period it will carry out, according to Article 110(4), only the acts necessary for the administration of public affairs. The mandate of the Government may also cease before the date of validation of the parliamentary elections, as Article 110(2) of the Constitution, republished, provides for two such situations: from the date of withdrawal of the confidence granted by Parliament, i.e. from the date of adoption of a motion of no confidence by the latter, or from the date on which the Prime Minister loses, under the terms of Article 106 of the same normative act, his office as a member of the Government or is unable to perform his duties for more than 45 days. The office of member of the Government, and therefore also that of Prime Minister, ceases in the following situations: resignation, dismissal (this method of ceasing to be a member of the Government is not applicable to the Prime Minister according to the express provisions of Art. 107 para. (2) of the Constitution], loss of electoral rights, existence or intervention of a state of incompatibility, death, impossibility of exercising duties for a period of more than 45 days. The termination of the mandate of a member of the Government, including that of the Prime Minister, can be inferred from *a per a contrario* interpretation of the provisions of Article 107(3) and (4) of the Constitution of Romania, republished.

mutual trust should also exist between the same actors so that such a governmental rotation can take place.

On the other hand, we need to identify the constitutional solutions (instruments, mechanisms) available to these actors to make a political agreement a reality within constitutional limits. Thus, in our view, two options are possible. One of them would be to initiate and vote on a motion of no confidence by the very parliamentary majority that gave the vote of confidence and supports the current government. We find this approach implausible, but not because such a mechanism could not work, but because we would be in the presence of a "constitutional game" when, in our opinion, the constitutional rules established for the procedure of appointing one of the most important public authorities in any constitutional system - the Government - would be used to satisfy, above all, political interests. A questionable approach, to say the least, if not dangerous, and which would set a less desirable (perhaps even undesirable) precedent that would open the possibility of a similar approach to other constitutional provisions in response to such political approaches. Now, even in such an artificially created constitutional situation (or perhaps even more so in such a situation), we consider relevant the judgments of the Constitutional Court of Romania according to which "respect for the rule of law (...) implies, on the part of the public authorities, constitutional behaviour and practices, which have their origin in the constitutional normative order, seen as a set of principles that underpin the social, political and legal relations of a society. In other words, this constitutional normative order has a broader significance than the positive rules enacted by the legislator, constituting the specific constitutional culture of a national community"[30]. We agree that, especially in more delicate, more complicated domestic and even international situations, which can generate or amplify crises, stability, especially governmental stability, must prevail, but can this be a plausible justification for changing the role/roles of the members of a governing coalition and, implicitly, of those forming a government?! Moreover, even the Constitutional Court has pointed out that "a characteristic of political institutions, of public authorities of constitutional rank, is stability. In order to ensure the fulfilment of their role and their proper functioning, the constituent legislator provided for terms of office whose duration is regulated in the Constitution and/or other guarantees of institutional stability. In the case of public authorities for which mandates have been provided, early termination of mandates may occur in exceptional cases, strictly and restrictively

[30] Decision of the Constitutional Court of Romania No. 611 of 3 October 2017 on the requests for resolution of legal conflicts of a constitutional nature between the Romanian Parliament, on the one hand, and the Public Prosecutor's Office of the High Court of Cassation and Justice, on the other hand, requests submitted by the Presidents of the Senate and the Chamber of Deputies, published in the Official Gazette of Romania, Part I, No. 877 of 7 November 2017.

regulated at constitutional level, precisely in order to preserve institutional stability and prevent possible abuses"[31].

Another option, which is the most widely used and the one envisaged to implement this plan of governmental rotation, is that of the resignation of the Prime Minister under the conditions set out in Article 110 para. (2) in conjunction with Art. 106 of the Constitution, provisions also taken over from Art. 42 of the Administrative Code. Although, in our opinion, this option would still be a case of pushing the limits of the relevant constitutional provisions in order to satisfy political wishes, it nevertheless seems to us to be the most plausible, appropriate and even realistic.

However, following the application of either of the two options, the procedure for the formation of a new government will be started, and it is mandatory to follow all the steps mentioned above. However, in order for the finality of the procedure to be a governmental changeover, it is mandatory that each actor - the President of Romania, the parties and/or political parties of the coalition that holds the majority in the Romanian Parliament, the Prime Minister in office, as well as the future candidate for the position of Prime Minister - of this "political-constitutional drama" strictly respects their role. Otherwise, avoiding the outbreak of a political crisis, perhaps even a governmental crisis, by using this particular solution of governmental rotation, will fail and may result in the aforementioned crisis or crises, which may even lead to the dissolution of Parliament under the conditions laid down in Article 89 of the Constitution and, implicitly, to early elections.

## 4. Conclusions

One of the essential elements of the rule of law, as identified by the Romanian State by the provisions of para. (3) of Art. 1 of the Constitution, republished, is the principle of the separation and balance of powers in the state, a principle also identified, *expressis verbis*, by para. (4) of the same constitutional article.

If at the time of the development of this principle, especially by Montesquieu in the 18th century, the emphasis was on the separation of powers, "nowadays, what is at stake is no longer so much the separation as the balance of powers"[32] . In our opinion, the existence of such a balance will be identified with stability in various dimensions - economic, social, etc., but above all political.

[31] Decision of the Constitutional Court of Romania no. 85 of 24 February 2020 on the requests for resolution of legal conflicts of constitutional nature between the President of Romania and the Romanian Parliament, submitted by the President of the Chamber of Deputies and the President of the Senate, published in the Official Monitor of Romania, Part I, no.195 of 11 March 2020.

[32] Cătălin-Silviu Săraru, *Tratat de contencios administrativ*, Universul Juridic Publishing House, Bucharest, 2022, p. 22.

Achieving such stability, but above all preserving it for the duration of the mandate of the central public authorities involved in ensuring this principle, is difficult to achieve, especially in the current period full of various national and international challenges, sometimes even real crises, accompanied by a lack of political class as a result of increased polarisation of voters' wishes.

In such a context, certainly, the art of negotiation and compromise, including for building and maintaining a consistent and stable political majority to ensure the governance of the state, takes on new dimensions and can generate special, unstructured solutions, such as the governmental bypass.

However, in one of its opinions, the Venice Commission stressed that "[r]espect for the Constitution cannot be limited to the literal implementation of its operational provisions. The Constitution by its very nature, in addition to guaranteeing human rights, provides a framework for the institutions of the state, and sets out their powers and obligations. The purpose of these provisions is to enable the proper functioning of the institutions on the basis of loyal cooperation between them. The Head of State, the Parliament, the Government, the judiciary, all serve the common purpose of promoting the interests of the country as a whole, **not the narrow interests of a single institution or a political party that appointed the incumbent.**"[33] On the basis of these findings, the Constitutional Court concluded that "[a] institutional conduct which is in keeping with lawful cooperation therefore has an *extra legem* component, based on constitutional practices, the primary purpose of which is the proper functioning of the State authorities, the proper administration of public interests and respect for the fundamental rights and freedoms of citizens. The secondary purpose is to avoid interinstitutional conflicts and remove blockages in the exercise of their legal prerogatives. The instruments that contribute to achieving these ends and that demonstrate loyalty to constitutional values are institutional dialogue and the establishment of mutually accepted practices."[34] However, in our opinion, such assessments should not be interpreted as meaning that by interpreting constitutional provisions in their spirit and not only in their letter, leaders within a governing coalition are allowed to create and use instruments that ensure their acquisition and maintenance of power by any means, even in a discretionary manner.

By exercising a fundamental right of the citizen in a constitutional and democratic state, namely the right to vote, political parties and/or parliamentary

[33] Opinion No. 685/2012 of the Venice Commission on the compatibility with constitutional principles and the rule of law of the actions of the Romanian Government regarding other state institutions and the Government Emergency Ordinance amending Law No. 47/1992 on the organization and functioning of the Constitutional Court and the Government Emergency Ordinance amending and supplementing Law No. 3/2000 on the organisation and conduct of the referendum in Romania, opinion adopted at the 93rd Plenary Session/Venice, 14-15 December 2012, CDL-AD(2012)026, consulted at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)026-rom, on 12 May 2023, para. 87.

[34] Decision No. 611 of 3 October 2017, cited above, para. 109.

political parties are not given a "blank cheque" as to how they will organise themselves to form the majority necessary to give a vote of confidence to a government, a majority which they are often no longer able to obtain following parliamentary elections. We believe that such mechanisms that push the constitutional limits, such as such a governmental rocade, are manifestations of discretionary power of the political and institutional actors who resort to it, offering them only a temporary solution and, implicitly, only an illusory hope that the electorate will not sanction such a maximum compromise for the possession of power, agreed at the expense of finding optimal solutions to the various problems of the voters.

Indeed, the constitutional provisions do not prohibit, *expressis verbis*, the conclusion of such agreements, the establishment of such compromises, as we have already pointed out. However, such a governmental rocade can have the undesirable fate of a chess game because it can bring a checkmate to the very people who invented it, either now, if the political calculations necessary to validate this rocade are not done correctly or political treachery makes its presence felt, or a little later, at the next parliamentary elections, when the sanction of non-election can be directly applied by any of the voters themselves.

These are also the reasons that lead us to believe that such a governmental rotation is an illusory, discretionary solution, at the limit of constitutionality and which does not offer genuine solutions to ensure a solid and stable government.

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# Problems of Administration of Disputes Arising in Connection with the Public Service: Jurisdiction and the Possibility of Mediation

Associate professor **Mariia KARMALITA**[1]
Associate professor **Maryna PYZHOVA**[2]

***Abstract***

*The purpose of the publication is to clarify the legal grounds for delimiting the jurisdiction over disputes arising in connection with public service and the legal grounds for applying the institution of mediation in the field of labor relations. The article examines the legal basis for determining the jurisdiction of labor disputes in Ukraine based on their subject matter and peculiarities of the subject composition of the dispute, as well as the prospects for using mediation, especially in the context of the challenges posed by COVID-19 and martial law in Ukraine. It is stated that 1) labor disputes arising in connection with public service may be considered within the framework of administrative proceedings; 2) globalization of the economy, in particular, the integration of the Ukrainian economy, requires the introduction of new effective institutions regulating market relations, and thanks to mediation, the institution of labor disputes has been able to develop in a new vector. The author analyzes the correlation between the concepts of "civil service" and "public service" and offers recommendations for their differentiation. The author formulates the concept of "dispute in the field of labor relations and public service". The legal grounds for the use of mediation in the field of labor relations and public service are substantiated. The methodological basis of the research is such methods of scientific knowledge as: dialectical, comparative legal, dogmatic, logical methods of scientific knowledge.*

***Keywords****: labor relations, administrative proceedings, public service, mediation of labor disputes.*

***JEL Classification:*** K31, K41, J52

## 1. Introduction

The globalization of the economy, including the integration of the Ukrainian economy, requires the introduction of new effective institutions to regulate market relations. This is especially true now, when disputes and disagreements arise between employees and employers. Given that, with the amendments to part one of Article 1 of the Law of Ukraine "On the Organization of Labor Relations under Martial Law", the said law defines the peculiarities of civil service, service in local self-government bodies, peculiarities of labor relations of employees of all enterprises, institutions, organizations in Ukraine,

[1] Mariia Karmalita – Department of International Law, Educational and Scientific Institute of Law of State Tax University, Ukraine, karmalitamasha@ukr.net.
[2] Maryna Pyzhova – Vice-rector for scientific work of State Tax University, Ukraine, pyzhova91@gmail.com.

regardless of ownership, type of activity and industry, representative offices of foreign business entities in Ukraine, as well as persons working under an employment contract concluded with individuals during the period of martial law imposed in accordance with the Law of Ukraine "On the Legal Regime of Martial Law"[3].

Therefore, the Law of Ukraine "On Mediation" adopted on November 16, 2021, established a new vector in resolving disputes arising in connection with public service through mediation, in particular, the institution of labor disputes was able to develop in a new direction. Mediation is a structured, voluntary and confidential out-of-court dispute resolution procedure in which a mediator assists the parties in understanding their interests and finding effective ways to reach a mutually beneficial solution. The use of mediation is not limited to any area of social relations, and therefore it can be used, in particular, in labor disputes. The relevance of the publication is caused by the presence of about 30 years of experience in using mediation in Ukraine as an alternative dispute resolution method, the growing interest in mediation in society, the increase in the pace of its spread and the adoption of the Law of Ukraine "On Mediation". At the same time, ordinary citizens still have not heard of mediation and are not ready to use it. Mediators themselves complain about the lack of minimum requirements for training and the mediation process. The specifics of labor relations, especially in the context of the challenges posed by COVID-19 and martial law in Ukraine, require a quick and efficient resolution of the dispute for both parties, which in most cases cannot be achieved in court.

It is worth mentioning that the legal basis for resolving labor disputes in Ukraine for many years has been Chapter XV "Individual Labor Disputes" of the Labor Code of Ukraine, which was adopted in 1971, and the Law of Ukraine dated 03.03.1998 "On the Procedure for Resolving Collective Labor Disputes (Conflicts)", as well as other regulations, including local ones. An interesting fact is that national legislation does not contain a definition of the concept of "labor disputes".

We can refer to the reflections of labor scholars such as S. Bortnik, K. Melnyk, L. Mogilevsky, who define labor disputes as disagreements over the application of labor legislation, collective bargaining agreements, agreements, local regulations, employment contracts, or related to the establishment of new or change of existing working conditions that are not settled through direct negotiations between employees and employers[4].

Article 221 of the Labor Code of Ukraine exhaustively defines two bodies that consider labor disputes: labor dispute commissions and local general

[3] On the organization of labor relations under martial law: Law of Ukraine dated March 15, 2022 No. 2136-IX, URL: https://zakon.rada.gov.ua/laws/show/2136-20#Text.

[4] Bortnyk, S.M., Melnyk, K.Iu., Mohilevskyi, L.V. and others, *Labor law of Ukraine: textbook*, Ministry of Internal Affairs of Ukraine, Kharkiv National University of Internal Affairs, Kharkiv, 2019, p. 408.

courts. At the same time, Article 2221 states that a labor dispute between an employee and an employer, regardless of the form of the employment contract, may be settled through mediation in accordance with the Law of Ukraine "On Mediation".

The legal understanding of public service is based on the provisions of the Code of Administrative Procedure of Ukraine, which defines public service as activities in state political positions, professional activities of judges, prosecutors, military service, alternative (non-military) service, diplomatic service, other civil service, service in the authorities of the Autonomous Republic of Crimea, local self-government bodies (Article 3(15))[5]. It is interesting that the Law of Ukraine "On Civil Service" uses the concept of state service, not public service. However, it does include a characteristic feature of publicity in this definition: civil service is a public, professional, politically impartial activity on practical fulfillment of tasks and functions of the state, in particular, in relation to ...[6]. Any decisions, actions or omissions of public authorities may be appealed to administrative courts, unless the Constitution or laws of Ukraine provide for a different procedure for judicial proceedings in respect of such decisions, actions or omissions [Article 2(2)].

Administrative court proceedings are the activities of the court to consider and resolve public law disputes that fall within administrative jurisdiction. First of all, according to the rules of administrative proceedings, courts resolve disputes of private individuals regarding appeals against decisions, actions or inaction of administrative bodies. The question arises: can disputes arising in connection with public service be considered within the framework of administrative proceedings?

## 2. Public service and labor relations

The legal understanding of public service is derived from the provisions of the Code of Administrative Procedure of Ukraine, which defines public service as activities in state political positions, professional activities of judges, prosecutors, military service, alternative (non-military) service, diplomatic service, other civil service, service in the authorities of the Autonomous Republic of Crimea, local self-government bodies (Article 3, paragraph 15)[7]. It is interesting that the Law of Ukraine "On Civil Service" uses the concept of state service, not public service. However, it does include a characteristic feature of publicity in this definition: civil service is a public, professional, politically

[5] Administrative Judicial Code of Ukraine dated July 6, 2005 No. 2747-IV. URL: https://zakon.rada.gov.ua/laws/show/2747-15/ed20170803#Text.
[6] On civil service: Law of Ukraine dated 10.12.2015 No. 889-VIII. URL: https://zakon.rada.gov.ua/laws/show/889-19#Text.
[7] Administrative Judicial Code of Ukraine dated July 6, 2005 No. 2747-IV. URL: https://zakon.rada.gov.ua/laws/show/2747-15/ed20170803#Text.

impartial activity on the practical fulfillment of tasks and functions of the state, in particular, in relation to ...[8]. And here we can recall the controversy over the correlation between the definitions of "public" and "state". An analysis of recent publications shows that a clear distinction between state and public service has not been made to this day.

In the science of administrative law, attention is focused primarily on two approaches to defining the essence of the concept of "public service": narrow (based on the provisions of the Code of Administrative Procedure of Ukraine) and broad (based on doctrinal principles). According to the narrow interpretation of this concept, the civil service includes the following factors: a) certification; b) leave; c) transfer to another position; d) salary; e) social protection; f) material support; g) pension; h) disciplinary liability. A broad interpretation, in addition to these elements, also covers the entry into public service and termination of public service[9].

Returning to labor relations within the civil service, the aforementioned Law of Ukraine "On Civil Service" in Article 5 states that the legislator determines that relations arising in connection with the entry, performance and termination of civil service are regulated by this Law, unless otherwise provided by law. And the provisions of labor law apply to civil servants in terms of relations not regulated by this Law.

Given that with the amendments to part one of Article 1 of the Law of Ukraine "On the Organization of Labor Relations under Martial Law", the said law defines the peculiarities of civil service, service in local self-government bodies, peculiarities of labor relations of employees of all enterprises, institutions, organizations in Ukraine regardless of their form of ownership, type of activity and industry, representative offices of foreign economic entities in Ukraine, as well as persons working under an employment contract concluded with individuals, during the period of martial law imposed in accordance with the Law of Ukraine "On the Legal Regime of Martial Law"[10]. The emergence of such a rule emphasizes a peculiar feature of the institution of public service.

We should emphasize that today there are two trends in the development of the civil service as a public legal institution in the world. One of them is related to the public legal status of the civil service, separation of civil servants from other categories of employees. As N. Neumyvaichenko notes, this approach negatively affects the labor and legal status of civil servants, manifesting itself in the restriction of traditional labor rights: to unite in trade unions, to conduct

[8] On civil service: Law of Ukraine dated 10.12.2015 No. 889-VIII. URL: https://zakon.rada.gov.ua/laws/show/889-19#Text.

[9] Skochilyas-Pavliv, O.V., Salo, P.I., *Problematic issues of judicial review of administrative cases regarding public service*. „Scientific Bulletin of the Uzhhorod National University". 2023. Issue 75. Part 1. p. 284–292.

[10] On the organization of labor relations under martial law: Law of Ukraine dated March 15, 2022 No. 2136-IX, URL: https://zakon.rada.gov.ua/laws/show/2136-20#Text.

collective bargaining, to conclude collective agreements, etc. This trend in the legal regulation of the civil service prevailed in the first half of the twentieth century in industrialized countries and is now widespread in many developing countries. The second trend, which has been especially evident in the last 50 years in developed countries with market economies, is, on the contrary, the extension of labor law norms and guarantees to civil servants, strengthening of collective bargaining relations in establishing their working conditions, abandonment of the principle of unilateral establishment of working conditions by the State, recognition of the State as an ordinary employer, and the relations regarding the performance of professional activities by civil servants in the civil service - labor relations, employment relations[11].

It is important that the second trend is fully supported by the International Labor Organization, since in its understanding civil servants constitute a special category of employees with specific labor relations. This is confirmed by the Convention concerning the Protection of the Right to Organize and to Determine Conditions of Employment in the Public Service No. 151 and the Recommendation concerning Procedures for Determining Conditions of Employment in the Public Service No. 159, which indicate that today there is an expansion of the civil service in many countries and emphasize the need for reasonable labor relations between public authorities and organizations of civil servants[12].

In this context, we can say that the public service consists of internal and external relations. And if external relations are the relations of civil servants with citizens in the course of performing their duties, with other state bodies and organizations, then these relations are regulated by administrative law,[13] is also reflected in jurisdictional proceedings. Internal relations of civil servants, i.e. relations arising between civil servants and heads of state bodies, are regulated by labor law. At the same time, the legislator simultaneously extended to them the effect of special legislation.

In our opinion, the existence of special legislative acts regulating the public service does not mean that these civil servants do not enter into labor relations. They have the right to rest, to safe working conditions, to guarantees and compensation, as well as other rights provided for by various labor law institutions. Therefore, it is necessary to say that, given the peculiarities of labor and the legal status of civil servants, their activities (i.e. labor) are regulated by

[11] Katz, H. C. (2013). *Is U.S. Public Sector Labor relations in the Midst of a Transformation?*, „Industrial and Labor Relations Review", 66(5), pp. 1031–1046. http://www.j stor.org/stable/24369570.

[12] Convention on the Protection of the Right to Organization and Procedures for Determining the Conditions of Employment in the Civil Service No. 151 of 1978, URL: https://zakon.rada.gov.ua/laws/show/993_187#Text.

[13] Lund J., Maranto C., *Public Sector Labor Law: An Update. Public sector employment in a time of transition*. Management Faculty Research and Publications. Cornell University Press (1996): pp. 21-58.

special laws, and the relevant provisions of these laws fall within the scope of labor law. It is important to understand that civil service is a special type of labor activity. And it is appropriate to recall here the so-called peculiarity of labor law - differentiation of norms, i.e. establishment of certain differences in the content and scope of rights and obligations of direct subjects of labor relations under certain conditions[14].

### 3. Handling labor disputes in different court jurisdictions

Judicial jurisdiction is an institution of law that encompasses legal norms that delineate the competencies of both different parts of the judicial system and types of legal proceedings - criminal, administrative, commercial and civil. As a rule, sectoral procedural legislation is codified, and the first articles of a legal act define the subject and territorial or subject and subjective jurisdiction to resolve disputes arising from the relevant sectoral legal relations. In particular, given the interest of this study, we can point to Articles 18 (subject matter jurisdiction) and 19 (territorial jurisdiction) of the Code of Administrative Procedure of Ukraine[15], as well as §1 of Chapter 2 (subject matter and subjective jurisdiction) of the Civil Procedure Code of Ukraine[16].

The debate on the division of jurisdiction between different courts has been going on for a long time, including at the level of the Supreme and Constitutional Courts of Ukraine. There are different opinions as to whether a certain category of disputes falls within the competence of one or another jurisdiction. According to practitioners, under current conditions, it is easier for national courts to resolve a case on the merits, i.e. to resolve a conflict between the parties, than to determine whether a case belongs to the relevant jurisdiction. At the same time, even in the case of a fair resolution of the dispute, all successes can be nullified if there is a violation of the jurisdiction determination[17].

As of today, jurisdiction is not only a problem for litigants, but also a pressing issue for the entire judicial system, due to the tendency for courts of different instances to interpret the law differently. Therefore, there is a need to create a legal mechanism that would ensure legal certainty and unity of approach to the jurisdiction of disputes.

Administrative proceedings are the activities of the court to consider and resolve public law disputes that fall within administrative jurisdiction. Primarily,

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[14] Pyzhova M. O., *Peculiarities of legal regulation of remuneration of employees of state executive service bodies*. „Legal scientific electronic journal". 2023. No. 3, p. 253-255, URL: http://www.lsej.org.ua/3_2023/59.pdf.

[15] Administrative Judicial Code of Ukraine dated July 6, 2005 No. 2747-IV, URL: https://zakon.rada.gov.ua/laws/show/2747-15/ed20170803#Text.

[16] Civil Procedure Code of Ukraine dated March 18, 2004 No. 1618-IV. URL: https://zakon.rada.gov.ua/laws/show/1618-15?find=1&text.

[17] Smokovich M. I., *Determination of jurisdictions of administrative courts and demarcation of judicial jurisdictions*. Kyiv: Yurinkom Inter, 2012, p. 304.

the rules of administrative proceedings are used by courts to resolve disputes of private individuals regarding appeals against decisions, actions or inaction of administrative bodies. In Ukraine, the rules of administrative proceedings are contained in the Code of Administrative Procedure (effective since 2005). Prior to that, courts resolved disputes with administrative authorities depending on the subject matter - according to the rules of civil or commercial proceedings. The task of administrative proceedings is to protect the rights of individuals in the field of public law relations from violations by administrative authorities. The principles of administrative proceedings create the foundation for the court proceedings, on the basis of which it must assess the contested decisions, actions or omissions. These include reasonableness, impartiality, prudence, proportionality, timeliness, etc. In no way should certain categories of cases be considered by both administrative and civil courts.

Representatives of the judiciary have concluded that a particular public law dispute falls within the jurisdiction of an administrative court: the distinction from other types of judicial jurisdiction can be judged by the aggregate presence of external signs of public law relations from which the dispute arose[18].

The theoretical and applied principles of administrative law functioning allow us to distinguish the following criteria of administrative jurisdiction consideration of disputes arising out of public law relations; dispute over a decision, action, or inaction of public authorities or performance by public authority holders of duties stipulated by law, dispute over a right or obligation in the field of public administration; presence in the disputed legal relationship of a public authority, a subject of delegated powers or a public authority holder; legislation that establishes the powers of subjects in the field of public administration (administrative law).

Public service is a type of labor activity, and although service-labor relations exist at the intersection of two branches of law - administrative and labor, they have differences in the method of legal regulation. That is why the relations related to admission to public service, its performance and termination are regulated by administrative law, and disputes arising out of such legal relations are subject to consideration in administrative proceedings[19].

At the same time, the judicial doctrine asserts that there is a division of jurisdiction in the labor sphere. For example, this can be seen in the Legal Position of the Grand Chamber of the Supreme Court (Resolution of 16.01. 2019 in case No. 192/1855/17) regarding the jurisdiction of disputes arising from the employment of a person in local self-government bodies under a fixed-term employment contract - given the subject matter of the dispute, the subject matter of the claim and the nature of the disputed legal relationship, the Grand Chamber of the

[18] Bevzenko V., *Criteria of administrative jurisdiction. Judicial and legal newspaper*. 2020. May 29. URL: https://sud.ua/ru/news/blog/169927-kriteriyi-administrativnoyi-yurisdiktsiyi.

[19] Shumylo M., *Jurisdiction of the court regarding labor disputes: practice of the Grand Chamber of the Supreme Court. Judicial and legal newspaper*. 2020. June 24, URL: https://bit.ly /2A0bhwp.

Supreme Court believes that the dispute in the case is subject to consideration under the rules of civil procedure[20] and the Legal Position of the Grand Chamber of the Supreme Court (Resolution of 20. 03.2019 in case No. 826/11367/16) on the jurisdiction of a dispute arising from discharge from military service - the Grand Chamber of the Supreme Court concludes that the jurisdiction of the dispute was determined correctly by the courts, since the dispute that arose during the discharge of the plaintiff from military service is public law, and therefore is subject to consideration in the manner prescribed by the Code of Administrative Procedure of Ukraine[21].

### 4. Application of mediation to disputes arising in connection with public service

Mediation has been discussed for a long time, and therefore the theoretical construction of the functioning of this institution in the socio-legal formation can be considered established[22]. Monographs[23] have already been written and methodological tools[24] for its implementation have been developed. The Law of Ukraine "On Mediation" adopted on November 16, 2021, established a new vector in resolving disputes arising in connection with public service through the use of mediation, in particular, the institution of labor disputes was able to develop in a new direction. It is quite logical that the use of mediation in the legal system of Ukraine will allow the parties to save time and money. And if it is introduced into the institution of public service, it will help to maintain adequate relations between civil servants and their managers[25].

According to the Law of Ukraine "On Mediation", mediation is an out-of-court voluntary, confidential, structured procedure in which the parties, with the help of a mediator (mediators), try to prevent or resolve a conflict (dispute) through negotiations[26]. This Law applies to social relations related to mediation

[20] The legal position of the Grand Chamber of the Supreme Court according to the resolution dated 16.01. 2019 in case No. 192/1855/17, URL: http://www.reyestr.court.gov.ua/Review/7925 0508.
[21] Legal position of the Grand Chamber of the Supreme Court according to the resolution dated 03.20.2019 in case No. 826/11367/16, URL: http://www.reyestr.court.gov.ua/Review/92173275.
[22] Bovsunivska Tetiana. *Diarist as creator of documentary mediation*. „Studia Polsko-Ukraińskie". 2021. Volume 8. pp.61–68. URL: https://cejsh.icm.edu.pl/cejsh/element/bwmeta1. element.ojs-doi-10_31338_2451-2958spu_8_4/c/articles-2156679.pdf.pdf.
[23] Mazaraki N. A., *Mediation in Ukraine: theory and practice*. Kyiv: Kyiv National University of Trade and Economics, 2018, p. 276.
[24] Nechaj, A. A., (ed.), *Code of Ethics of the Mediator of Labor and Corporate Disputes*, Kyiv: "School World" Publishing Group, 2021, p. 23; Nechaj, A.A (ed.), *Typical Standards in the field of mediation*, School World Publishing Group, 2021, p. 65.
[25] Yaroshenko O., Pyzhova M., Ivchuk Y., Vapnyarchuk N., Savielieva M., *The use of mediation in administrative proceedings: the experience of European Union member states*. „Revista Relações Internacionais do Mundo Atual", 2021. Volume 3. n. 32, pp. 64–68.
[26] On mediation: Law of Ukraine dated November 16, 2021 No. 1875-IX. URL: https://zakon.rada.gov.ua/laws/show/1875-20#Text.

in order to prevent conflicts (disputes) in the future or to resolve any conflicts (disputes), including civil, family, labor, economic, administrative, as well as in cases of administrative offenses and in criminal proceedings with the aim of reconciliation between the victim and the suspect (accused). The law may provide for specifics of mediation in certain categories of conflicts (disputes).

Based on the analysis of the current national labor legislation, there are two types of labor disputes, one of which is individual labor disputes and the other is collective labor disputes. It should be noted at the outset that pursuant to Article 3(2) of the Law of Ukraine "On Mediation", mediation shall not be applied in collective labor disputes, as well as in disputes arising out of relations provided for in part one of this Article, if such disputes affect or may affect the rights and legitimate interests of third parties who do not participate in mediation. Thus, only individual labor disputes may be resolved through mediation.

With regard to labor legislation, namely the possibility of applying the institution of mediation to labor relations, the Labor Code in Article 222-1 contains provisions on the settlement of labor disputes through mediation[27]. In particular, one can see the legal basis for a labor dispute between an employee and the owner or his authorized body, regardless of the form of the employment contract, to be settled through mediation in accordance with the Law of Ukraine "On Mediation", taking into account the peculiarities provided for by this Code.

It is worth noting that mediation is a part of alternative dispute resolution tools and is a cost-effective and efficient dispute resolution mechanism. We understand alternative instruments of labor dispute resolution as a set of procedures not prohibited by law aimed at peaceful settlement of disputes between the parties on the basis of coordination of their positions and interests, which are carried out by the parties to the conflict themselves or with the involvement of other persons, to develop a mutually acceptable solution that satisfies the interests of each of them and aims to resolve the conflict[28].

A number of international acts (a directive of the European Parliament and the Council of the European Union, recommendations of the Committee of Ministers of the Council of Europe to member states) regulate the issue of conciliation, and foreign countries (e.g., the United States, Germany, Finland, South Korea) have gained significant successful experience by introducing mediation to resolve labor disputes. There are many positive aspects of mediation. Among them are the following: confidentiality, voluntariness, short terms of dispute resolution, and the ability to come to a joint solution that suits both parties[29].

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[27] Labor Code of 10.12.1971 No. 322-VIII. URL: https://zakon.rada.gov.ua/laws/show/322-08#Text.

[28] Burak, V. Ya., Kulachok-Titova, L. V., Pylypenko, P. D., Chudyk-Bilousova, N. I., *Alternative methods of resolving labor disputes*, under the editorship U. Hellmann, P. D. Pylypenko. Khmelnytskyi: Khmelnytskyi University of Management and Law, 2015, p. 172.

[29] Kyselova O.I., Myrhorod-Karpova V.V., *Mediation in labor disputes*. Scientific notes of the Lviv University of Business and Law. The series is economical. Legal series. 2022. Issue 32. p. 220–224.

At the same time, there are a number of problems with mediation of labor disputes arising in connection with public service. Mediation has not yet become widespread in Ukraine. Firstly, there is a low level of awareness of the mediation procedure itself, and there is no market for professional mediators.

A separate problem is the lack of clear procedures for accessing mediation and communication channels between participants. It should also be borne in mind that there are currently no circumstances that create demand for such a legal service as mediation, and therefore the supply side is still imperfect.

The difference between consideration of an individual labor dispute by the Labor Disputes Commission and mediation is still not entirely clear to both ordinary employees and competent people. If we look at the essence, the goal is the same; the form of dispute resolution is more or less similar. We come to the conclusion that the Labor Disputes Commission is a relic of the Labor Code of 1971, so this issue should be unified and only mediation should be left at the legislative level. This is confirmed by the opinion of such scholars as B. Stychynskyi, H. Chanysheva, A. Jaresko[30], who believe that the role of the Commission in resolving labor disputes has already been weakened. The scholars believe that employees for various reasons mostly do not apply to the Labor Disputes Commission, and therefore the question arises as to whether it is advisable to preserve this institution in the labor legislation of Ukraine.

Thus, the issues of the feasibility of the Labor Disputes Commission, the use of mediation, the formation of a market for professional mediators, and the supply and demand for mediation are extremely relevant, as the number of labor disputes is growing every day, especially during the period of martial law.

## 5. Conclusions

An important fact is that part 2 of Article 17 of the Code of Administrative Procedure states that the jurisdiction of administrative courts extends to public law disputes, including disputes over the admission of citizens to public service, its performance, and dismissal from public service. The clarity of the content of this provision does not allow for its ambiguous interpretation. At the same time, its proper implementation requires a clear understanding of the "public service" itself and its peculiarities as a labor activity. This explains the above emphasis on the correlation between labor relations and public service.

We would like to state that labor disputes arising in connection with public service may be considered within the framework of administrative proceedings. We consider a dispute in the field of labor relations and public service to be a disagreement between an employee (civil servant and public official) and an employer (public authority) arising in connection with the entry,

[30] Stychynskyi, B.S., Zub, I.V., Rotan, V.H. (eds.), *Scientific and practical commentary on the legislation of Ukraine on labor*, Kyiv: A.S.K., 2001, p. 1072.

performance and termination of public service.

In the context of martial law, mediation of disputes in the field of labor relations and public service is particularly relevant. This is because the administration of justice by Ukrainian courts has become extremely difficult under such circumstances, and it is difficult to guarantee the smooth operation of courts during the war. The globalization of the economy, in particular the integration of the Ukrainian economy, requires the introduction of new effective institutions that regulate market relations, and mediation has enabled the institution of labor disputes to develop in a new direction.

A separate issue is the need to amend the Law of Ukraine "On Mediation" and the Law of Ukraine "On Civil Service" to lay down the legal basis for the settlement of disputes in the public service through the use of mediation. Currently, there is no such prohibition, but the lack of public awareness and the sometimes erroneous perception that civil service is regulated only by administrative law creates obstacles to the use of mediation in the public service. The time for such changes has already come, as public service reforms are inevitable, given the European integration course of our country. Therefore, the public service must be efficient and not "stagnant", aimed at attracting intellectuals, and flexible dispute resolution through mediation will certainly contribute to this.

Thus, based on the general principles of national legislation, moral and ethical standards of society, international principles of mediation and the specifics of labor disputes, we believe that the application of mediation to disputes arising in connection with public service is a real tool for protecting both private and public interests. The mediation procedure itself is promising, it needs to be developed, and awareness should be raised among citizens, as it can strike a balance between the interests of employers and employees, and facilitate the continuation of labor relations between them.

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# Complementarity between Civil Status Acts and Mitrical Acts

Student **Marius Vasile BÂRDAN** [1]

***Abstract***

*The present study aims to analyse the link that can be established between civil status acts and those that are performed in the church. By presenting concrete examples, the article highlights both similarities and differences. The article also highlights the connection that we believe must exist in a society between these two institutions, the legal and the religious, and how they influence each other. As important as the mission of the law is, the religious framework cannot be ignored when events are directly linked to civil status acts. Aware that the two institutions have their own organisational framework, we will conclude with our view of how the two interact, also emphasising the comparative dimension.*

***Keywords:*** *civil status documents, legal institutions, certificate, religious framework.*

***JEL Classification:*** K23, N30, Z12

## 1. Introductory considerations

Reading the History of the Romanian State and Law, we learn that, from the very beginning, in Romania, there was a close link between the State and the Church, the Church Pravila being the work of canon law according to which the State was directed. The canonical norms, therefore, depict the way in which the ecclesial body conceives the proper functioning of the relations between its components in liturgical, sacramental and pastoral life. Ecclesiastical law is not to be confused with canon law, which is a branch of law regulating the relations of the secular state with the various religious denominations and is, in its broadest sense, the sum of the legally binding rules governing the Christian Church, either in its internal policy or in its relations with the secular power. Since there are various churches, which differ widely in their principles and practice, it follows that there is a similar difference in their ecclesiastical law, which is the result of their corporate conscience, modified by several relationships with secular authority[2]. The importance of the sources of canonical and ecclesiastical law also lies in the fact that many institutions and concepts of canon law have influenced jurisprudence

[1] Marius Vasile Bârdan - Faculty of Psychology, Behavioral and Legal Sciences, „Andrei Saguna" University of Constanta; PhD. in Entomology at the University of Life Sciences „Ion Ionescu de la Brad", Iasi, Romania, nifonmariusvasile@gmail.com.

[2] Cristina Elena Popa Tache, *Towards a law of the soul and bioenergies of the living,* Ed. L' Harmattan, Collection: Logiques Juridiques, 2022, preface by Jean-Luc Martin-Lagardette, pp. 127-133.

in countries influenced by Protestantism, having a particular influence on the legal regulations governing, for example, the theory of obligations, the institution of marriage, the doctrine of modes of acquisition of property, possession, wills, legal persons, criminal procedure (through the legal regime of evidence). To the examples of canonical rights set out above are added the rights of other faiths, their legal regulations, which together reflect the interface between law and religion in a global perspective. The history of the legal principles of the relationship between *sacerdotium* and *imperium* - i.e. of secular ecclesiastical authority or the church with the state - is a central factor in European history[3].

**2. Some clarifications**

In the Civil Code[4], in Chapter III, Section 3, the provisions from Article 98 to Article 103 regulate Civil Status Acts (civil status, proof of civil status, cancellation, completion, amendment or rectification of civil status acts, entry of entries on the civil status act, acts drawn up by a civil status officer who is not competent, other means of proof of civil status).

But what are civil status documents? In one sense, as *negotium iuris*, they are legal acts[5], the source of civil status (e.g. marriage). In another sense, as *instrumentum probationis*, civil status acts are scriptural evidence of unique and personal events that occur in a person's life: birth, marriage and death, and have an important probative value. Also, Article 1 of Law 119/1996 states that: "Civil status acts are authentic documents that prove the birth, marriage or death of a person. They are drawn up in the interests of the State and of the individual and serve to ascertain the number and structure of the population, the demographic situation and the protection of the fundamental rights and freedoms of citizens". So, taking marriage as an example, the civil registrar is basically the witness who certifies that a certain action has taken place over the persons entered in the civil status register.

Reading Article 102 of the NCC, which refers to the competence or lack of competence of the civil registrar, it can be seen that this is an application of the adage *error communis facit ius*. The common and invincible error in which those of good faith find themselves confers validity on the act drawn up even by an incompetent civil servant. I appreciate that there is a close connection between the theory of appearance in civil law and the Sacrament of Holy Baptism, where

[3] Interesting studies on this subject can be found in the *Ecclesiastical Law Journal,* Ed. Cambridge University Press, especially Doe, N. (1999), *The Principles of Canon Law: A Focus of Legal Unity in Anglican-Roman Catholic Relations*, „Ecclesiastical Law Journal", 5(25), p. 221-240.

[4] The Civil Code, Hamangiu Publishing House Ltd, ed. 11, Bucharest 2022.

[5] Regarding the legal nature of these acts of administrative law and the resolution of disputes concerning them, see Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 504-507; Cătălin-Silviu Săraru, *Tratat de contencios administrativ*, Universul Juridic Publishing House, Bucharest, 2022, p. 327-332.

the perpetrator, as a matter of urgency, can be any baptized and confirmed Christian. The latter may perform the baptism of an infant in danger of dying unbaptized, whether or not the latter has a birth certificate, in order to be mentioned in the liturgy of the dead. If the infant is alive, then it goes to the church to have the Sacrament of Holy Baptism administered, but without the full immersion that you, Christian, did. The emergency baptism that has been performed is not recorded in the register of mitrical acts, in the Church, but the baptism takes place in an act of worship, which is the pomel of the dead. Likewise, those who are not baptized are not listed on the living rosary next to those who have the Sacrament of Holy Communion, but on a separate rosary. Those who have died suspicious deaths, it is specified, and those who have taken their own lives, whether they were in their right mind or not, are not passed on the altar, nor are they buried as a Christian, but are given the Mass for suicides. Those who have requested that their bodies after death be cremated are also not passed on the pomegranate tree and are not given a memorial service, the perpetrator being threatened with deposition from the priesthood.

### 3. Comparative analysis from the perspective of actual formalities

The acts required in the exercise of the sanctifying power are the acts concerning the administration of the holy sacraments and the hierurgy[6]. The Mithraic Acts include the protocol of baptisms and the protocol of weddings.

*The baptismal protocol* is the act in which the records are made on the basis of the birth certificate issued by the civil authority and following the administration of the holy sacrament of baptism.

The protocol has the following heading: 1. current no., 2. year, month, day of birth and baptism, 3. sex, 4. legitimate or illegitimate, 5. infant's baptismal name, 6. parents' name, surname, religion, status, age and occupation, 7. parents' residence, 8. godparents' name, surname, residence, 9. name, surname of the institution of birth, 10. is anointed with the Holy Myrrh, 11. name and surname of the baptising priest, 12. date of death of the infant, 13. birth certificate number, 14. when the baptismal certificate or extract was issued, 15. remarks.

The Baptismal Certificate or Baptismal Extract is the document proving the baptism. It is drawn up in duplicate. One copy remains in the register of certificates and one is handed to the applicant.

The certificate reads as follows:

Archdiocese..., Parish..., Town..., County..., Certificate of Baptism.

We, the parish priest of the parish of..., in the town of..., County..., hereby certify that on the day of..., year..., we have celebrated the Holy Sacrament of Baptism of the infant..., son (daughter) of the faithful.... and of the faithful... of

[6]https://www.academia.edu/33312164/administratie_bisericeasca_4_1_pagina_cu_pagina_pdf, accessed on 1 May 2023.

this parish, after having fulfilled the formalities required by civil law, as evidenced by birth certificate No. .... of the year..., of the Municipality..., County..., having as godparents the faithful... It was entered in the register of baptisms in the year..., position .... This certificate was issued today..., number..., year..., L.S. Paroh (signature).

The *protocol (register) of the married couple* is the act in which the entries are made on the basis of the marriage certificate and after the administration of the sacrament of holy matrimony.

It has the following heading:

1. current no..., year, month, day of marriage, 3-6 surname and first name, religion, state, character, age, place of birth and residence of the bridegroom, bride, bride and the officiant, 7. first, second or third marriage, 8. when the betrothal was made and when the vestiges[7] , 9. date and no. of the act from the registrar, 10. when the extract was given, 11. observations.

The Certificate of Cununie shall be drawn up in duplicate, one copy of which shall be given to the applicant and one copy of which shall remain in the register.

The Act reads as follows:

Diocese..., Parish..., of the town..., county... Certificate of Marriage.

We, the parish priest of the church in the town of..., county..., hereby certify that on the day of..., year..., we have celebrated the Holy Wedding of the faithful..., with the faithful....., having proved that they have entered into a civil marriage, with marriage certificate No. .... of ..., year ..., issued by the Town Hall of ..., County ..., having as their godparents the faithful ... This certificate was issued today ..., year ..., No.... L.S. Pastor.

*The protocol of the dead* is concluded on the basis of the burial certificate issued by the City Hall on the basis of the Death Certificate, and after the burial.

The protocol has the following dates:

Volume..., page..., 1. Current number..., 2. Year, month, day of death, burial, 3. Name, surname and profession of the deceased, 4. Country, place of birth of the deceased: town, commune, village, county where the deceased lived, street and house number5. Age of the deceased, 6. Religion, 7. Marital status, 8. If not, why not?9. Type or cause of death, 10. Place of burial, 11. Name and surname of the priest, 12. Date and number of the civil status document, when the extract was given, 14.

*The necessary documents concerning the dissolution of the religious marriage (divorce) are:*

- a reasoned request from those concerned, addressed to the parish priest, registered with the parish
- civil divorce certificate

[7] There is still a document that is made in the church, but it is more practiced in Transylvania, a document that has no counterpart in the civil world.

- the parish priest's report showing the causes of the divorce, the fact that reconciliation was attempted and concrete proposals.

Today religious marriages are only allowed after they have been made at the civil status, and if they have to be undone, they are only undone in court, not having in this case a civil divorce certificate, but only the divorce decree, which does not make the church's rightful subject.

I believe that if *the Protocol of Good Dismissal* existed in practice, life in Romanian families would be better.

The protocol of good will is concluded by the parish priest on the occasion of the announcement of the decision of two young people that they want to get engaged and married religiously[8]. On the basis of this document, the marriage is publicised by shouting in the church and posting in the parish office. It is practised in the region of Ardeal, Romania. It is good to be generalized. It provides an opportunity for the canonical enticement and preparation of young people for marriage and family.

The Act reads as follows:

Diocese, Protocol of Good Will, taken in the Parish of..., in the year of our Lord..., on the day..., of the month..., Present before us the undersigned..., of..., of religion.... and of..., of religion... and declaring themselves willing to perform the Holy Sacrament of Matrimony, they were asked within the meaning of the legal provisions in force concerning marriage one by one:

a) Are they not somehow forced into marriage by their parents or by others who replace their parents?

b) Do they not want to take this step for some particular interest, such as wealth or the special beauty of some party?

c) Whether they meet the religious, moral, physical and social conditions required for the conclusion of a marriage?

d) Whether or not there are impediments to marriage imposed by the holy canons and if so, to what extent can they be removed?

To these questions each of the persons named declared that they are unsolicited by anyone, without any greed for wealth or beauty, only alone, of their own free will and out of the urge of the pure love they feel for one another they wish to conclude the sacrament of marriage.[9]

Noting that there is no impediment and after having been given the necessary guidance concerning the marriage, all this, for the sake of better stability, has been recorded here in the protocol and subscribed to by us. The above date...,

[8] I found in a Catholic church list with the names of children to be baptized and confirmed, where godparents were expected at prebaptismal catechesis and lists of families to be married, who were expected with their godparents at premarital catechesis.

[9] Today, for entry into monasticism, which is considered a sacrament of the Church, the candidate's marriage to the Church and to the Bridegroom Jesus Christ, a canonical initiation and a certificate of baptism and other civil status documents are required along with the personal application for membership in a monastic establishment.

the parish priest of the place..., the bride and groom..., the witnesses.... Also, on this day the parents (guardians)..., of the above-named, also appeared before us, and, after the question put to them, declared that they do not in any way dispense with the children under their guardianship in this marriage, but give their consent to the marriage of the said children, which they confirm by their own subscription. Date above..., parents (guardians) of the bride and groom....[10]

Secular marriage and religious marriage[11] should be closely linked in the case of Christian persons, because the family as a cell of society exists in the symbiosis of church and state, although in practice this is not always the case. Today there can be a civil marriage that is not followed by a religious marriage, but there cannot be a religious marriage without a civil marriage, and in this sense the provisions of Art. 259 para. (3) of the NCC. Or even in the church they are investigated whether they are relatives or not, as well as other temptations from a canonical point of view, as we have in the Orthodox Canon Law[12], but also in other confessions and religions.

If the above formalities were coordinated, this would have a positive impact on helping to strengthen social cohesion and a sense of belonging to a community. The Church has the social role of bringing people together and promoting shared values, helping to build a harmonious and cohesive society. This harmonisation of the two categories of formalities presented can be achieved in the form of partnerships or consultations, while respecting the autonomy of both parties.

## 4. Conclusions

In concluding the public debate, we accept that there is complementarity between the Civil Status Acts and the Mitrical Acts. For a good existence of the church-state symbiosis I consider that their link should be indissoluble or at least better functionally interconnected. In countries with a majority Christian population, for these citizens there should be neither Church without State nor State without Church. q.e.d. Complementarity of State and Church can bring benefits to a society by coordinating activities and collaborating in areas of common interest, while respecting the autonomy of both institutions and protecting individual rights through balance and respect for the principles of the rule of law and democratic values. Coordination between the state and the church is of significant importance in a society, as it can contribute to social stability, respect for fundamental rights and the promotion of ethical and moral values, and this topic remains open for further research.

[10]https://www.academia.edu/33312164/administratie_bisericeasca_4_1_pagina_cu_pagina_pdf, accessed on 1 May 2023.
[11] Corhan Adriana, *Family Law*, 2nd revised and completed edition, Lumina Lex, Bucharest, 2008, pp. 60-61.
[12] Ioan N. Floca, *Orthodox Canon Law*, vol. II, EIBMBOR, Bucharest, 1990, pp 67-101.

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# The New Trends in Administrative Decisions in Portugal - the Simplex Program and the Adequate Pursuit of Public Interest

Associate professor **Raquel CARVALHO**[1]

***Abstract***

*The trend towards the acceleration and simplification of administrative procedures is not new in the Portuguese legal system. However, the globalization of economies, which need to be reconciled with the protection of multiple public interests, has been pushing the legislator to pursue this path. This paper proposes to analyse DL no. 11/2023, of February 10th, included in the simplex programme, which has introduced several simplification and acceleration changes in many legal systems, especially in the environmental field. This is a particularly complex area, which requires great care when implementing solutions that facilitate decision-making, at the serious risk of not adequately pursuing public interests. The preamble of this law clarifies that it " aims to initiate the simplification reform of existing licencing, through the elimination of licences, authorisations, acts, and dispensable or redundant procedures linked to the protection of environmental resources, simplifying the activities of companies without compromising environmental protection (...), the Public Administration focusing, particularly, on monitoring, co-responsibility, and self-control by economic operators. Is simplification reconcilable with environmental public interests? Will it be sufficient, given the irreversibility of much ecological damage, to rely solely on monitoring and surveillance functions, leaving aside the preventive and precautionary functions?*

***Keywords:*** *administrative simplification; non-express acts; silence as an administrative act; public interest; environmental interests.*

***JEL Classification:*** K23, K24, Q5

## 1. Introductory section

In this reflection, we intend to address the simplification trend in administrative procedures in Portugal, in particular through the analysis of a recent diploma which, in a very broad way, revises many diplomas in the environmental area, also taking the opportunity to amend the Administrative Procedure Code. As expressly stated in the diploma – DL 11/2023, of February 10th –, it " aims to initiate the simplification reform of existing licencing, through the elimination of licences, authorisations, acts, and dispensable or redundant procedures linked to the protection of environmental resources, simplifying the activities of companies without compromising environmental protection (...), the Public Administration

[1] Raquel Carvalho - Faculty of Law, Universidade Católica Portuguesa; Research Centre for the Future of Law, Portugal, rmcarvalho@ucp.pt; Orcid: 0000-0001-8929-7936.

focusing, particularly, on monitoring, co-responsibility and self-control by economic operators". Thus, we will present the solutions therein, identify the environmental regimes involved, and enunciate the objections that such solutions raise. This is, therefore, a legislative analysis, accompanied by a dogmatic reflection framed in the Portuguese administrative paradigm. The conclusions will express our disagreements in relation to the legislative option which, by now, is known will have continuity in the context of urban planning law, awaiting only the publication of the corresponding diploma.

## 2. The administrative simplification goal and its tools

Through Directive 2006/123/EC, among other measures, the European Union has introduced administrative simplification as one of the ways to allow a better exercise of the freedom of economic initiative and the free movement of goods, persons, and services.

Portugal has, in fact, an extensive and unflattering record of long administrative procedures that do not favour said freedoms, nor the sustainable development unequivocally assumed in some of the Sustainable Development Goals (SDGs), such as the 11th, 12th, 13th, and 16th.

In previous times, the Simplex programme led the Government to establish many solutions of tacit acts of approval in the areas of environment and urban planning and management, and particular regimes of mandatory and binding opinions set prior to that programme.

In general, administrative acts must be issued expressively. Hence, the Portuguese Administrative Procedure Code has established a deadline – 60 working days –, but it is applied in a supplementary manner and only when the special regimes do not contain distinct rules. However, the Legislator has foreseen some rules if no express decision is issued in due time. It will mean a non-fulfilment of the duty to decide and allows the citizen to recourse to administrative and judicial remedies. But if the requirements of article 130 are met, said silence can mean a tacit approval[2]. Which would be perfectly acceptable in all the situations where

[2] *Analysing the dogmatic qualification of tacit approval in Spanish Law,* Arzoz Santisteban, X., *El silencio administrativo. Análisis constitucional y administrativo,* Wolters Kluwer, Madrid, 2019, pp. 293-294; in French Law, Deguergue, M., "Le silence de l'Administration en droit administrative français", *Les Cahiers de droit*, vol. 56, numéro 3-4, décembre, 2015, https://doi.org./10.7202/1034456ar. Desgree, A., *Le silence de l'Administration – Recherche sur la décision implicite*, 2021, https://www.theses.fr/2021NANT3007.pdf; in Portuguese Law, Cadilha, C., "O Silêncio Administrativo", *CJA*, n.º 28, 2001; Carvalho, R., "O deferimento tácito em direito do urbanismo e ambiente – Breves reflexões", *Revista Jurídica do Urbanismo e do Ambiente*, n.ºs 31- 34, 2010, pp. 351-416; Correia, F. A., "O Silêncio da Administração no Direito do Urbanismo Português: Sinopse de uma Reforma", in *Ars Iudicandi – Estudos em Homenagem ao Prof. Doutor António Castanheira Neves*, Vol. III, Coimbra Ed., Coimbra, 2008, pp. 125 ff.; Martines, F., "La 'non decisione' sugli interessi pubblici sensibili: Il silenzio assenso fra administrazioni pubbliche introdotto dall'art. 17 bis della L. 241/1990", *Diritto Amministrativo*, 3, Giuffrè, 2018, pp. 747-786; Morillo-Velarde Pérez, J., "La reforma del silencio administrativo en la Ley de procedimiento administrativo común desde la

the administrative bodies are bound by law to issue a precise decision. Not so much, though, when discretionary powers are involved in the decision-making process. Briefly, the requirements set out in article 130 are: (i) private initiative procedure; (ii) provision for the possibility of the formation of an implied act in a law or regulation; (iii) absence of notification of a final decision on a request made by a private individual; (iv) to the competent body; (v) which constitutes them in the legal duty to decide; (vi) if there is no notification of the act until "the first working day after the expiry of the time limit for decision"; (vii) expiry of the time limit for ruling without the issue of an express decision. Article 130 does not establish by itself the tacit approval, only the requirements[3].

The value of silence is also foreseen in another kind of acts issued by consultive administrative bodies: the opinions. Usually, opinions do not have content decision, except if the Legislator foresees it as a binding opinion. Hence, it is just like an administrative act because the administrative body who has the decision power must follow the content of that opinion. Until this new Decree-Law, whenever the law demanded an opinion of such configuration, the procedure could not go on without it, and the instructor of the administrative procedure had to inquire again and insist with the consultant administrative body in order for the opinion to be issued. Only then, after this due diligence, could the procedure continue. As if the maintenance of silence would mean nothing against. The problem of silence is much more visible in this legal solution: when the Legislator imposes the intervention of another administrative body, asking for their opinion, normally that means their particular accuracy and competence in the matter at issue. It is risky to assume, as many seem to understand the basis of the legal solution, that repeated silence means nothing to oppose. The organizational difficulties of the Portuguese Public Administration, the scarcity of human resources and, sometimes, their poor qualification, are well known. These data seem, in my perspective, to rule out the conclusion that silence means nothing to object. Most probably, due to the workload, it means that they did not get to the procedure in time to study it and issue the opinion. An opinion that the Legislator deemed so important as to make it binding.

The dematerialisation of procedures, differently from the abolition of prior control acts or the formation of tacit acts, is a mechanism that has been present for some time – and successfully – in the field of public procurement in

perspectiva del silencio estimatorio", in Laguna Paz, J. C., Sanz Rubiales, I., Mozos y Touya, I. M. (coord), *Derecho administrativo e integración europea. Estudios en homenaje al profesor José Luis Martínez López-Muñiz*, Reus Ed., Madrid, 2017, pp. 843-862. For a deeper análisis, *The Sound of Silence in European Administrative Law*, Dacian Dragos, Polonca Kovac and Hanna Tolsma (Ed)., Palgrave, 2020.

[3] Mário Aroso de Almeida, *Teoria Geral do Direito Administrativo*, 9.ª ed. revista e atualizada, Almedina, Coimbra, 2022, p. 300. For a deeper analysis of this issue, Raquel Carvalho, "The possibility of non-expressed administrative decisions: Between administrative efficiency and public interest protection – some notes from Portugal", presented at EGPA 2022 Conference, in Lisboa (forthcoming).

Portugal and has been widely welcome in the Administrative Procedure Code. In public procurement procedures, in addition to making the procedural documents available on an electronic platform, in most types of procedures, the proposals are also uploaded to the electronic platform, as well as any clarifications they may have (see the provisions of Articles 40, 50, 62 and 72). Similarly, in the post-adjudicatory phase, the qualification documents are also made available on the electronic platform (Article 85), as well as the contract (Article 94). In fact, Portugal is clearly leading the way in this field of electronic public procurement[4].

With regard to the Administrative Procedure Code, which contains the supplementary rules for procedural proceedings, it is important to highlight the enshrinement of: (i) the use of electronic means in the exercise of administrative functions (Article 14); (ii) the instruction of administrative procedures by electronic means (Article 61); (iii) the creation of the Electronic Point of Single Contact (Article 62); (iv) communications by electronic means (Article 63); final decision issued by electronic means (Article 94); (v) submission of applications by electronic means (Article 104); (vi) notifications by electronic means (Article 112).

The Government, in the context of an expanded programme of administrative simplification and modernisation, which has had various editions and revisions, has considered it a "priority to simplify administrative activity through the continuous elimination of licences, authorisations, and unnecessary administrative acts, in a logic of 'zero licencing'". Consequently, and in this precise framework, it has been understood that the aforementioned simplification, aimed at combating the lack of competitiveness of the country (with regard to national and international investment), would involve the elimination of licences, authorisations, and administrative requirements. In the Legislator's understanding, such acts prove to be disproportionate to the desirable preventative control objectives, create operating costs, and bring no "effective added value for the public interest that is intended to be pursued"[5].

The Legislator further adds that "one of the factors contributing to this diagnosis are the excessive barriers in the licencing of economic activities, which have been pointed out in several analyses by international institutions, such as the

[4] Raquel Carvalho, *"The Directive 2014/24/EU and the implementation of e-procurement in Portugal: Part I"*, *European Procurement and Public Private Partnership Law Review*, 2019, 14, 1, pp. 43-49; Idem, "The Directive 2014/24/EU and the implementation of e-procurement in Portugal: Part II", *European Procurement and Public Private Partnership Law Review*, 2019, 14, 2, pp. 70-78; Raquel Carvalho and Marta Portocarrero, "E-procurement: new challenges for local authorities", in *Democratic and electronic changes in local public action in Europe – REvolution or E-volution*, (Editors) Marig Doucy, Magali Dreyfus, Bayonne, Institut Francophone pour la Justice et la Democratie, 2022; Raquel Carvalho, "La digitalización de los procedimientos administrativos como instrumentos de simplificación, en particular, en la contratacion pública en Portugal", in *Tecnología, administración pública y regulación*, (Editors) Luis Ferney Moreno Castillo, William Iván Gallo Aponte and Vivian Cristina Lima López Valle, Colombia, 2021, pp. 245-271.

[5] Preamble of Decree-Law no. 11/2023, February 10th.

European Commission, the Organisation for Economic Cooperation and Development, and the World Bank, as aspects to be addressed to foster competitiveness, competition, investment and growth"[6]. Consequently, he considers it necessary to review some legislative solutions in certain sectors of activity, namely public health, protection of cultural heritage, consumer protection, spatial and urban planning, and environment. In particular, in what concerns the form of intervention of the Public Administration. The intention of the government, in this matter, was expressed in one of the headings of the Recovery and Resilience Plan: TD-r33 – Economic Justice and Business Environment, component 18: "Within the scope of licencing, the intention is to reduce the administrative burden on companies, in particular by streamlining the procedures inherent to sectoral licencing and other investment-inhibiting procedures, reducing the time and number of necessary interactions and respective costs. To achieve this goal, a survey study and proposals for legislative/regulatory change and evolution should be developed, which should act in two dimensions.

*Regulatory dimension*: where a survey on the barriers to investment in the field of licencing and procedures that most constrain private investment will be carried out and measures will be proposed aimed at reducing stages/times of procedures, requirements for prior opinions, streamlining of decisions (e.g., conferences of services[7]), dematerialization of processes and documents, including services related to EU funds.

*Digital dimension*: where constraints will be identified at the licencing and registry area level that, particularly throughout the life cycle of companies, may evolve to become more predictable, agile and simple, taking advantage of technology in key and intensive areas of interaction (e.g., finance, social security, registry services, and notary public services) through, for example: online processing of licences, functional interoperability between services involved in certain life events, ensuring compliance with the "only once" principle, improving the services' communication channels in an omnichannel logic. The focus of the Economic Justice reform must be the interest of the recipients of the public justice service – citizens and companies – and the investments to be made must be evaluated according to their contribution to achieving the reform's objectives – reduction of pendency and the time required to process and conclude processes, increase in the recovery of companies and credits, improvement and simplification of the interaction of citizens and companies with the public administration, pointing out as essential goals of this digital transition the simplification of the legal framework and requirements required from citizens and companies in their interaction with the Justice System, electronic processing, interoperability and automation in courts, simplification and creation of the integrated insolvency platform, recovery of companies and reform of administrative and tax courts, and the

[6] Preamble of Decree-Law no. 11/2023, February 10th.

[7] Marta Portocarrero, *Modelos de simplificação administrativa. A conferência procedimental e a concentração de competências e procedimentos no direito administrative*, UCeditora, 2002.

life cycles of citizens (e.g. e-Registrars system) and companies (e.g. Company 2.0), are examples of fundamental pieces to achieve a more resilient, transparent justice, close to citizens and companies.[8]

The usual administrative interventions in complex administrative procedures, such as those affecting environmental public interests, are perceived as "constraints", unjustified sectoral obstacles. At the same time, however, the need is acknowledged that "their elimination does not impair compliance with the rules of environmental protection, with the Public Administration focusing particularly on monitoring, co-responsibility and self-control by economic operators".

So, the main objective is the elimination of administrative control measures, such as authorisations and licences, and the simplification of the legal framework for opinions.

The legal regimes considered in this Decree-Law are: (i) environmental impact assessment (EIA); (ii) environmental licence; (iii) Single Environmental Report; (iv) simplification of the regime for the production and use of water for reuse; (v) removal of administrative barriers for businesses to re-use waste; (vi) amendments to the waste management legal framework; (vii) amendment of the legal framework for landfill of waste; (viii) mechanism for certifying tacit approval, free of charge and dematerialised; (ix) several amendments regarding the Administrative Procedure Code related to deadlines and tacit decisions and opinions.

### 3. The option between preventing control and monitoring and co-responsibility

The intention behind this set of modifications, as with other alterations to the legal system, is based on shifting the responsibility of pursuing the public interest from administrative entities to private individuals. Based on the most profound alteration of State functions – the shift from the Provider State to the Regulator State – but with the same constitutional context of broad catalogues of Fundamental Rights, the State, seeing itself without resources, either financially or substantially, without human and qualified resources (because it underpays them and has a long delay in their qualification), supposedly finds in these mechanisms the solution to improve competitiveness. However, the implementation of preventive mechanisms *per se* does not mean the existence of obstacles or delay in decisions if there are human and procedural conditions for compliance with the standards of protection of the public interest.

This shifting of responsibility for the protection of the public interest, here environmental, to private parties is a failed act. Justified in the supposed increase of the inspection powers of the Public Administration and regulatory

[8] https://recuperarportugal.gov.pt/2023/02/21/td-r33-justica-economica-e-ambiente-de-negocios/, accessed May 2nd, 2023.

institutions, it seems to forget two fundamental aspects: the environmental public interest is particularly complex, which is why all the economic activities that interfere with it should be subject to prior judgments of conformity and adequacy, in the light of the parameters of legality, proportionality and good administration of the public interest. This is something that private parties, even in the face of mechanisms such as prior communication, an instrument already widely used in various fields such as urban planning law, and provided for in this diploma with regard to water resources (substitution of the licence for works to construct hydraulic infrastructures and water abstraction to make use of private water resources) or even its exemption (cutting down cork oaks), are not in a position to pursue as if they were public administration. Even if under the "threat" of subsequent inspection and accountability, private individuals are naturally governed by criteria that do not, as a rule, contemplate the common good. Hence, the need for the Public Administration to have duties in this as in other areas. Moreover, the issues of insufficient human resources also manifest themselves at the stage of monitoring and supervision of the Public Administration. With the consequent unprotection of the environmental public interest present there.

On the other hand, these modifications imply a shift of the legal paradigm of public interest protection. The authorisations, licences and opinions are foreseen in the legal order so that the administrative bodies can assess in every moment what should be the more adequate decision, considering how the individual interest can be accommodated with the public ones. In order to be able to make such ongoing considerations, the legislator enshrines a particular kind of powers into the provision of competence: discretionary powers. These powers are established through a set of tools that are set to allow case-to-case adaptations: concepts of possibility, vagueness, judgment of prognosis, and possibility of choice between open and closed alternatives[9]. These tools are particularly fit to allow the administrative body to decide, considering, in each situation, all the specific requirements and particularities of the case.

When the Legislator, though, maintaining these kinds of powers, establishes that, when an expressed decision is not issued within the deadline, that means the approval of a tacit decision, this is a contradictory and wrongful implementation of legal solutions. The establishment of discretionary powers means the clear recognition, from the Legislator, that he cannot foresee all the possible decisions for all possible cases. Therefore, within the principle of legality, he uses some tools to leave the adequate decision to the administrative body. Hence, how can he, afterwards, subordinate such an option to the mere elapse of time? If it

[9] Correia, J. S., *"Conceitos Jurídicos Indeterminados e Âmbito do Controlo Jurisdicional*", *CJA*, n.º 70, 2008, pp. 32-57; Poscher, R., "Ambiguity and vagueness in legal interpretation", in P. M. Tiersma and L. M. Solan (eds.), *Oxford Handbook on language and law*, Oxford University Press, 2012; Tropea, G., "La discrezionalità amministrativa tra semplificazioni e liberalizzazioni, anche alla luce della legge n. 124/2015", *Diritto Amministrativo*, 1-2, Giuffrè, 2016, pp. 107-175.

were only a question of time, there would be no need for discretionary administrative powers – legislative consideration would be enough, listing all the situations and their solutions in the legal provisions. The administrative agent would be a mere executor of the law.

Therefore, in my opinion, the Legislator has been forced by facts to implement rapid solutions without seeing the whole picture of the legal framework of administrative function as he has established himself.

Finally, realising, perhaps, the incoherence of accepting the formation of tacit acts of approval in areas that are susceptible to administrative consideration reduces the situations of submission to control acts for the protection of the environmental public interest.

## 4. The legislative solutions

### 4.1. Environmental impact assessment

Environmental impact assessment:

(a) The number of cases in which a discretionary decision by the competent authorities is required is reduced because, in the legislator's perspective, such decisions have "the consequence of further complicating and delaying the procedures" (preamble). As examples of the implementation of this line of legal provisions: “it is no longer necessary to carry out a case-by-case analysis to verify whether an EIA will be necessary in the food, textile, leather, wood, and paper and rubber industries, when they are located in industrial parks or clusters that are more than 500 m from residential areas and occupy an area of less than 1 ha. Similarly, the implementation of complementary sludge treatment in existing wastewater treatment plants, namely hydrolysis (thermal or biological), solar drying and composting, also does not require a case-by-case analysis to verify whether an EIA is necessary. Likewise, the need for a case-by-case analysis for energy production from solar sources is eliminated when: i) the installed area is less than 15 ha; ii) it is not located less than 2 km from other photovoltaic plants with more than 1 MW, when their combined occupation area does not equal or exceed 15 ha, and iii) the connection to the public service electricity grid's disconnecting station is made by a line with a voltage not exceeding 60 kV and a length of less than 10 km. Finally, the case-by-case analysis for the production of electricity from wind sources is also eliminated when a tower is involved, provided that it is more than 2 km away from another tower”;

(b) reduction in the number of cases in which EIA is mandatory (small solar electricity producers; wind farms in greater number than at present; power transmission network up to 110KV; reduction in mandatory EIA cases in fish farming);

(c) elimination of preventive control acts, in absolute, namely the EIA: modernization of railway tracks and with the alterations or extensions of projects

in the areas of production and transformation of metals, minerals, chemicals, food, textiles, tanning, wood, and paper and rubber industries. In this last case, the exemption from AIA is subject to the verification of some requirements that, in essence, reveal the need for consideration of the location and size of the project;

(d) simplification of the EIA procedure in relation to infrastructures related to water, electricity, natural gas, diesel, transport and telecommunications, creating a new figure: "environmental analysis of corridors";

(e) improvement in the wording of certain legal provisions to "make the analysis carried out in these situations more flexible";

(f) "after obtaining a favourable EIS, whether express or tacit, it is no longer necessary to carry out any additional procedure regarding these matters";

(g) elimination of the environmental licence renewal procedure, "considering that monitoring and emission control concerns are already covered by the applicable regime, which allows for a quick and demanding action by the Public Administration whenever necessary".

### 4.2. Environmental licence

An environmental licence "is an administrative act that establishes the environmental conditions to which the operation of a polluting installation is subject. The law defines the industrial and agricultural activities that are subject to environmental licencing"[10]. The need for renewal of the environmental licence is abolished, considering that the concerns of monitoring and control of emissions are already covered by the applicable regime, which allows for a quick and demanding action of the Public Administration whenever necessary. Thus, the environmental licence no longer has to be renewed after 10 years, as required by the regime in force. In some activities, such as certain installations in the chemical sector without industrial scale, the licence is abolished. In order to avoid duplication of emissions licencing, the permit for emissions into the air is waived for those who already have or may come to have an environmental licence. The participation of accredited entities in the instruction of licencing procedures to obtain environmental licences is also eliminated, remaining only for information purposes and with no functions of control.

### 4.3. Dematerialization

The Single Environmental Report (SRE) on environmental matters is created to simplify and dematerialise reporting obligations. This is an instrument for collecting monitoring information from various public entities, such as the Portuguese Environment Agency and the regional development and coordination

[10] Consulted May 4th, 2023 (https://dre.pt/dre/lexionario/termo/licenca-ambiental).

commissions[11].

### 4.4. Water resources

The simplification of procedures for the production and use of water, incorporating the principles of circular economy, is obtained through procedural simplification, reflected in the abolition of the licence required whenever "it is a question of reuse by the same natural or legal person or by entities included in the same group, and also when, in urban wastewater management systems, there is only one managing body that produces water for its own use or to transfer to third parties, provided that the environmental receptors are the same as the discharge of water from which it originates".

With regard to certain hydraulic works, the legislator has replaced the licence with prior notification, when the construction is a continuation of a pre-existent one or a rehabilitation of previous construction, without altering their initial characteristics. Renewal of user licences becomes automatic.

### 4.5. Waste management

The need to obtain a waste permit will be waived in the case of an industrial establishment which has already obtained a permit under the Responsible Industry System (RIS). The permit is replaced by a binding opinion as part of the procedure for granting a permit under the RIS.

Several changes in waste management procedures regarding waste from exploitation of mineral deposits and mineral masses are taking place. It is now allowed to "[wet] waste by re-injecting leachate or concentrate from the advanced membrane treatment unit, which will relieve operators of the costs of transporting and forwarding waste to an appropriate final destination. Some of the limit values applicable to landfills of non-hazardous waste are also eliminated and replaced by the possibility of defining additional parameters for certain types of waste, in order to reduce constraints on the acceptability of waste in landfills.

[11] *Analysing the simplification of procedures in Portuguese administrative law*, Silveira, J. T, Freitas, T. F. Fabião, G. and Raimundo, M., "The Simplification of Procedures in Portuguese Administrative Law", *Administrative Sciences*, 12, 9, 2022, https://doi.org/10.3390/admsci120100 09; Prata Roque, Miguel. 2020. "O procedimento administrativo eletrónico". In *Comentários ao Código do Procedimento Administrativo*, 5th ed. Edited by Carla Amado Gomes, Ana Fernanda Neves and Tiago Serrão. Lisboa: AAFDL, vol. II; Carvalho, Raquel. 2016. "Simplificação e eficiência administrativas na reforma do Estado – Breves reflexões em torno de algumas soluções do Código do Procedimento Administrativo". *In Estudos em Homenagem Conselheiro Presidente Rui Moura Ramos*. Coimbra: Almedina, vol. II.

### 4.6. Tacit approval certification mechanism

Given the multiplicity of provisions for the formation of tacit acts of approval and because private individuals had no means of proving the formation of such acts, thus hindering, in the Legislator's view, the functioning of the instrument, it is provided that "an administrative entity to be designated must, within a very short period of time, issue this document in a dematerialised form and free of charge, which will serve to prove to any administrative entity, including inspections and police entities, that the licence or authorisation was obtained by tacit approval".

### 4.7. Amendments to the Administrative Procedure Code

The legislator, somewhat discretely, included some amendments to the law of administrative procedure, applicable to the special regimes, in a suppletive way. He shortened deadlines and altered the regime for binding opinions, in an attempt to harmonise the formation of tacit acts in the special regimes with the requirements that appear in the procedural law, namely the absence of notification, as one of the requirements to be met for the formation of a tacit act.

One of the most questionable amendments concerns the repeal of interpellation in the case of binding mandatory opinions. The current wording of the rule leaves, at least, the doubt as to whether the rule on the possibility of continuing the procedure, within the paragraph on mandatory and non-binding opinions, should apply. I am inclined, by virtue of all the reasons and grounds that I have given, to conclude that such a solution cannot be reached without further consideration.

| Article 92 PAC before the amendment | Present Article 92 PAC |
|---|---|
| 1 - Opinions must always be well founded and must expressly and clearly conclude on all the questions indicated in the consultation.<br>2 - The person responsible for directing the procedure must request, whenever possible, simultaneously, the competent bodies to issue the opinions that are to be issued as soon as, given the progress of the procedure, the presuppositions for that are met.<br>3 - In the absence of a special provision, the opinions are issued within 20 days, unless the person responsible for directing the procedure justifiably sets a | 1 - [...]<br>2 - The person responsible for directing the procedure **must simultaneously request**, from the competent bodies, the issuing of the opinions that may be necessary as soon as, in view of the progress of the procedure, the presuppositions for that are gathered.<br>3 - In the absence of a special provision, the opinions are issued within **15 days**.<br>**4 - (Revoked.)**<br>5 - When a mandatory opinion is not issued within the timeframe envisaged in paragraph 3, the procedure must |

| | |
|---|---|
| different deadline.<br>4 - The different time limit provided for in the previous paragraph must not be less than 10 days or more than 30 days.<br>5 - When a mandatory opinion is not issued within the timeframe provided in the previous paragraph, the procedure can continue and be decided without the opinion, unless there is express legal provision to the contrary.<br>6 - In the event that the mandatory opinion is binding, the final decision can only be issued without the prior issuing of that opinion, provided that the person responsible for directing the procedure has, within 10 days, questioned the competent body to issue it and the latter has not done so within 20 days of that questioning. | continue and be decided.<br>**6 - (Revoked.)**<br>7 - The opinion cannot be issued after the deadline provided in paragraph 3. |

Furthermore, the Legislator redraws now the possibility of a belated delivery of the opinion.

### 5. Appreciation

**A.** One of the main errors of the new provisions, believing it will achieve simplification, in my point of view, is the underlying dogmatic understanding that there is interchangeability between decision-making powers and supervisory powers. The consecration of discretionary powers to make decisions that involve multiple interests, both public and private, is justified in the creation of the best conditions for the administrative agent to make the best decision in each concrete case. Therefore, when the preamble of the diploma justifies the promotion of the "elimination of licences, authorizations, acts, and redundant procedures in environmental matters" with the reinforcement of the supervision and co-accountability of the economic operators, it is transforming the paradigm of administrative law. To decide is to reflect upon the interests at stake, to choose the best solution within the law and good administration. The supervisory powers are monitoring compliance with the law. Prior control acts, as the name suggests, are intended to prevent damage to very delicate interests, which must be protected at all times. Because once injured, they may be irrecoverable. The supervisory power "runs

after the damage", it does not assume the precautionary principle[12]. In environmental matters, administrative simplification cannot be pursued by eliminating the instruments that protect the public interest. Therefore, all instruments which involve (i) very short deadlines for complex decisions; (ii) formation of tacit acts of approval; (iii) devaluation of the non-existence of binding mandatory opinions, and (iv) elimination of previous control administrative acts, contribute to the lack of protection of the environmental public interest.

**B.** The option of dematerialization is an Eco-friendly tool

**C.** Finally, the transference of the responsibility for protecting the environment to the citizens, even though they have also that duty, seems a decision of doubtful constitutional validity, because it means the renunciation of the exercise of constitutional functions.

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# ON THE VITAL PUBLIC INTEREST IN EFFICIENT, EFFECTIVE AND FAIR ADMINISTRATION AT ALL LEVELS OF GOVERNMENT

# European Union Membership and the Constitution of Romania

Lecturer **Ovidiu Horia MAICAN**[1]

***Abstract***

*One of the problems that bring a strong lately (despite past failures in implementing the new European construction) is what effect it will have on Romania's accession to the European Union for the Constitution of our country. In the last years, much less attention has been given to the practical implementation of new institutional proposals included in the Treaty of Lisbon. Even a cursory examination indicates that the implementation of some of these proposals is likely to be uneasy, and in some cases could be a source of future problems or difficulties.*

***Keywords:*** *Romania, Constitution, Treaty of Lisbon, accession, European integration.*

***JEL Classification*****:** K33

## 1. Introduction

It becomes clear that, after Romania's accession to the European Union, community integration and application of european law can not be realized in practice without a revision of the Constitution of Romania, a process that will be achieved gradually and balanced, without forcing or accelerating certain processes, primarily through better public information on the process.

## 2. General aspects

Romania (as well as current and future member states of the European Union) will be in the future to give up some of the attributes of sovereignty, transferring them to the Union.

In this respect, the Constitution establishes separate provisions, grouped under Title VI (Euro-Atlantic integration). Article 145 of this title shows that our country's accession to the Treaties establishing the European Union, to transfer certain powers to EU institutions and the joint exercise with the other countries of powers established by these treaties, is achieved through a regulation adopted at a joint session of both parliamentary chambers, by a vote of two thirds of the deputies and senators.[2]

As a result of accession, the European union rules becomes ascendant

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[1] Ovidiu-Horia Maican - Faculty of Law, Bucharest University of Economic Studies, Romania, ovidium716@gmail.com.

[2] Gheorghe Iancu, *Drept constituţional şi instituţii politice*, 3rd ed., Lumina Lex Publishing House, Bucharest, 2005, p 603.

(priority) as otherwise provided in the law, respecting the provisions of the Act of Accession. Implementation of the obligations of the Act is guaranteed by the joint efforts of all three branches of government. The new position of EU member puts into question the necessity to revise the Romanian Constitution.

The procedure rules of both parliamentary chambers do not have special provisions in this field. As a result, are valid the general rules of legislative parliamentary procedure. The project and the proposal of revision may be admitted only after the decision of Constitutional Court. The non-constitutionality of the project and the proposal of revision, declared by the Constitutional Court, has as effect in the parliamentary procedure the blocking of legiferation procedure.

These effects must be estimated in terms of the influence of the Treaty of Lisbon and constitutional systems in the Member States which are now EU.

The constitutional system we can understand the coherent and harmonious whole structure of political institutions and governance mechanisms mentioned in the Constitution, which is achieved through social management system.[3]

Closely related is the concept of constitutional system of political regime.[4]

According to a definition of a Romanian author, the political regime is defined as a single coherent whole structure of legal rules and mechanisms of constitutional, political, ideological, socio-economic, which is done with government, or political power is achieved.[5]

Within the European Union meet only pluralistic political regimes, characterized by ideological pluralism, the existence of at least two functioning parties acting lawfully and for seizing power, and the existence of different public powers (executive, legislative and judicial).[6]

From this point of view, in the Community meet parliamentary regimes (Austria, Belgium, Denmark, Germany, Greece, Latvia, Luxembourg, United Kingdom, Ireland, Italy, Netherlands, Spain, Sweden and Hungary) and semi-presidential regimes (Bulgaria, Estonia, France, Lithuania, Poland, Portugal and Romania). Czech Republic, Finland, Slovakia and Slovenia can be considered to some extent as a middle way between semi-presidential and presidential regime, and Cyprus and Malta are characterized by a presidential regime. In terms of parliamentary organization, meet with bicameral system states (Austria, Belgium, Czech Republic, France, Germany, Ireland, Italy, United Kingdom, Netherlands, Poland, Romania and Spain) and unicameral system states (Bulgaria, Cyprus, Denmark, Estonia, Finland, Greece, Latvia, Lithuania, Luxembourg, Malta, Portugal, Slovakia, Slovenia, Sweden and Hungary.

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[3] Ioan Muraru, Mihai Constantinescu, *Drept parlamentar românesc*, All Beck Publishing House, Bucharest, 2005, p. 254.

[4] Cristian Ionescu, *Regimuri politice contemporane*, 2nd ed., C. H. Beck Publishing House, Bucharest, 2006, p. 11.

[5] Ibid, p. 63.

[6] Ibid, p. 80-82.

The Treaty of Lisbon does not specify anything in what way to proceed if the European constitutional provisions are in conflict with the Constitution of the Member States. In theory, the acts adopted by the European institutions in exercising their powers will have priority over the laws of Member States. Special problems may raise the problem of European citizenship.

Article 16, paragraph 4 of the Constitution of Romania shows that after our country's accession to the European Union, EU citizens, if they meet conditions set by the organic law, may elect and be elected in local authorities. In applying this constitutional provision is required of an organic law providing voting prerequisites, the law has not yet appeared. European countries legislation does not cover foreign citizen's access to all local authorities. About other types of appointments or elections (including elections and European MEP functions) do not speak Romanian in constitutional texts. Neither the Treaty on Romania's accession to the European Union does not clarify things.

These gaps are filled by Law no. 33/2007 regarding the organization of the European Parliament elections.[7]

Article 5 of the law enshrines the two groups of voters for the European elections, the European (Community) voter and the national voter. Community voter is any citizen of an EU Member State other than Romania, having the right to vote in Romania to the European Parliament and the domicile or residence in Romania. National voter is any citizen of Romania having the right to elect members of Romania in the European Parliament. In terms of the Constitutions of the States of the Community, only the Austrian Constitution, art. 23 A, has similar provisions. This article shows that members of the European Parliament delegation in the Republic of Austria may be elected by the Austrians who have not the right to vote was raised by a provision of European law, or by citizens of another EU member state, which may vote on European legislation.

Treaty of Lisbon shows that there are areas where the Union has exclusive competence in other areas as these powers are shared.

In areas where the Union has exclusive competence, it can legislate only that states can do so only if the Union has mandated this. In the case of shared competences, enactment falls equally to the Member and the Union. Moreover, Member States coordinate their economic policies and those in employment within the Union.

In particular, the Union may establish and implement a common foreign and security policy, including a common defense policy. The Union shall have exclusive competence in the field of customs union, competition, monetary policy (only for countries that have adopted the euro as their currency), conservation of marine biological resources under the common fisheries policy and common commercial policy. Shared competence (between Union and Member States) will be no internal market, social policy, social cohesion, territorial and economic,

[7] Republished in Official Gazette no. 627 of August 31, 2012, with subsequent amendments.

agriculture and fisheries (excluding the conservation of marine biological resources), environment, consumer protection, transport networks trans-European energy, freedom, security and justice and security issues (safety) of joint public health sector.

In addition to exclusive and shared competences, the Union shall have competence to support, coordinating and complementary action in areas such as protection of human health, industry, culture, tourism, education, youth, sports, vocational training, civil protection and administrative cooperation.

### 3. Effects of accession

Need to revise the Constitution of Romania membership itself derives from the provisions of par. 3 of art. 11, that "Where a treaty to which Romania is to become part contains provisions contrary to the Constitution, its ratification can take place only after reviewing the Constitution." According to this constitutional principle, whether any treaty or other european legislation establishes provisions contrary to the Constitution of our country, constitutional revision becomes mandatory. Romanian constitutional text does not specify to whom falls the task of finding of unconstitutionality.

The difficulties encountered in the process of ratification by Member States of the European Constitution was designed, especially in situations where ratification was achieved through popular referendum proves that this process must be based primarily on an understanding by citizens and correct their information by national and EU authorities.

It is somewhat contradictory that some governments, in theory adherents of the concept of popular sovereignty by Jean-Jacques Rousseau, that sovereignty belongs to the citizens (which means that usually only the law can be adopted by referendum) have supported the idea of repetition popular referendums until former draft European Constitution was adopted in the old form. Further, it is appropriate to list the constitutional provisions that may be affected, or which may conflict with the European law.

Thus, art. 1 of the Constitution states that "Romania is a nation state, sovereign and independent, unitary and indivisible." The words of the national state is somewhat outdated in the current European political developments, not present in any of the existing constitutions in the European Union. The Romanian constitutional history, this phrase appeared in the 1923 and 1938 Constitutions, the Constitution of 1866 and the three totalitarian Constitution (1948, 1952 and 1965) having similar provisions. Elimination not pose any danger, especially for the fact that the European Union is a federation of states and will respect the national identities of Member States.

For example, any person having the nationality of one of the Member States will have automatically and simultaneously and European citizenship. European citizenship will have an ancillary (secondary) from the main nationality

(a member of the State of origin) and will not replace national citizenship. From a practical perspective, given that Romania is a member of the European Union, any natural person who acquires the Romanian citizenship, will automatically acquire the European citizenship too. In this context, perhaps should be amended Art. 5 of our Constitution, regulating citizenship.

Any defects in writing this article, combined with weaknesses in border control and legal regime of granting Romanian citizenship can cause difficulties in our country, especially if the Romanian citizenship is granted to persons wrongly endorsed by the European Union countries.

Although Art. 16, par. 3 gives the right to hold public office, civil or military, all persons who have Romanian citizenship and residence in the country. European acts regulating the free movement of workers within the Community, are not applicable to public functions (public service). The last paragraph of art. 16 confers the right to elect and be elected in local authorities meeting the requirements of European Union citizens organic law, it only when Romania's EU admission. Article II-100 of the former European fundamental law is somewhat different, providing the right for any citizen of the Union resident in that State, under the same terms as citizens of the host country. Article 35 of the constitution anticipated integration of our country in the Community, allowing Romanian citizens to elect and be elected to Parliament. On the same line to register and par. 2 of art. 41, that "foreign citizens and stateless persons may acquire ownership of private land under the terms resulting from Romania's accession to the European Union and other international treaties to which Romania is party, on the basis of reciprocity, as provided by law organic and by legal inheritance.

This constitutional amendment is necessary to ensure the free movement of capital, one of the four fundamental freedoms (along with that of persons, services and goods). Ombudsman activity will be backed by the European Ombudsman, who may receive complaints regarding the activities of european institutions (except the Court of Justice of the European Union) from any natural or legal person residing or having its registered office in one of Member States. Romanian Ombudsman system has the power to defend only the rights and freedoms of individuals. Domestic constitutional text does not include any mention of whether legal persons and foreign citizens or stateless persons can enforce their rights before it. Enactment raises special problems.

Romanian Parliament passes constitutional, organic laws and ordinary laws.

In the European Union's legal acts, is seen a larger variety.

We are talking here about the regulations, directives, decisions, recommendations and opinions. Regulation is a legislative act (legal) of general application. Presents binding in its entirety and directly applicable in all Member States.

Directive is also compulsory, but only the outcome to be achieved. In each Member State, national authorities may choose forms and methods by which

to reach the result to be achieved.

Decision is a binding document in its entirety. Is binding only for those whom it is addressed. Recommendations and opinions are not binding.

As you can see, in practice, only the organic and ordinary laws can sometimes come at odds with European Union legal acts. Any disputes arising from conflicts between its national and EU legal provisions will be addressed by national and EU courts. There will be exceptions of unconstitutionality raised in Romanian courts.

**4. Special areas**

Special problems arise in national defense, public order and state security. Chamber of Deputies and the Senate adopted a joint session of the country's national defense strategy, examine the reports of the Supreme Council of National Defence and appoint the directors of information services. Organic laws are regulated organization of the Supreme Defence Council, the structure and organization of national defense forces. Unfortunately, this area of confusion and failure can occur.

These arise primarily from the fact that Romania is not yet a clear distinction between the defense, public order and state security. The European legislation makes a clear distinction between the Common Foreign and Security Policy, (or defense work involving conventional military forces and intelligence services or special) and common Freedom, Security and Justice, that justice, order public and state security (assuming the courts, prosecutors, police and firefighters, customs, borders, civil protection, the prison system and, to a lesser extent, intelligence). Lisbon Treaty shows that the EU would coordinate (leading) a common foreign and security policy, aiming at both a growing degree of convergence of Member States' actions (as evidenced by the existence of an EU Foreign Minister). At the same time, the Council will identify (determine) the Union's strategic interests and objectives of foreign and security policy. Common foreign and security policy will be implemented by the European Union and the Member States through the use of resources (means) national and european.

European decisions in foreign policy and security policy will be adopted by the Council unanimously. A particularly interesting aspect is that the common foreign and security policy includes defense policy and security policy. Defence policy and security policy will include feathering (progressive) for a policy (strategy) of the European Union's common defense.

This can lead to a common defense, if the Council decides by unanimity in this respect. In this situation, it is recommended that member countries adopt such a decision in accordance with their constitutional procedures.

What is important is that european policy in this area will not prejudice the specific character (particularly) the defense and security policy of the Member

States, particularly the common defense made in the North Atlantic Treaty Organisation (NATO).

Member States will provide military and civilian capabilities available to the Union to implement a policy of defense and security policy. At the same time, countries which together establish multinational forces, it will devote itself to achieving the goals of defense policy and security policy.

In addition, it was created in 2004 a European Defence Agency, responsible for military research, acquisition and armaments, the establishment of policies (strategies) of European armaments. An important aspect in this context is that policy decisions adopted European Security and Defence Policy (including the initiation of actions or missions) will be established by a unanimous Council decision on a proposal from the European Union Foreign Minister, or at a Member State. The European Union will be simultaneously a space of freedom, security and justice (Romanian constitutional texts not exist in this respect).

In this area will be approximated (within unclear and interpreted) laws and regulations of the Member States. National parliaments of the Member States will be involved in the political monitoring of Europol and Eurojust in the evaluation work. Special problems (involving a novelty even for national constitutions) are made by the solidarity clause. This article shows that the European Union with all Member States will act in solidarity with any state victim of a terrorist attack or a natural disaster. Simultaneously, the Union will mobilize all resources (means) available to it (including the military resources provided by Member States) in order to prevent terrorist threats on the territory of member countries to protect democratic institutions and the civilian population from any terrorist attack, and assisting (help, support) any Member State upon request of the authorities (institutions) of its policy, if a terrorist attack or a natural disaster.

As seen from the discussion above, given the European provisions, it is necessary to make a definition or distinction in terms of constitutional regulations of the concepts of the Romanian national security and foreign policy, defense policy and security, armed forces, freedom, justice and public order.

In the field of judiciary, will be developed judicial cooperation in civil and criminal, based on mutual recognition of judicial decisions. In criminal law, will be established minimum rules concerning the mutual admissibility of evidence between Member States, the rights of persons during criminal investigations, crime victims' rights and other specific aspects of criminal investigation. What is important is that it will set minimum rules concerning the definition of offenses and penalties (sanctions) particularly in the field of transborder crimes (terrorism, illicit traffic of drugs, weapons, and human beings, sexual exploitation of women and children, money laundering, corruption, counterfeiting (forgery) of payment instruments, organized crime and computer-related crimes). European provisions will determine the structure and powers of Eurojust.

It eas created too the European Public Prosecutor Office (EPPO).

This office will investigate and forward the proceedings before national

courts those accused of crimes against the financial interests of the European Union.

This will mean prosecution and interference in the work of national courts, meaning giving up sovereignty in the legal field and creating the space of supranational judicial authority, in addition to existing ones so far.

The Union will ensure the police cooperation, involving Member States' competent authorities (police, customs and other law enforcement services).

This cooperation will be aimed at prevention, detection and investigating offenses.

To this end, European regulations shall establish measures for the collection, storage, analysis and exchange of relevant information, mutual support and exchanges in the field of personnel and equipment, and techniques in the field of investigating serious forms of organized crime.

The provisions of the Treaty of Lisbon make Romanian constitutional regulations on the economy and public finances (art. 134-136).

Article 134 stipulates that the state must ensure freedom of trade and protecting fair competition. In this context, some contradictions and conflicts may arise due to the fact that Treaty of Lisbon indicates the power to regulate the Union through the European law establishing some measures for the implementation of a common commercial policy, which sometimes can impair the freedom of trade within national borders. Moreover, there is ample space devoted to ensuring free competition. Issues of particular importance are raised by the powers of the Court of Justice of the European Union.

In practice, it will operate as a constitutional court not only as a Supreme Court, as before.

Thus, if the Commission (in its capacity as guardian of the treaties) considers that a Member State fails to fulfill a constitutional obligation, it will send a reasoned opinion, and allowing state concerned (involved) to submit comments. If the state does not comply with the Commission's opinion within the period of this community forum will bring the case before the Court of Justice of the European Union. It may also receive an action brought by a Member State if it considers that another Member State has failed to fulfill their constitutional obligations. An action against another Member State and the Commission may be made up to reach the Court. In this case, the Commission will send a reasoned opinion to each of those states, both countries by enabling them to express their views, both in writing and orally. In the event that the Commission did not express any opinion within three months of receiving notification, the absence of its opinion can not prevent bringing the case before the Court. Where the Court of Justice considers that a Member State has failed to fulfill their constitutional obligations, the State may be required to take the necessary steps to achieve the Court's decision. It can happen as the Commission consider that a Member State has not implemented the decision of the Court, will bring the case before the european Courts, with the possibility and the State (involved) to submit his observations.

Will be specified and the amount to be paid by the state.

Unfortunately, it is not clear how to resolve the situation in which the decisions of the Commission and the Court of Justice of the European Union regulations are contrary to national constitutional. Court of Justice may issue preliminary rulings on the interpretation of the Constitution, and the validity (validity) acts of the institutions, offices and agencies. Such a question may be raised before a court (court, tribunal) national, and it may ask the Court of Justice if necessary.

In the last years we faced judicial conflicts between Constitutional Court, Supreme Court and territorial courts in the field of enforcing the provisions of European courts.

## 5. Conclusions

As can be seen from the discussion so far, Romania's EU accession will have some effect on the Romanian Constitution, effects determined primarily by the need to align with the European Constitution, effects that probably were not taken into account in the development of the fundamental law of our country or in the accession process. The most important effects (consequences) will occur in foreign policy, national defense, public order and state security[8]. But we must not neglect the effects of economic, social or cultural. Of course, that the consequences (positive or negative) of these effects will be correlated with changes at the institutional and political structure. How will occur, however, only the future (more or less distant) can tell us.

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[8] Regarding the Integration of Romanian authorities and institutions into the European Union's system of values to see Cătălin-Silviu Săraru, *European Administrative Space - recent challenges and evolution prospects*, ADJURIS – International Academic Publisher, Bucharest, 2022, p. 130-132.

# Control over the Administration in Kosovo

Assistant professor **Artan MALOKU**[1]

***Abstract***

*The administration has a very important role in the functioning of the state, in addition to the special role it has, it must act according to the laws and rules that define the work of the administration. Therefore, in the administration we need supervision or control of the administration. The purpose of this paper is the research related to the notions of the activity of the institutions and the presentation of some acts which have been subjected to the control in the procedure. As for the methodology, we will treat the manuscript according to the historical, analytical, comparative scientific method. In the first part of this paper, we will get to know the role and importance of control in the administration's operation. Further, the paper will deal with the structure of the control elements, explaining what are the subjects, the object and the authorizations of the control which are developed by the concrete institutions where the basis for them is the exercise of control and the operation of legality.*

***Keywords:*** *control, institutions, external control, internal control, administrative act.*

***JEL Classification:*** K23

## 1. Introduction

The functioning of the administration of a state is determined not by the number of laws that are in force, but by the number of such laws that are properly administered, and by the extent to which their provisions are actually implemented.

In this paper, the control over the administration is dealt with as a strong basis, which enables the administration to be as efficient as possible with as few errors as possible during the development of administrative procedures and the decision-making of the administrative body.

The method of control over the administration is exercised in several ways and by different institutions, both within the administration and outside it. In this paper, we will deal with the internal control, which is the legal control of the administration, and that based on this type of control, it can be done in two ways: hierarchical and institutional.

The last part of the paper deals with the external administrative control, this control which is exercised by some specialized institutions whose tasks have the same goal of the legality of the acts issued by the institutions they supervise.

[1] Artan Maloku - Faculty of Law, University "Haxhi Zeka" Peje; Doctoral student at the Faculty of Law, University "St. Kliment Ohridski"- Bitola, North Macedonia, artan.maloku@unhz.eu.

## 2. The importance of control over administration

Control is a professional activity - a special activity of setting efficiency criteria, permanent monitoring of the realism of certain tasks and jobs, and comparing the results achieved by the specified criteria and adjusting those deviations.[2] This enables the measurement of the deviation of the actions during the work of the administration, the correction of those actions and the possibility of their improvement.

Control represents permanent human dedication and is as old as human society is, but its concept, content, forms, types and carriers are changed along with the change in the functioning of the state and human societies.[3]

The purpose of the control is to show the eventual deficiencies and errors that may appear during the organizational work of the administration, and to eliminate them in time. Control includes the actions, procedures and behaviors with which the realization of the administrative body's goal is supervised, while the way of its exercise depends on the body's goal. For the control to be efficient, it is necessary to exercise it carefully and the control must be at the right time, also the control must be objective and impartial and that the control must be accompanied by relevant sanctions, because if we do not have sanctions against these actions, we have no work with effect for citizens and improvement of those actions.[4]

The word control derives from the Latin word "contrarotula" which in the 18th century indicated a controlled copy of a document, contract, court decision, etc. Later this word was used in different fields of activity, namely the work of all subjects in society.[5]

The control includes three relatively separate phases:

The first one relates to the comparison of what was foreseen and what was realized, followed by the evaluation, the finding based on the performed verification, the confirmation or denial of the checked work.

The second phase consists of the relevant intervention, which realizes the stated assessment. Intervention is not necessary if the assessment has been positive.

The third intervention is useful, only when it is necessary to avoid the

[2] Eugen Pusic, *Real science*, Skolska knjiga, Zagreb, 1995, p. 310-311.

[3] Esat Stavileci, Agur Sokoli, Mirlinda Batalli. Administrative Law, University of Pristina, 2012, Pristina, p.103. See also Cristina Elena Popa Tache, *Administrative Review and Reform Movements from the Perspective of International Investment Law*, in Julien Cazala, Velimir Zivkovic (editors), *Administrative Law and Public Administration in the Global Social System, (Contributions to the 3rd International Conference. Contemporary Challenges in Administrative Law from an Interdisciplinary Perspective, October 9, 2020)*, ADJURIS – International Academic Publisher, 2020, pp. 212-217.

[4] Stavileci, E., *Notions and principles of public administration*, 2005, Pristina, p. 75.

[5] Popovic, Markovic, Kuzmanovic, *Basics of management science*, 1959, Blegrad, p. 189.

deviation which is constituted by the specified criterion.[6]

In order to strengthen the legality of the work of the state administration, different measures should be taken. This goal is achieved by organizing the control of the work of the state administration, with tasks to ensure its legality and efficiency.

### 3. Subjects, object and authorizations of control over the administration

**The control subjects** of the administration are:

a) Control bearers and

b) Bodies over which control is exercised.

The control bearers are entities which are authorized by legal norms to exercise the specific form of control over the administration, and in certain cases the active control entities use the authorizations they have available.[7]

The implementation of control over the administration in most cases is presented to us between two or more bodies, where one of them has the role of the active subject and which exercises the control, while the other body has the passive role and against which the control is exercised.

This control which the active body exercises over an institution is based on the legal regulation where laws, regulations and other by-laws are drawn up for its operation. The passive body is obliged to adhere to all instructions and remarks if we have violated any specific provisions.

**The object of control -** over the administration is the administrative work, the behavior of the administration, the way of using its authorizations such as the acts that the administration issues, namely the measures that it undertakes.[8] But the exercise of control over the administration is also aimed at those cases when the administration does not take action when it should have taken action, not issuing acts within the legal deadlines, etc.

**Control authorizations -** consist of all the measures that the control bearer can use in the event that it proves that the body over which the control is exercised does not act as it is normed in the given situation, that is, it does not act in the appropriate way.[9]

Institutional mechanisms for administration control are regulated by the Constitution and other acts. In every democratic state, the principle of separation of powers must be respected, which means the division of power into legislative, executive and judicial, the special bodies for the exercise of these powers, as well as the relationship between the bodies carrying these powers.

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[6] Tomic. Z, *Administrative Law*, 1998, Belgrad, p. 50.

[7] Esat Stavileci, Agur Sokoli, Mirlinda Batalli, *Administrative Law*, University of Pristina, 2012, Pristina, p. 112.

[8] Ibid, p. 112.

[9] Borkovic. I, *Administrative Law*, 1997, Zagreb, p. 83.

Every body in a state of law must act as far as the Constitution and the law allow, not exceeding the limits set by them. Each state institution must have a clearly defined scope of its competences, within which it is authorized to act in accordance with constitutional and legal requirements.

The Constitution of the Republic of Kosovo, in article four, has determined the form of government and the division of power, as well as the checks and balances between them.[10]

The control mechanisms of the administration are: control of the administration by the Assembly, control within the public administration, judicial control, control of the administration by the Ombudsman and control by the Auditor General.

In the Republic of North Macedonia, the Government sets the principles for the internal organization and work of the ministries and other administrative bodies, orients and supervises their work. The Government determines the policy of implementation of laws and other provisions of the Assembly and bears responsibility for their implementation. In the event of a conflict of powers between state administration bodies, between state administration bodies and legal entities and others, which are entrusted with public authorizations by law, the solution must be made by the Government of the Republic of North Macedonia.[11]

Delegated powers, supervision are also included in work efficiency. The supervision of the legality of the acts is exercised by the relevant ministry of the local government, and the supervision of the delegated work of the municipality is exercised by the state administration body that makes the delegation. State administration bodies exercise control over the legality of the work of municipal bodies.[12] All acts and provisions of municipal bodies are subject to the control and supervision procedure, while the subject of assessment is the legal basis of the act, the provision and the process of approving the act.[13]

The control mechanisms of the administration are: the control of the administration by the Assembly, the control within the public administration, the judicial control (Administrative Court), the control of the administration by the Ombudsman and the control by the State Audit Office.

### 4. Administrative internal control

Internal administrative control is based on the principle of hierarchical

[10] Constituinal of the Republic of Kosovo, Official Gazette of the Republic of Kosovo, 2008, article 4.

[11] Law No. 124 on General Administrative Procedure, Official Gazette of the Republic of the North Macedonia, 2015, article 23.

[12] Maksuti. M, *Constitional Law*, AAB Riinvest University, 2012, Pristina, p. 112.

[13] Zendeli. M, Memet. F., Memeti. S., Memeti. A., Rustemi. S., *Judicial Control over Public Administration*, „Acta Universitatis Danubius" Vol. 8, no. 2/2012, p. 91-100.

control, therefore sometimes it is also called hierarchical control, because it originates from administrative systems which are based on the pure hierarchical principle and within which administrative work has not been regulated by law.[14]

The need for this type of control stems from the need for coordination of administrative actions, achievement of administrative goals. There is no hierarchy without control and submission, while the hierarchical principle remains one of the important principles of the organization and work of the state administration.[15]

The basic deficiency of internal administrative control derives from its hierarchical origin and has to do with the fact that the administration controls itself according to the principle of self-control.[16]

The forms of internal control are: Instacional control (with complaint) and hierarchical (supervisory).[17]

**Instacional control** (with complaint) is exercised based on the dissatisfaction of the party, namely through the use of a complaint directly to the higher instance than the instance that issued the administrative decision, for this reason it is called institutional control[18].

With the use of the complaint, the decision-making is decided by another body, the second instance, a higher instance that makes a decision regarding the legality of the decision of the first instance, the control of the legality of the decision of the lower instance. The violation is assessed whether it is material or procedural, in case of finding a violation, it can be returned for decision-making in the first instance, or a decision can be taken from the second instance.[19] This control is exercised only on the basis of a complaint, without a complaint there is no instacional control.

The complaint has two effects:

1. suspensive (the moment when the party submits the complaint, the complaint stops the execution of the decision),[20]

2. devolutive effect (decision-making belongs to the second-level body).[21]

The objection has only a suspensive effect, which means that despite the fact that a real act is opposed, at the moment of submitting the objection, the

[14] Lilic. S, *Administrative Law*, Belgrad, 1998, p. 123.
[15] Stjepanovic. N, Lilic. S, *Law*, Belgrad, 1995, p. 366-367.
[16] Esat Stavileci, Agur Sokoli, Mirlinda Batalli, *Administrative Law*, University of Pristina, 2012, Pristina, p.122.
[17] Ibid, p.122.
[18] See some consideration in Florin Cazacu, *The Public Administration and the Current Social and Political Environment in Romania*, „Perspectives of Law and Public Administration", Volume 12, Issue 1, March 2023, pp. 124-128.
[19] Law No. 05/L-031(2016) on General Administrative Procedure, Officiale Gazette of the Republic of Kosovo, article 125.
[20] Ibid, article 130.
[21] Ibid, article 27.

decision-making remains with the body that issued that real act. And that body is only obliged to appoint a committee to assess the objection. That commission issues an administrative act afterwards and an appeal must be filed against it.[22]

**Hierarchical (supervisory) control,** this type of control is exercised ex officio. Official supervision is also called official control, or control based on official supervision, as well as hierarchical control.[23]

Official supervision is regulated by the Law on Administrative Procedure and is exercised according to the procedure.[24] This is similar in content to the procedure according to the complaint, but there is no complaint. The decision can be canceled based on official supervision by the second-level body, and if there is no second-level body, then this is done by the body which is authorized by law to exercise control over the work of the body that issued the decisio.[25]

Official control can be exercised after the lower body issues the administrative act, afterwards (ex post), but it can also be exercised (ex ante) before the body approaches the issuance of the administrative act (example: the supervisory body gives prior consent to issue the act).[26]

### 5. Administrative external control

The administrative control of the administration, in addition to being an internal administrative control, can also be presented as an external administrative control. Although some administration bodies exercise it as an external administrative control. External administrative control is control which is most often exercised through special bodies of the administration and exclusively, inspectorates and inspection services, understood in certain sectors of administrative and social activity.[27]

The 1833 act marks an epoch in the history of the administration of US labor laws. Until 1833. The methods of enforcement provided for in the act of 1802, and in the subsequent acts of 1825 and 1831, consisted simply in providing that the judges should annually appoint two overseers in each industrial locality, one of whom would be a clergyman. And the other one of the judges themselves would act without payment. Juedges had the power to impose fines of from £2 to £5 ($9.73 $24.33) for breaches of the law, and to obtain information from em-

[22] Ibid, article 138.
[23] Esat Stavileci, Agur Sokoli, Mirlinda Batalli, *Administrative Law*, University of Pristina, 2012, Pristina, p.125.
[24] Law No. 124 on General Administrative Procedure, Official Gazette of the Republic of North Macedonia, 2015, article 103.3.
[25] Esat Stavileci, Agur Sokoli, Mirlinda Batalli, *Administrative Law*, University of Pristina, 2012, Pristina, p.125.
[26] Ibid, p.126.
[27] Ibid, p.126.

ployees or those who worked in shops, measures were taken that informers (collaborators) to receive half of the money from the fines given.[28]

External administrative control means the influence of the specialized administrative body on other administrative bodies and other implementers, with the aim of ensuring the regular implementation of the laws and by-laws of the higher body. This control has the legal character of power. The purpose pursued by that body is to ensure the full and timely implementation of laws and decisions in the field of state administration.[29]

The various inspectorates - are in some form outside the sphere of administration, but which are within the executive. Such can be the labor inspectorate, environment inspectorate, forest inspectorate, etc. Some authors call this control external administrative control, some call it a special form of administration control work.

As for the operation of these inspection bodies in Kosovo, they did not have any legal regulation at the central level, until a year ago when the law on inspections came into force,[30] and with the entry into force of this law, the special administrative bodies have clarified their activity as far as their limit can reach.

This is the external administrative control because the complaints submitted to these inspectorates are at the third level of decision-making. For example, the independent supervisory council for civil servants (KPMSHC), the decisions it issues are final and binding, it is not a court, but which judges the decisions of the administration regarding the violation of labor rights for civil servants.[31] The entire activity of this institution is also regulated by law and works with other acts as far as the decision-making procedure is concerned.

**Example in practice:** when issuing an administrative act, the administration body can commit violations, and these violations can be serious violations, which are also called flagrant violations of material and procedural provisions, violations of a lighter level, cure the law is not violated, but only technical errors are made, but also a violation when the principle of opportunity is not respected.[32]

Practical case of the invalidity of the administrative act The Kosovo Institute for the Protection of Monuments (IKMM), dated 16.10.2019 with decision no. 68/2019,[33] has approved the request of "Dardania Castle" with owner M.S.

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[28] Meeker. R, *Administration of labour laws and factory inspection in certain european countries*, Washington government printing office, 1915, p. 38.

[29] Stavileci. E, *Introduction to administrative sciences*, Pristina, 1997, p. 123.

[30] Law No. 08/L-067 on Inspections, Official Gazette of the Republic of Kosovo, 2022.

[31] Law No. 06/L-048, Law on the Independent Supervisory Council for the Civil Service of Kosovo, Official Gazette of the Repbulic of Kosovo, 2018.

[32] Sokoli. A, *Administrative procedural law*, Publishing House University of Pristina, 2014, Pristina. p. 49.

[33] Kosovo Institute for the Protection of Monuments, decision no. 68/2019, https://klankosova.tv/instituti-per-mbrotjen-e-monumenteve-e-jep-ne-shfrytezim-kalane-e-vushtrrise/, publication journal by Klan Kosova.

for the temporary utilization of the Cultural Heritage Monument "Vushtrri Castle" in Vushtrri.

The IKMM, within the Ministry of Culture, decided to put the Castle into use to make an annex of it a restaurant. After this decision, municipalities, organizations and groups of citizens reacted, this group invited the state prosecutor's office to start investigations regarding the adoption of this illegal decision.[34]

After these developments, the Cultural Heritage Inspectorate declares this decision invalid, and orders the prohibition of any unauthorized action in the City Castle, the asset of Cultural Heritage under Permanent Protection of the Kosovo Council for Cultural Heritage.[35]

For any intervention in the Cultural Heritage asset, each interested party is obliged to obtain permission from the Archaeological Institute of Kosovo, as a competent institution, which was not respected in this decision.

Any unauthorized intervention in the Cultural Heritage asset is defined as a misdemeanor based on the provisions of the Law on Cultural Heritage,[36] as well as based on the provisions of the Criminal Code, damage, destruction and unauthorized extraction of monuments or protected objects outside the Republic of Kosovo, is defined as a criminal offense.[37]

With the issued decision, the IKMM has exceeded its competences, the Inspectorate also assesses that the IKMM is wrongly based on Article 6 par.4 of the Law on Cultural Heritage, which provides that: "The use for economic and cultural benefit of the heritage architectural is authorized with written permission from the competent Institution, in cases where the values of the architectural heritage are protected", while the Old Castle did not belong to the architectural category, as referred to by the IKMM in its decision. Therefore, this decision is declared invalid and illegal by the Cultural Heritage Inspectorate, for lack of competence and illegality.[38]

## 6. Conclusion

From all this review in the theoretical aspect related to some parts of control, we tried to present some main and interesting points related to the notions of

[34] See article Journal, https://kallxo.com/lajm/qytetaret-kundershtojne-vendimin-per-dhenie-ne-shf rytezim-te-kalase-se-vushtrrise/, consulted on 1.0.2023.
[35] Inspectorate of Cultural Heritage, decision no. 18/2019, dated 18.10.2019, https://www.njeshi. com/inspektorati-per-trashegimi-kulturore-ndalon-cfaredo-nderhyrje-ne-kalane-e-vushtrrise/, publication journal by Njeshi.com, consulted on 1.0.2023.
[36] Law No. 02/L-88, Cultural Heritage Law, Official Gazette of the Repbulic of Kosovo, 2008.
[37] Code No. 06/L-074, Criminal Code of the Republic of Kosovo, Official Gazette of the Republic of Kosova, 2019, article 354.
[38] Inspectorate of Cultural Heritage, decision no. 18/2019, dated 18.10.2019, https://www.njeshi. com/inspektorati-per-trashegimi-kulturore-ndalon-cfaredo-nderhyrje-ne-kalane-e-vushtrrise/, publication Journal by Njeshi.com, consulted on 1.0.2023.

activity and efficiency of control over the administration[39].

Control in terms of its importance, we noticed that it plays a very important role in exercising the actions of the administration bodies in a legal and fair manner.

During the treatment of this paper, we noticed that the authorizations for control can vary depending on the system that the states have in place, for example in Kosovo there is no Administrative Court, as the system is built in North Macedonia, Kosovo has only one department of which deals with administrative matters and which functions within the Basic Court in Pristina. This lack of an Administrative Court causes a problem in the resolution of the cases which are challenged before this department because the resolution of the cases took several years.

Regarding the internal control and in particular the hierarchical one, we noticed that if during the procedural actions but also after the issuing of the administrative act, the superior or supervisory body is empowered by laws to exercise control over the institutions that are operating. In addition, I think that in some cases there may be an excess of the powers of the supervisory bodies by exerting influence on the decision of the case, based on the principle of the discretion of the administrative body.

The external administrative control in this paper was presented to us as an external or special supervisor of state institutions, where it is often presented as the third level which decides on issues in the administrative procedure. So, in addition to the general laws that the administrative bodies operate, they must also decide on the basis of the special laws that regulate the system of the respective institutions.

Invalid administrative acts are very much present in our society, with internet searches or on the pages of administrative bodies, we come across headlines for various illegal decisions that affect individual and collective interests, so in many cases their legality enables control external administrative. During the last years, the Basic Court in Pristina has issued many judgments about invalid acts, where a large number of them are related to violations of basic procedures and decisions by non-competent bodies.

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[39] See for example, Bogdan-Radu Herzog, *The Removal of Economic Barriers in the Process of Social Deconstruction. Legal Precedents Created by Prosbul, the VOC and Loi le Chapelier,* in „International Investment Law Journal", Volume 2, Issue 2, July 2022, p. 134.

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# Where Next, Local Self-Governments?

Lecturer **Ádám VARGA**[1]

***Abstract***

*Local self-governments are faced with many challenges in the 21st century. Efficiency plays an increasingly important role in the functioning of public administrations everywhere, and one of the main tasks of public authorities is to provide a good service to citizens. Local communities also expect local self-government to carry out its tasks well. But local self-governance is not just about getting local tasks right; it also necessarily involves making local rules. And all this is carried out by democratically elected bodies. In this paper, I will examine the principles on which we need to look at local self-government if we are to find a place for it in 21st century democracy. I will seek answers to this question primarily by analysing and comparing different terms. In my view, the essence of local self-government cannot be sought in its decentralised nature alone, nor can it be treated as a purely efficiency issue. Local self-governments are also autonomous bodies which, in the principle of subsidiarity, also claim the right to carry out tasks that genuinely serve the local community.*

***Keywords:*** *local self-government, local public power, local public affairs, autonomy, subsidiarity, vertical division of power.*

***JEL Classification:*** K10

## 1. Introductory remarks

Local self-governments are faced with many challenges in the 21st century. Efficiency plays an increasingly important role in the functioning of public administrations everywhere, and one of the main tasks of public authorities is to provide a good service to citizens. Local communities also expect local self-government to carry out its tasks well. But local self-governance is not just about getting local tasks right; it also necessarily involves making local rules. And all this is carried out by democratically elected bodies.

Within society there can be different more particular communities. Such elementary communities are, among others, the family, the association, the scientific society, the church or the political party. Even if a national or social community has reached a higher degree of unity, it cannot eliminate the organising power of all these. These communities act within the framework of their autonomy, the extent of which is determined by the sovereign State, to varying degrees according to the nature of each community.[2] This is no different for local self-

[1] Ádám Varga - Faculty of Law and Political Sciences, Pázmány Péter Catholic University, Hungary, varga.adam@jak.ppke.hu.

[2] András Lapsánszky, András Patyi, Albert Takács, *A közigazgatás szervezete és szervezeti joga*. Dialóg Campus, Budapest, 2017. p. 173.

governments, which, in addition to their many similarities, are differentiated from other types of self-government (public bodies, civil organisations) by a number of important features. Among these, Ulrich Scheuner stresses that local self-government is differentiated from self-government organised on a professional-occupational basis primarily by its democratic-political basis and its general powers.[3]

Local self-governments are special members of the governing structures, confirmed on the one hand by their role in history, and on the other, by their vertical position within the state. However, this institution having a centuries-old history throughout Europe is completely different from one state to another, and therefore has different structures and functions from one country to another. They depend on the state, but also influence it. They are highly respected, nevertheless their transformation is an ongoing topic. They are close to the citizens, but their true significance is difficult to recognize. They are the most mysterious formations of the governing bodies, dependent on how we approach them.

At the centre of local self-government is undoubtedly the exercise of local public tasks. According to the European Charter of Local Self-Government (hereinafter: Charter), the role of local self-government is to manage local public affairs with guaranteed autonomy. [4] Local public affairs give substance to local self-government and this is what gives meaning to the status. The most important question in this context is therefore whether there are any matters that are entrusted to local self-government. Without these, local self-government is just an empty box.

However, it is also a necessary attribute of local self-government that it is empowered to exercise public power. This public power is exercised by local self-government as local public power, exercised by the bodies and persons empowered to exercise it, and must be traceable back to the people. The existence of local public power is thus not only a question of fact but also a programme, a necessity for the realisation of local democracy. This raises a number of further questions.

In my view, the essence of local self-government cannot be sought in its decentralised nature alone, nor can it be treated as a purely efficiency issue. Local self-governments are also autonomous bodies which, in the principle of subsidiarity, also claim the right to carry out tasks that genuinely serve the local community.

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[3] Ulrich Scheuner, *Grundbegriffe der Selbstverwaltung*. In: Günter Püttner (ed.): *Handbuch der kommunalen Wissenschaft und Praxis. Band 1 Grundlagen. Zweite, völlig neu bearbeitete Auflage.* Springer, Berlin – Heidelberg, 1981. p. 17.

[4] István Balázs, *Helyi önkormányzáshoz való jog*. In: Vanda Lamm (Ed.): *Emberi jogi enciklopédia.* HVG-Orac, Budapest, 2018. p. 387.

## 2. The importance of local public power

Everyone is at home somewhere. We are at home in our family, we are at home in our parents' house, we are at home in the village or in the housing estate. We are at home where the streets are familiar, where the buildings tell a story, where the hillsides are familiar, where we can find anything in the shop at first sight, where we know our neighbours' cars, where we greet each other with a smile. In a sense, we are at home everywhere, where we are bound together by a common language, a common culture, a similar way of thinking.

The basic idea behind self-governance is the following: if we want something done right, we do it ourselves.[5] The focus is on the local community or its members when it comes to exercising local public power. Local communities carry out tasks that are of particular interest to them, for their own benefit. This is based on the fact that a municipality (a city district or a larger housing block), as the natural environment of citizens is more than an abstract concept. It is indeed a physically delimited area, a place where people spend a significant part of their everyday lives. We notice the daily changes, the dirty streets, the quarreling neighbours, the cutting down of a tree, a new building, a renovated playground, etc. Everyone has one or more (but in any case, a finite number) of these settlements in their life. And in our everyday environment we are inevitably more sensitive to every stimulus. Not because they are necessarily the most important moments in our lives, but because they are close to us. They necessarily have problems in common, specific needs, and face situations they want to solve themselves. In the words of Alexis de Tocqueville, "the general interests of the country touch its inhabitants only from time to time. The interests of locality, every day".[6] Angelika Vetter also points out that citizens consider local political issues to be more important than national ones, not only in terms of democratic theory, but also because local communities are central to citizens' daily lives.[7] In Reinhard Hendler's view the purpose of self-government is to provide more legal influence over the management of matters to those who are particularly affected by certain public matters, than to other citizens.[8] John Stuart Mill adds, that "the very object of having a local representation is in order that those who have any interest in

[5] Zoltán Magyary, *Magyar közigazgatás – A közigazgatás szerepe a XX. sz. államában a magyar közigazgatás szervezete működése és jogi rendje.* Királyi Magyar Egyetemi Nyomda, Budapest, 1942. pp. 116-117.

[6] Alexis de Tocqueville, *Democracy in America.* Liberty Fund, Indianapolis, 2010. p. 583.

[7] Angelika Vetter, *Lokale Politik als Ressource der Demokratie in Europa? Lokale Autonomie, lokale Strukturen und die Einstellungen der Bürger zur lokalen Politik.* Springer, Wiesbaden, 2002. pp. 191–192.

[8] Reinhard Hendler, *Grundbegriffe der Selbstverwaltung*. In: Thomas Mann – Günter Püttner (eds.): *Handbuch der kommunalen Wissenschaft und Praxis. Band 1 Grundlagen und Kommunalverfassung. Dritte, völlig neu bearbeitete Auflage.* Springer, Berlin-Heidelberg-New York, 2007. p. 20.

common which they do not share with the general body of their countrymen may manage that joint interest by themselves".[9] Locals may namely have common interests that do not necessarily coincide with those residing in the neighboring municipality or the interests of the central state level. This is the essence of local public affairs. In addition, (based on the survey of the Eurobarometer) the outstanding role of municipalities is reinforced by the fact that the level of trust in local authorities is higher than the trust in national governments or parliaments.[10]

The premise of the original conception of any form of self-government was that all participants have the same preferences. This assumption of homogeneity collapsed in the recent centuries, nevertheless, a weaker notion is logically coherent: A collectivity governs itself when decisions implemented on its behalf reflect the preferences of its members.[11] István Ereky also points out that self-government is only possible for public bodies for which the statutory law explicitly recognises the right of self-determination of the depositaries. This right of self-determination extends only to their independent powers, they shall not be given instructions in that respect.[12] József Petrétei stresses that the recognition of the state is also necessary because the existence of autonomies implies the possibility of fragmentation, but a democratic state must grant the request for autonomy in accordance with democratic political values, while certain reasonable limits must be constitutionally enshrined.[13]

State public power and local public power are part of a single public power, both of which derive their legitimacy from 'the people'. Local autonomy, while to some extent separate the local community from state power, is closely linked to the state.[14] On the one hand, the central organs of the state exercise self-limitation when they recognise the right to self-government, i.e. it is based on state recognition. On the other hand, the self-organisation of local communities is known since the emergence of pre-national society and the state only legitimises it.[15] In fact, regardless of the chronology, the local community is the original political framework of the people. Living together in one place is the fact from which the local community derives its original direct legitimation, not derived

[9] John Stuart Mill, *Considerations on Representative Government*. The Floating Press, Auckland, 2009, p. 324.
[10] Andreas Ladner *et al.*, *Patterns of Local Autonomy in Europe.* Palgrave Macmillan, 2019. p. 8.
[11] Adam Przeworski, *Democracy and the Limits of Self-Government*. Cambridge University Press, New York. 2010. pp. 17-18.
[12] István Ereky, *Közigazgatás és önkormányzat*. Szeged Városi Nyomda és Könyvkiadó, Budapest, 1939. pp. 376–377.
[13] József Petrétei, *Az önkormányzatok fogalmáról, jellegéről és alkotmányi szabályozásáról*. '*Jura'* 1995/1. p. 7.
[14] Herbert Küpper, *A helyi önkormányzás joga*. In: Jakab András (ed.): *Az Alkotmány kommentárja II.* Századvég Kiadó, Budapest, 2009. p. 1503.
[15] Krisztina Csalló, *Önkormányzás, autonómia. A helyi önkormányzatok szabályozási típusai Európában.* In: Feik Csaba (ed.): *Magyarország helyi önkormányzatai*. NKE KTK, Budapest, 2014. p. 24.

from the state.[16]

If the sovereign is the people, then it necessarily means the whole population. Lóránt Csink is right that in a unitary state there is no entity other than the central state power that also carries sovereignty. However, according to him, if the origin of sovereignty is the whole population, then some parts of it are not.[17] It is clear that a formal disruption of the principle of popular sovereignty cannot explain the need to ensure local participation. However, this does not mean that the issue is not linked to popular sovereignty. According to József Petrétei, local self-government is the result of the expression of the will of every voter, which is a manifestation of popular sovereignty, and this gives it a specific legitimacy.[18] What is exercised by the people at national level is exercised at local level by the local population. But this only means that the source and exerciser of local public power is the local 'sub-population' (possibly supplemented by foreign nationals). This does not mean that local self-government is sovereign, and that local popular sovereignty can only be exercised within the framework defined and circumscribed by state law.[19] Think about it: every voter has a double vote. On the one hand, through parliamentary elections, a community of voters establishes central power. At the same time, we cannot forget that with the other vote, people create the leaders of their local communities by electing their own representatives and mayors, thus creating a local power that is partially independent of central power.[20]

I myself believe that local communities are as much depositories of popular sovereignty as the whole population. Local power also derives from the people, but its functions are clearly different from those of the central power.

However, it should also be remembered that the scientific and technological revolution has brought changes whose direction is moving from local to integration. The closed local communities in small villages are also being broken up. And big cities look little like the human-scale local communities of smaller towns. These trends undoubtedly pose a risk to the principle of self-government, but they also provide even stronger justification for the legal protection of self-government as a democratic institution.[21] The implementation of democracy requires a sophisticated mixture of local and national institutions. There is a need for local institutions, but also for a non-local mechanism to supervise and complement them.[22] The responsibility for establishing the system lies on the shoulders of the constitutional and legislative branches.

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[16] Küpper, *op. cit*., pp. 1502–1503.
[17] Lóránt Csink, *Mozaikok a hatalommegosztáshoz*. Pázmány Press, Budapest, 2014. pp. 156–157.
[18] Petrétei, *op. cit*., p. 11.
[19] Küpper, *op. cit*., p. 1517.
[20] Gábor Zongor, *Szubjektív értékelés az önkormányzati rendszerről és annak változásáról*. 'Új Magyar Közigazgatás' 2016/3. p. 28.
[21] Jenő Kaltenbach, *Az önkormányzati felügyelet.* Universum, Szeged, 1991, pp. 136–137.
[22] Christopher L. Eisgruber, *Constitutional Self-Government.* Harvard University Press, Cambridge -London, 2001, pp. 87–91.

I believe that at the centre of local democracy is the direct election of local representatives (and if it is possible, the mayor). More specifically, democratic legitimacy can only be guaranteed through the election of local decision-makers by members of the local community.

### 3. The exercise of local public affairs

Alongside the exercise of local public power, another objective of local self-government is the effective exercise of local public affairs. Local public affairs are to be sought not outside but within state affairs, a specific slice of public affairs that is vertically separated from other public affairs. On the negative approach, all public affairs are considered local if they are not primarily linked to the national level but are confined to a territorial unit.[23] This is a much broader scope than classical executive administration,[24] including, for example, cooperation with the residents.[25] Ilona Pálné Kovács distinguishes five main groups of activities, all of which fall within the scope of local public affairs. These are the direction of local political life, regulation, public administration, the delivery and organisation of public services, and local economic development.[26]

A requirement (and also a limit) for the autonomous handling of local public affairs is the possession of functions and powers, without which the local self-government has no decision-making competence.[27] This gives rise to a need for an open-ended interpretation of the concept of functions and powers, which allows for the exercise of all public functions which in some way particularly affect the local population and which are not prohibited (e.g. because they fall within the competence of another body). In practical approach, the National Assembly decides what is a local public function, by defining in the Act a mandatory function for the local self-government. In the case of voluntary functions, this decision falls to the representative body.[28] What is significant from all this is not only that practical reasons can be used to decide on the allocation of functions, but also that this must be done at a high normative level. The Charter makes this possible quite specifically through the constitution or by an act.[29] In my view, the really interesting thing about this issue is what criteria limit the decision-maker when making a decision on a local public affair.

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[23] Küpper, *op. cit*., p. 1507.

[24] Ilona Pálné Kovács, *Helyi önkormányzatok.* In: Jakab András – Fekete Balázs (eds.): *Internetes Jogtudományi Enciklopédia.* The document is available online at http://ijoten.hu/szocikk/helyi-onkormanyzatok (13 May 2023.), 2017. [38]

[25] Marianna Nagy, István Hoffman (eds.), *A Magyarország helyi önkormányzatairól szóló törvény magyarázata. Második, hatályosított kiadás.* HVG-Orac, Budapest, 2014. pp. 48–49.

[26] Pálné Kovács, *op. cit.*, [38]

[27] József Fogarasi, Imre Ivancsics, László Kiss, *A helyi önkormányzatok kézikönyve. Második átdolgozott kiadás.* Unió, Budapest, 1994. p. 66.

[28] Adrián Fábián, *Kommentár az önkormányzati törvényhez*. Complex, Budapest, 2013. p. 44.

[29] Article 4(1) of the Charter.

The system of local self-governments shows significant differences in every state. Although, the list of components of the system is practically the same everywhere, their proportion, however, varies to a very high extent. These can be grouped along different research approaches, but the most fundamental difference can be observed in connection with the powers. Accordingly, we can talk about a system of general clause and system of enumeration.

The Anglo-Saxon states consider local self-governments as bodies subject to parliamentary sovereignty, therefore their functions and powers extend only to matters, which have been exactly determined by the parliament. Its application seems simple; however, it raises significant challenges if the separation of powers is not clear in the acts. The case law has extended the principle so that only the rules of substantive powers have to be regulated by an act (*i.e.* not the implementing powers), which has been further eased in the US by increasingly acknowledging the autonomy of local self-governments.[30] In the UK the functions can be divided into necessary services, protective services, convenience services and occasional services.[31]

The approach of the general clause system is radically different: in this system the autonomy of self-governments is acknowledged in general. The basis of the regulation is that the local self-governments have autonomy in local public affairs, referred to in a generic term.[32] Accordingly, the local self-governments – beside fulfilling their obligatory functions – enjoy wide freedom regarding additional voluntary functions they take on.

The Charter is based on the general clause system; however, states applying the enumeration model are not excluded from it either. Joining the Charter has also brought to the front of British minds the question of the ultra vires principle. Many worried that a shift towards a system of general clause could open the door to potential misuse. According to Colin Crawford, the situation is simpler: although in the spirit of the Charter the lawfulness of the provision of duties must be presumed, measures can be taken if misused.[33]

It is no wonder that British authors try to explain local government reforms also through the devolution principle. Devolution is a specific British approach that seeks to regionalise within a system based on parliamentary sovereignty without dismantling sovereignty. It is close to decentralisation,[34] therefore it is logical to compare it with decentralisation, but in fact it is much more than that, ultimately leading to the realisation of municipal autonomy through the local

[30] István Hoffman, Mod*ellváltás a megyei önkormányzatok feladat- és hatásköreinek meghatározásában: generálklauzula helyett enumeráció?* 'Közjogi Szemle' 2012/2. p. 27.
[31] Dániel Iván, *Devolúció és önkormányzatiság.* 'Kisebbségkutatás' 2015/1. p. 86.
[32] Hoffman, (2012) *op. cit*., p. 27.
[33] Colin Crawford, *European Influence on Local Self-Government?* 'Local Government Studies' 1992/1. p. 76-77.
[34] József Fogarasi, for example, uses the term devolution without much clarification, practically as a synonym for decentralisation. See József Fogarasi, *Önkormányzati kézikönyv*. HVG-Orac, Budapest, 1997. pp. 23–28.

reinforcement of political power. This is significant because the concept of devolution has been increasingly used in British local government literature over the last decade or so. It seems as if authors are trying to explain the need for local government reform through the useful ideas of devolution theory. Robert Agnaroff argues that devolution is a way of developing autonomy, or the transfer of power downward to intermediate or local political authorities. Devolution as self-rule tries to combine the promise of democracy with expected efficiencies of government, that are closer to the people affected by local decisions. Devolution is normally enabled by organic or basic nature central legislation and supporting regulations.[35] In my reading, it seems that some British authors want to use the additional possibilities offered by devolution to move British local governments towards genuine self-government, but in fact they are talking about nothing more than increasing local autonomy. Colin Copus, Mark Roberts and Rachel Wall also note that this is an extremely difficult process, and that attempts at devolution in the UK have usually remained at the level of administrative decentralisation. Shift of power from the centre to the local level would be vital to renew local democracy. However, this requires that this change is organised from the bottom up by local communities. Without this, only the central government's objectives can be achieved, and it still has no trust in local government.[36]

### 4. Efficiency versus local public power?

Based on the issues discussed in the previous chapter, efficiency and the exercise of local public power are interdependent in the functioning of local self-government. However, it should not be forgotten that, although interdependent, the efficiency of public administration and the exercise of local democracy in practice often work against each other. The primary reason for this is that the central organs of state power (especially the executing power) have a primary interest in the efficient delivery of public affairs, as they are ultimately responsible for the efficiency of the state's functioning. Meanwhile, local communities insist that they should be able to decide for themselves on matters that concern them as far as possible. In federal states, vertical division of powers helps to address this problem, but in unitary states (or within a member state of a federal state) it is much more complicated. In the case of operational problems, the state wants to find some way to increase efficiency and to do so by increasing centralisation where necessary. This is helped by the emphasis on state supremacy, whereby the rights of local self-government originate from the state and can only be exercised within the framework set at central level. In contrast, local communities can claim that their members are themselves part of the power and have the

[35] Robert Agranoff, *Autonomy, Devolution and Intergovernmental Relations*, 'Regional and Federal Studies', 2004/1. pp. 26, 29.
[36] Colin Copus, Mark Roberts, Rachel Wall, *Local Government in England – Centralisation, Autonomy and Control*. Palgrave Macmillan, London, 2017. pp. 133–135.

right to carry out their local affairs themselves. In fact, both approaches are valid and, theoretically, not only are they not irreconcilably opposed to each other, but they can only achieve their goals together. In practice, however, implementation often appears to be one-sided, with certain tendencies emerging from time to time, which typically aim to increase efficiency by reducing local public power. However, there is also a tendency to focus on the increase of local democracy, which makes it difficult to address efficiency problems.

Local self-government reforms almost always go hand in hand with territorial reforms. The primary reason for this is the difficulty of filling the small communities in a fragmented municipal structure with functions.

In the last period (2008-2017), 15 European countries have implemented territorial reforms, and the number of European local self-governments has decreased by more than 5,000. In some countries, this transformation is still ongoing. The economic crisis of 2008 and subsequent years has contributed significantly to the resurgence of territorial reforms, which have been dominated by cost-saving arguments.[37] István Hoffman reports that states have used various techniques to address the issue of economies of scale. The Scandinavian countries (and partly also the Anglo-Saxon countries and Germany) have tried to adapt the number and size of self-governments to the increased municipal functions by merging local self-governments.[38] In other countries, however, the territorial level has been strengthened or duplicated (e.g. in the countries of the latin model) and the role of partnerships has been strengthened.[39] However, Pawel Swianiewicz, on the basis of a review of the relevant research, doubts whether territorial fragmentation is a real problem, and even more doubts whether merger is a solution. Therefore, he believes that this is perhaps not the right question to ask, but rather when, where and under what circumstances it can be a solution.[40] Colin Copus, Mark Roberts and Rachel Wall also speak explicitly about the disadvantage of large local governments. They argue that, based on the mistaken assumption that bigger is better, England has the largest local government units in Europe.[41]

The issue of territorial reform is a typical, but not the only, manifestation of the apparent conflict between the two fundamental objectives of local government. The relationship between the two could be analysed from a number of angles, but from a jurisprudential point of view, I believe that it is necessary to

[37] Pawel Swianiewicz, *If territorial fragmentation is a problem, is amalgamation a solution? – Ten years later*. 'Local Government Studies' 2018/1. pp. 2–3.
[38] István Hoffman, *A helyi önkormányzatok és szerveik (tisztségviselőik) által ellátott feladatok főbb kérdései.* 'Magyar Jog' 2017/4. p. 223.
[39] István Hoffman, *Gondolatok a 21. századi önkormányzati jog fontosabb intézményeiről és modelljeiről – A nyugati demokráciák és Magyarország szabályozásainak, valamint azok változásainak tükrében.* ELTE Eötvös Kiadó, Budapest, 2015. pp. 36–37.
[40] Swianiewicz, *op. cit.*, p. 7.
[41] Copus, Roberts, Wall, *op. cit.*, p. 9.

resolve the dilemmas by means of a dogmatic approach, through a correct interpretation of the principles that shape the content of local self-government.

### 5. The importance of the principles of local self-government (autonomy, subsidiarity, vertical division of power)

Local self-governments cannot be defined as entities against the state, nor do they merely assist in executing the central will. The significance of local self-governments lies in their role in the division and balancing of powers.[42] They were originally established as safeguards against absolutist state power in many countries, but in a globalizing world it is no longer possible to interpret the local self-government in its original sense, since we are all democrats.[43] In a parliamentary democracy people are no longer opposed to state power, instead, it is the various groups of the people that are against each other. On this basis, the importance of the protection of local self-governments arises when it is necessary to protect the preferences of smaller communities against state power.[44]

Autonomy is one of the most significant attributes of self-government. While autonomy and self-government are commonly considered to be synonymous, autonomy – in relation to public bodies – is in fact about self-regulation based on authorization under the law.[45] Thus, autonomy is the right of a community other than the state to adopt law itself.[46] It is necessarily limited, autonomy does not protect action that does not comply with the legal framework. As the autonomous body is part of a greater political system, the principle of autonomy shall be reconciled with the principle of unity.[47]

According to the principle of subsidiarity, there is a natural need for local solutions to problems. This principle – without it being mentioned in the Hungarian constitution – is still one of the most important basic principles.[48] It prohibits higher forums of power from interfering unreasonably – i.e. in a way that is incompatible with the requirement of the public good – in the area of jurisdiction of lower forums of power,[49] and specifies that the higher level may only intervene

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[42] Klaus Stern, *Die Verfassungsgarantie der kommunalen Selbstverwaltung*. In: Günter Püttner (ed.): *Handbuch der kommunalen Wissenschaft und Praxis. Band 1 Grundlagen. Zweite, völlig neu bearbeitete Auflage*, Springer, Berlin-Heidelberg, 1981, p. 204.

[43] Dieter Hoffmann-Axthelm, *Lokale Selbstverwaltung – Möglichkeit und Grenzen direkter Demokratie*, VS Verlag, Wiesbaden, 2004. pp. 13-14.

[44] Hans Peters, *Grenzen der kommunalen Selbstverwaltung in Preussen.* Springer, Berlin, 1926. p. 43.

[45] Hendler, *op. cit.*, p. 12.

[46] Peters, *op. cit*., pp. 37-38.

[47] Ladner *et al., op. cit*., pp. 175-176.

[48] Franz-Ludwig Knemeyer, *Subsidiarität – Föderalismus, Dezentralisation: Initiativen zu einem "Europa der Regionen".* 'Zeitschrift für Rechtspolitik' 1990/5. p. 174.

[49] János Frivaldszky, *Szubszidiaritás és az európai identitás a közösségek Európájáért.* In: János Frivaldszky (ed.), *Szubszidiaritás és szolidaritás az Európai Unióban*. Faludi Ferenc Akadémia, Budapest, 2006. p. 36.

in lower level relations in order to assist these forums. However, this does not mean that these matters are no longer of national relevance. At the local level, communities must have sufficient freedom (autonomy) to deal with their own affairs. The principle of subsidiarity defines and limits their freedom of action. The legitimate authority to substitute for failing actors if need be.[50] For this reason, allocating certain tasks, which are unresolvable at the lower level, to a higher level instead, is also a part of the principle of subsidiarity.[51] The Charter lays down that public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.[52]

However, this does not mean that municipalities have sovereign power; in fact, the delegation of tasks must be at the 'wise discretion' of the state. This may be implemented through decentralization, which is not only an appropriate and practical principle for organizing public administration, but also the cornerstone of local autonomy itself.[53] In light of the principle of subsidiarity, the need for autonomy through decentralization necessarily leads to the central bodies of the state being marginalized in these matters, in a sense, the latter lose their ability to solve the issues raised within their own sphere of competence.

From a certain point of view, this can even be considered a vertical division of power, because it is in the constitutional definition of fundamental powers (and in the statutory provision implementing it) that the transfer of certain public powers may be found,[54] which, moreover, serves to divide political power.[55] The division of executive power between the public administration subordinated to the Government and independent local self-governments, does not call into question the local self-government's affiliation with the executive power. As such, it is practically an internal division of powers.[56] In essence it manifests itself as a kind of limited autonomy, which - due to the unity of the state – subsists only within the confines of the relevant laws.

The real emphasis is on matters that are exercised locally, independently

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[50] Thierry Berthet, Philippe Cuntigh, *Local Mirrors of State Modernisation: The Case of the Territorialisation of Employment Policy in France*. In Vincent Hoffmann-Martinot, Hellmut Wollmann (eds.), *State and Local Government Reforms in France and Germany.* VS Verlag, Wiesbaden, 2006. p. 186.

[51] Arno Waschkuhn, *Was ist Subsidiarität? Ein sozialphilosophisches Ordnungsprinzip: Von Thomas von Aquin bis zur "Civil Society".* Springer, Wiesbaden, 1995. p. 59.

[52] Article 4(3) of the Charter.

[53] *Cf.* Edit Soós, *A szubszidiaritás mint a többszintű kormányzás működését meghatározó alapelv*. In: Péter Ákos Ferwagner, Zoltán Kalmár (eds.): *Távolabbra tekintve: tanulmányok J. Nagy László 65. születésnapjára.* Universitas Szeged, Szeged, 2010. p. 57.

[54] Antal Ádám, *Az önkormányzati rendszer alkotmányi összefüggéseiről*. In: Imre Verebélyi (ed.): *Egy évtized önkormányzati mérlege és a jövő kilátásai.* MKI – MTA PTI – MTA RKK, Budapest, 2000. pp. 151-152.

[55] Hendler, *op. cit*., p. 15.

[56] Küpper, *op. cit*., pp. 1503-1504.

and democratically. I took the view that – by focusing on subsidiarity – local communities shall carry out tasks as long as they are truly local and can be achieved by their own means (with the active support of the central public bodies). These are the functions and powers of local self-governments. In light of the foregoing, jointly applied principles lead to a vertical division of power. Power is divided, which, nonetheless, does not mean that one sovereign body limits another; it is rather the case of the state restraining itself by virtue of the principle of democracy.

The European states typically do not consider the right to local self-government to be a collective fundamental right jointly exercised by the local community.[57] Even though there are constitutions declaring certain rights, formally they do not appear as fundamental rights (that is, under such name).[58] One of the reasons behind this is that the 'power' of self-governments lies usually not in their entitlement for fundamental rights, but in their ability to enforce their interests.[59]

Regardless of what the right to local self-government is called, it is not a fundamental right, but a form of limitation to the state's power, which allows local communities to claim decisions in matters affecting them, while also respecting the sovereignty of the state. Thus, it is in fact a matter of how the state is organized and, instead of an eloquent definition, it rather requires to be applied in practice on a day to day basis. It only really starts functioning as a 'right' when the state, abusing its higher level of power for some reason, fails to respect the powers of local self-governments.

## 6. Conclusions

Local self-governments also form part of the state structure (supremacy of the state is therefore not in question); nor have they rights that may be opposed to the state, with the exception of their powers being respected. From a legal point of view, the goal of both the state and of the local self-government is to serve the public good. This is how they become counterbalancing powers: if there is a public interest of local nature separated from the central will, it will necessarily limit the margin of maneuver of the central public bodies. If autonomy is jeopardized, this can be particularly intensified, but it must not become an explicit political objective. Consequently, the relation between the goal and the means shall is not negligible: local self-governments do not operate to counterbalance the central power of the state (contrary to the views in vogue centuries ago); they only take this role as far as they must take the interest of the locals into account.

Normative principles justify that local self-government has to be free to make regulatory decisions. This implies that local self-government must adopt a

[57] Róbert Kovács *et al*., *Önkormányzatok jogállása*. Dialóg Campus, Budapest, 2018. p. 8.
[58] István Temesi, Gondolatok az önkormányzati alapjogokról. '*Új Magyar Közigazgatás'* 2010/12. p. 27.
[59] Csink, *op. cit*., p. 160.

democratic structure, that it must find the resources to undertake any service collectively wished to be provided for itself, that it ought to represent the views of its inhabitants to other agencies, and finally that higher levels of government must respect its integrity and morally legitimate activities.[60] According to Hans Peters, autonomy is the right of a separate community from the state to create law for itself. For local communities, it means that they can enact generally enforceable norms in their own sphere of activity. The dominant opinion is that autonomy and self-government (or more precisely self-administration,[61] which I translate in this section for the clarity of the text) are two concepts of different natures. He agreed with Paul Laband, who said that the concepts of self-administration and autonomy are similar and often interlinked.[62]

In many respects, local self-governments are in a subordinate position within organization hierarchy of the state. In my view, it is necessary to create the legal framework to ensure that central public bodies with a stronger power would not enforce their own political or professional preferences against the will of local communities having different political or professional beliefs. This is the purpose of the legal protection of local self-governments. In this context the legal system shall contain rules, which grant the protection of powers and there shall be bodies that enable the enforcement of these rules. This is indispensable for the protection of the autonomy of local self-government.

I believe that, if local power and central power respect each other's latitude, it necessarily leads to a vertical division of power. Not because there are duplicated levels of power, but precisely because there are not. Local self-governments clearly do not have state sovereignty and should not be seen as the central power's 'competitors'. On the contrary, both are acting in their own capacity. The state does not want to take over the affairs of local communities, while local self-governments do not want to be the state within the state. In this reading, this principle is mostly about self-limitation, which in turn leads to an ultimate division of power between the central and local levels. It is more a result than a starting point, and therefore could not be further from the principle of what we call vertical division of powers in the case of federal states. Yet the result is similar: The state does not interfere in local affairs and *vice versa,* i.e. the principles of autonomy and subsidiarity apply. In Reinhard Hendler's formulation, local self-government as an instrument of decentralisation leads to a plurality of state decision-makers and serves to dismantle political power as an actor in the vertical division of powers.[63] This division can be assessed primarily against the central executive power, but the legislative power must also respect the limits set by the constitutional power, such as the right to adopt regulations on local public affairs.

[60] Ladner et. al., *op. cit.*, p. 10.
[61] The German word 'Selbstverwaltung' is usually translated (and used in this sense) simply as 'self-government', but it literally means self-administration.
[62] Peters, *op. cit.*, pp. 37–38.
[63] Hendler, *op. cit.*, p. 15.

The legislative is thus also limited, in that it cannot by law empty the powers of the local self-governments.

In principle, it is the sovereign decision of the state to recognise what is a local public matter, but this also imposes obligations on the state in the context of subsidiarity. This could be ensured through deconcentration as well, but, through decentralisation (thereby recognising autonomy), the central power necessarily limits itself, because it transfers powers to the local self-governments concerning which it cannot later claim to have the central executive power take over the decisions concerned. This leads to a situation where the central level of the state necessarily abdicates its right to decide on the issue. This, I am convinced, whatever the name, is effectively a vertical division of power.

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# 100 Years of Constitutional Regulation of the Romanian Administrative Contentious

Associate professor **Elena Emilia ȘTEFAN**[1]

***Abstract***

*29 March 2023 will mark 100 years since the adoption of the Romanian Constitution of 1923. In our opinion, that moment had a great emotional charge for generations of patriotic Romanians who contributed to creating the framework suitable for the adoption of this Fundamental Act, those times when the wheel of history was full of unpredictability, after the First World War. The Constitution of 1923 meant a glorious moment for the administrative law: the constitutional regulation of the Romanian contentious administrative. From this point of view, the topic we propose is of present-day, this being a tribute year, but, at the same time, it is important because it proposes a leap in time, by analyzing the moment of the emergence of the contentious administrative in our country, by providing information for the experts in the legal field, but not only. Furthermore, the scope of this paperwork is to document and try to clarify if there was any normative act in force in our country, before the adoption of the Constitution of 1923, which made reference to the contentious administrative and what the respective document included. From this point of view, the structure of the paperwork proposes a number of three sections, in order to fulfill the scope of the research. The final part of the study consists of short conclusions that we have reached after analyzing the proposed topic.*

***Keywords:*** *Constitution, Council of State, law, contentious administrative, public authority.*

***JEL Classification:*** K23

## 1. Introduction

Although the normative regulation of the Romanian contentious administrative went through several stages, this study proposes an analysis of the legislation around the year 1923, in order to pay tribute to that historical moment of the adoption of the Constitution. It is well known that: „the law establishes the essential rules (principles) of social coexistence[2]". Notwithstanding, „nowadays society faces, among other things, an acute crisis of law (...)[3]".

We cannot analyze the contentious administrative outside the rule of law. According to Tudor Drăganu: „the emergence of the rule of law entails the exist-

[1] Elena Emilia Ștefan - „Nicolae Titulescu" University of Bucharest, Romania, stefanelena@gmail.com

[2] N. Popa, *Trăim deja într-o „criză" a dreptului?* in „Revista de Drept Public" no. 2/2022, p. 12.

[3] M. Bădescu, *Pledoarie pentru o mai bună legiferare*, in „Revista de Drept Public" no. 4/2022, p. 13.

ence of social and political conditions in the absence of which it cannot be established (…). But even if these premises of the rule of law are legal data and mechanisms suitable to ensure the most efficient guarantee of the citizens' rights and freedoms, the rule of law remains *an ideal* that faces difficult, and sometimes very difficult obstacles to overcome in its practical realization[4]". In our opinion, *the contentious administrative* is one of these mechanisms specially created by the legislator to protect citizens' rights. In the same vein, a recent study stated the following: „the contentious administrative, together with the contentious constitutional, are two pillars that support the system of the legal edifice in Romania[5]".

In the opinion of Tudor Drăganu: „the normative establishment of behavioral criteria, the requirements of which the community understands to formulate related to the conduct of people, in such a way that the community preserves itself, its existence is not questioned, in the conditions of a behavior arbitrariness, is of the essence of any community[6]". In this respect, the states of the world have regulated free access to justice in their normative acts, and mechanisms to verify the observance of this right are available on the European level. In the same vein, French doctrine states that: „Any person enjoys the facility to refer to the tribunals organized by the law all the petitions that the person in question wants to file. The tribunal the petitions are referred to shall be bound to judge them if it has the jurisdiction, on the contrary, it shall rule its lack of jurisdiction. The right to sue, understood in this respect, is not a private right; it is a public right, a public freedom[7]".

The scope of our approach is to emphasize the great role of the contentious administrative in the constitutional history of the country, as a defender of the legality[8] of the activity in the public administration, but also of individuals in front of the abuses of public authorities[9].

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[4] T. Drăganu, *Introducere în teoria și practica statului de drept*, Dacia Publishing House, Cluj-Napoca, 1992, p.184.

[5] V. Vedinaș, G. Goga, *Raportul dintre dreptul comun și regulile procedurale specifice în materia contenciosului administrativ: privire specială asupra recursului*, in „Revista de Drept Public" no.1/2022, Universul Juridic Publishing House, Bucharest, p. 13.

[6] N. Popa, *Teoria generală a dreptului*, 6th edition, C.H. Beck Publishing House, Bucharest, 2020, p. 54.

[7] E. Glasson, A Tissier, *Traite theoretique et practique d´organisation judiciaire, de competence et procedure civile*, Paris, 1925, ed. III, tom I, p. 415 *apud* T. Drăganu, *Liberul acces la justiție*, Lumina Lex Publishing House, Bucharest, 2003, p. 17.

[8] See B. Pressix, *Le principe de legalite en droit administratif francais*, „Revue Française de Droit Administratif" no. 2/2022, p. 206; U. Stelkens, *La question initiale: combien existe-t-il de principes de legalite en droit de l' Union europeenne?* „Revue Française de Droit Administratif" no. 2/2022, p.199; E. E. Ștefan, *Legalitate și moralitate în activitatea autorităților publice*, in „Revista de Drept Public" no. 4/2017, pp. 95-105.

[9] On public authorities, see M. C. Cliza, *Drept administrativ*, Part I, Pro Universitaria Publishing House, Bucharest, 2011, pp.12-20.

## 2. Content of the paperwork

### 2.1. The first normative act on the contentious administrative in Romania before 1923

The specialized literature provided as follows: „the full realization of the contentious administrative by means of the judicial power is the most important voice in the achievement of the principle of separation of powers, which represents the fundamental principle of the existence of the rule of law and in which the central character is the judge[10]". Before 1923, the foundations of Romanian contentious administrative were laid by means of Law no. 167 of 11 February 1864 on the establishment of a Council of State[11]. In this respect, the doctrine has recently noted: „the roots of the contentious administrative in the fertile soil of Romanian law are deep and they date from the year of grace 1864, when the enlightened Ruler Alexandru Ioan Cuza, created, according to the French model, the Council of State[12]".

Law no. 167 of 11 February 1864 has only 65 articles. According to the specialized literature, by means of this law "the Council of State was established according to the French model, having legislative duties (preparation of drafts law), administrative duties (administrative counseling and disciplinary forum for public servants) and contentious administrative duties[13]".

At a first reading of Law no.167 of 11 February 1864, a remarkable thing can be noted, which can only be understood from the point of view of knowing the constitutional history of our country. A formula is mentioned in the introductory part of the law which can give rise to a topic of reflection. After the name of the issuer, the law provides as follows: „*With the mercy of God and the national will, Ruler of the United Romanian Principalities. We wish you good health to all present and those to come*". On the one hand, the text appeals to divinity and the national will. On the other hand, the text includes a wish of health for the living and descendants.

In Chapter 1- *General provisions*, art. 1 para. (1) provides as follows: "The Council of State is next to the executive power to prepare the draft laws that the Government will present to the Electoral Assembly and the administrative regulations related to the implementation of the laws" and para. (2) provides: „It also exercises contentious duties, assigned to it by laws in the administrative fields and has no legislative duties". Furthermore, art. 6 provides as follows: „The

[10] I. Nedelcu, *Manopere dolosive și frauda legii în dreptul public și privat*, Universitaria Publishing House, Craiova, 1995, p. 73.
[11] See https://legislatie.just.ro/Public/DetaliiDocument/19659, last visit on 07.03.2023.
[12] V. Vedinaș, G. Goga, *op.cit.*, p.14.
[13] C. S. Săraru, *Tratat de contencios administrativ*, Universul Juridic Publishing House, Bucharest, 2022, p. 57.

Council of State is under the direction and presidency of the Ruler".

In what concerns the terms that a person must fulfilled in order to be a member of the Council of State, the law establishes the following: to be Romanian or naturalized Romanian and to be at least 35 years old (art.13). Regarding the entry into office, the law provides for the advisers of the Council of State to take the oath before God (art.15).

In what concerns the evidence in the litigation, Law no. 167 of 11 February 1864 regulates the on-site investigation, expressly referred to in art. 35: „*in contentious and disciplinary matters, one of the members of the Council of State may be tasked with conducting the on-site investigation*". Other issues on the court procedure are referred to in art. 36: summoning of the parties, the hearing of the parties which can be verbal or written, the deliberations are public, the possibility to adduce interrogation for the parties to the litigation. Furthermore, the law provides that the party can represent itself or by lawyer, this resulting from the interpretation[14] of art. 36 para. (2): "*the parties shall be able to defend themselves verbally or in writing, directly or by a lawyer*".

The Council of State had three categories of duties, regarding the contentious administrative, according to Law no.167 of 11 February 1864:

a) in what concerns the jurisdiction of the contentious administrative, art. 49 provides the following: "The Council of State could judge, as higher court or court of last resort, all contentious administrative cases to be assigned to it by means of a law".

b) also, in respect of the jurisdiction in the contentious administrative field, art.51 provides three categories of litigations. Therefore, „the individuals and the legal entities the interests of which are harmed by any administrative measure may file the following petitions with the Council of State:

- against the resolutions of the ministers made by committing abuse of powers[15] or by violating the laws and regulations in force;
- against the resolutions or acts of commencement of proceedings given by prefects or other administrative agencies, under the violation of laws and regulations;
- against the resolutions of public works commissions".

c) according to art. 52, the Council of State performed, as the doctrine provided: a contentious of interpretation[16]. It is about the possibility of the individuals to resort directly to the Council of State to obtain the interpretation of a decree, ordinance or regulation, data in administrative fields whereby the interests

[14] For the interpretation of the legal norm, see N. Popa (coord.), E. Anghel, C. Ene-Dinu, L.-C. Spătaru -Negură, *Teoria generală a dreptului. Caiet de seminar*, 3rd edition, C.H. Beck Publishing House, Bucharest, 2017, pp. 197-202.

[15] In what concerns second appeal for excess of power, see Ch. Debbasch, *Droit administratif*, Paris, 2002, p.785 *apud* T. Drăganu, *Liberul acces la justiție*, Lumina Lex Publishing House, Bucharest, 2003, p.156.

[16] C. Rarincescu, *Contenciosul administrativ român*, second edition, Universul Juridic Publishing House, Bucharest, 2019, p.76.

of other individuals would be reached.

### 2.2. Contentious administrative in the Constitution of 1923

The need to regulate the contentious administrative resulted from practice. However, „understanding the necessity is always and in all fields a process of consciousness[17]". As Paul Negulescu mentioned, "The law is only the garment that covers the necessities of life[18]."

The Constitution of 1923 was promulgated by King Ferdinand I of Romania, on 28 March 1923, by Royal Decree no.1360[19], published in Official Journal no. 282 of 29 March 1923 and was the one that expressly regulated the contentious administrative in art. 107. This article consists of 5 paragraphs. As Constantin Rarincescu noted, „in order to end the constitutional controversy which was raised by the right to annul or declare illegal the administrative acts, the constituent legislator of 1923 made the contentious administrative a constitutional institution, with two fundamental features:

a) the Constitution of 1923 is refractory to the establishment of administrative tribunals and

b) entrusts the contentious administrative duties to the ordinary judicial power, including among these attributions the power to annul illegal administrative acts[20]".

As Antonie Iorgovan noted „the contentious administrative became a constitutional institution by means of the Constitution of 1923, similar provisions were also included in the Constitution of 1938 (art. 78)"[21]. Therefore, according to the Constitution of 1923, „*the one whose rights were aggrieved, either by an authority administrative act or by a management act made in violation of the laws and regulations or by the bad will of the administrative authorities to solve the petition regarding a certain right, can resort to the courts for the recognition of his right*". Furthermore, "*the judicial power judges whether the act is illegal, can annul it or award civil damages, until the date of restoration of the aggrieved right, with jurisdiction to judge the compensation petition either against the sued administrative authority or against guilty public official*".

At the same time, the Constitution of 1923 also regulates the motion filed to the rejection of the claim, by establishing that governing acts and those of military command are not judged by the judiciary power. Subsequently, under art.

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[17] A. M. Naschitz, *Necesitate și libertate în domeniul respectării dreptului*, in „Studii și Cercetări Juridice" no.1/1958, p.14.

[18] P. Negulescu, *Curs de drept constituțional român (Class of Romanian constitutional law)*, held at the University of Bucharest, edited by Alex. Th. Doicescu, Bucharest, 1927, p. 113.

[19] Public information, available online at https://www.ccr.ro/comunicat-de-presa-08-ianuarie-2023/, visited on 07.03.2023.

[20] C. Rarincescu, *op.cit.*, 2019, pp. 95-96.

[21] A. Iorgovan, *Tratat de drept administrativ*, vol. II, 4th edition, All Beck Publishing House, Bucharest, 2005, p. 511.

107 of the Constitution, the Law for the contentious administrative was adopted on 23 December 1925, the first law in our country in this field[22] however in relation to the topic of the study, we do not want to develop our analysis further at this moment.

The tribute to the Constitution of 1923 is important from other points of view as well. Therefore, as recently reported by the doctrine, "the Constitution of 1923 established the first Legislative Council - organized as a distinct institution of the state, established by Law no. 20/1925 (Mârzescu Law)[23]". Furthermore, "the Constitution of 1923 expressly established in art. 103 the control of the constitutionality of laws[24]".

### 2.3. Several opinions about current contentious administrative

Public administration[25] has gone through multiple changes and challenges[26], many of which have been contemplated by recent doctrinal analyses[27]. Nowadays, the law of the contentious administrative is Law no. 554/2004[28], and one of the challenges of public administration is undoubtedly digitalization[29]. In this section, we wanted to know the dynamics of the contentious administrative litigations from the practice of the national courts.

By analyzing the Activity Report of 2021, it appears that the High Court of Cassation and Justice, Division of contentious administrative and fiscal faced

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[22] For further details, see A. Iorgovan, *Tratat de drept administrativ, op. cit.*, 2005, p.511; C.S. Săraru, *Tratat de contencios administrativ, op. cit*., 2022, pp.60-61; D. Apostol Tofan, *Drept administrativ,* vol. II, edition 5, C.H. Beck Publishing House, Bucharest, 2020, pp.110-111.

[23] The law was promulgated by Royal Decree no.738 of 25 February 1925 and published in OJ no. 45 of 26 February 1925 *apud* A.-J. Niță, *Consiliul Legislativ - organ consultativ al Parlamentului în asigurarea calității Legii, condiție primordială a statului de drept*, in „Revista de Drept Public" no. 1/2022, p. 39.

[24] S. G. Barbu, A Muraru, V. Bărbățeanu, *Elemente de contencios constituțional*, C.H. Beck Publishing House, Bucharest, 2021, p.12.

[25] See also R. M. Popescu, *Jurisprudența CJUE cu privire la noțiunea de „administrație publică" (Case-law of the CJEU on the term of "public administration") used in art. 45 para. (4) TEU*, in CKS ebook 2017, pp. 528-532.

[26] Regarding the challenges of modern public administration, see C. S. Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 576-579.

[27] V. Vedinaș, *Dreptul administrativ român la cumpăna dintre milenii, veacuri și regimuri politice*, in „Revista de Drept Public" no. 4/2022, pp. 29-65; V. Vedinaș, *Quo vadis administrative law*, „Juridical Tribune - Tribuna Juridica", Volume 8, Issue 2, December 2018, p. 390-397.

[28] Law no. 554/2004 of the contentious administrative, published in OJ no. 1154 of 7 December 2004, with latest amendment by GEO no. 57/2019 on the Administrative Code, published in OJ no. 555 of 5 July 2019.

[29] On digitization or digital policy, see A. Fuerea, *Dimensiunea juridică europeană a globalizării în era digitală*, in Ciprian Paul Romițan and Paul-George Buta (coordonators), *Collective volume In Honorem Viorel Roș. „Studii de Drept Privat și Public"*, Hamangiu Publishing House, Bucharest, 2021, p. 57; A.-M. Conea, *Politicile Uniunii Europene. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2020, pp. 190-214.

a large number of litigations. "From the total number of cases on the dockets in 2021 (…) 12,108 case files were on the dockets of the Division of contentious administrative and fiscal", according to page 69 of the Activity Report of 2021[30]. Furthermore, "the number of 12,108 case files resulted from adding up the number of newly registered files in 2021, with the number of case files remained unsettled at the end of 2020 (7336), by noting a decrease in the number of case files in 2021 compared to 2020, when there were 14, 311 case files on the dockets of the division" (page 83 of the Report[31]).

"From the total of the cases newly registered in 2021, 4,772 cases were registered on the dockets of Division of the contentious administrative and fiscal (page 70 Report) and on the cases settled in 2021, 6,355 cases were settled by Division of the contentious administrative and fiscal (page 71 Report), being, without doubt, the division with the greatest number of cases compared to Divisions civile and criminal of the same supreme court[32]".

Based on the doctrine, the following were outlined: "even if current Law no.554/2004 of the contentious administrative provides the establishment of administrative-fiscal tribunals, unfortunately, in a little while it will be two decades since it was adopted and even to this day these courts have not been established[33]". "This is one of the causes that hinders (...) the evolution of the administrative law (...)[34]". "The contentious administrative litigations have several roles in a state:

a) discipline and hold accountable the conduct of public authorities, by putting a stop to arbitrariness and the tendency to abuse or that tendency to take advantage of power, which Montesquieu spoke of;

b) protect public assets and national wealth, especially that representing public property of the state and of territorial and administrative divisions"[35].

### 3. Conclusions

This study presents in a personal way the first regulation of Romanian contentious administrative, from a historical point of view. The analysis began with a documentation revealing that even before the adoption of the Constitution of 1923, there was a normative act in our country that referred to the contentious administrative. Following the analysis, we identified in this respect, Law no. 167 of 11 February 1864 on the establishment of a Council of State. This law gave us the opportunity to build an arch over time because more than 150 years have

[30] https://www.iccj.ro/wp-content/uploads/2022/03/RAPORT-ACTIVITATE-2021-10-martie-2021.pdf, visited on 08.06.2022.
[31] *Idem.*
[32] *Idem.*
[33] V. Vedinaș, *Dreptul administrativ român ..., op. cit.*, p.32.
[34] *Ibidem*, p. 32.
[35] *Ibidem*, pp. 32-33.

passed since the adoption of the first road-opening law in the matter of the contentious administrative.

Subsequently, the Constitution of 1923 expressly regulated in art. 107 the contentious administrative and we are currently celebrating the 100th anniversary of this historic moment. Despite the fact that nowadays the contentious administrative benefits from a modern regulation, Law no. 554/2004, administrative-fiscal tribunals are not established, and the Activity Report of the High Court of Cassation and Justice of 2021 shows the great number of contentious administrative litigations that hinders the activity of the supreme court. From this point of view, we support the establishment of administrative-fiscal tribunals in order to release the courts of law, the divisions of contentious administrative and fiscal, from a great part of the litigations.

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# The Compensation Mechanism of Expropriated Pursuant to the Law No. 255/2010. Vulnerabilities and Possible Solutions

Lawyer **Ioan PARASCHIV**[1]

***Abstract***

*The objective of the study is to analyse the compensation mechanism for the persons affected by the expropriation procedure necessary to achieve the objectives of national interest, according to Law no. 255/2010, highlighting its deficiencies and possible legal remedial solutions. The analysis carried out was based on the deductive method and essentially reveals the fact that in order to respect and strengthen the constitutionally regulated pillars of the compensation mechanism within the expropriation procedure regulated by Law no. 255/2010, respectively of the "just" and "preemptive" character of the compensation of the affected persons, a legislative reform in the field of expropriation is necessary to provide the expropriators with the modern legal instruments, necessary for the fair establishment of compensation even from the administrative phase of the expropriation procedure, with the consequence of increasing confidence in the state institutions that act as expropriators or representatives of the expropriator, relieving the state budget of additional expenses and the courts of disputes that can be prevented.*

***Keywords****: expropriation, entitled persons, persons affected by expropriation, compensation mechanism.*

***JEL Classification****:* K11, K15, K25

## 1. Introductory considerations

Expropriation is the main legal instrument at the disposal of the state and territorial administrative units, which act as expropriators, for the acquisition of certain immovable assets that are necessary for the realization of the public utility projects proposed by the expropriators, but which are privately owned by natural or legal persons, public or private, with or without profit and/or of any other expropriated entities. The expropriation procedure therefore allows the transparent acquisition of immovable property affected by the achievement of public utility objectives, with the appropriate compensation of the expropriated persons; the legal compensation mechanism attached to the expropriation becomes an incident, which should have as a mandatory result the "fair" and "prior" compensation of all the people affected by the expropriation, according to art. 44 para. 3 of the Romanian Constitution.

The requirements regarding the "fair" and "prior" compensation of ex-

[1] Ioan Paraschiv - Bucharest Bar Association, Romania, ioan.paraschiv@ip-legal.ro.

propriated persons are of the original essence of the national concept of expropriation, of French inspiration[2], found as such in the Constitution of 1866[3] which expressly regulated them in the content of art. 19[4]; moreover, these constitutional provisions succeeded the first normative act in modern Romanian legislation dedicated to expropriation, respectively Law no. 1378/1864 for Expropriation in case of public utility[5] ("Law no. 1378/1864") which had effectively implemented them, since: (i) the expropriated persons, dissatisfied with the initial offer of the administration, were compensated through the mediation of the court, and the level of compensation was established by a jury or commission by reference to the "table of offers and requests" (art. 36, art. 38, art. 48); in other words, by reference to the circulation value of the buildings from the time of expropriation; and (ii) the expropriated person did not lose possession of the expropriated property until the actual payment of the compensation (art. 20 par. 2, art. 63). Such requirements were therefore present in the legislator's legal conception regarding expropriation since 1864.

Of course, this original configuration of expropriation and the related compensation mechanism has been subject to legislative adjustments over time. These were determined, mainly, by the political interests of the time, calibrated, however, also by reference to the social component or better said to the level of social pressure. However, there is a stability in the legal regulation of expropriation in the first part of the 20th century, so that an important reconfiguration of the concept and implicitly of the related compensation mechanism took place during the communist regime, with the entering into force of the Constitution of 1948[6] and then a set of normative acts with implications in the field of expropriation[7]. Thus, although a compensation mechanism was maintained, at least formally, for

[2] Ana Maria Nicolcescu, *Expropriation for reasons of public utility*, Universul Juridic, Bucharest, 2019, p. 39; Eugen Chelaru, *Observations regarding expropriation for reasons of public utility regulated by Law no. 255/2010* in „Romanian Journal of Private Law" no. 3/2021, p. 75; Valeriu Stoica, *Civil Law. Main real rights*, 4th edition, C. H. Beck Publishing House, Bucharest, 2021, p. 121; Corneliu Bârsan, *Civil Law. The main real rights in the regulation of the new Civil Code*, 2nd edition, revised and updated, Hamangiu Publishing House, Bucharest, 2015, p. 134; Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *Civil Law Course. Main real rights*, 2nd edition revised and added, Hamangiu Publishing House, Bucharest, 2013, p. 214.

[3] Published in the Official Gazette, Part I no. 142 of July 13, 1866.

[4] Constitution of 1866, art. 19 para. 2: "No one can be expropriated except for the cause of legalized public utility, established, and after a fair and prior compensation".

[5] Published in the Official Gazette, Part I of October 20, 1864.

[6] Published in the Official Gazette, Part I no. 87bis of April 13, 1948.

[7] Decree no. 417/1949 regarding the declaration as abrogated of some laws and decrees, published in the Official Gazette no. 71 of November 16, 1949, which repeals Law no. 1378/ 1864; Decree no. 545/1958, published in the Official Gazette no. 41 of December 30, 1958; Decision of the Council of Ministers no. 1676/1959 for the application of art. 6 of Decree no. 545/1958, unpublished; Decree no. 467/1979 regarding the evaluation of buildings, land and plantations that are taken over, with payment, into state property through expropriation or in other cases provided for by law, published in the Official Bulletin no. 3 of January 4, 1980.

the persons affected by expropriation[8] or nationalization[9], on the other hand, multiple concrete ways of inactivating[10] the right to compensation of the entitled persons were legally regulated. The compensation of the people affected by expropriations or nationalization had become arbitrary and mostly formal; the right to fair compensation of these persons has become rather illusory. However, we will not insist further on these aspects which are well-known, the reason for their generic mention being related to marking the minimum point of the legal regulation of the compensation mechanism in case of expropriation, at least from the point of view of social justice and its effectiveness.

Finally, after the fall of the communist regime, Law no. 33/1994 regarding expropriation for reasons of public utility[11] ("Law no. 33/1994"), still in force today, normative act conceived based on Law no. 1378/1864, a fact that reveals the legislator's return to the original legal concept of expropriation. However, the expropriation procedure regulated by Law no. 33/1994 would later be considered too "difficult", compared to the requirements of rapid achievement of national, county and local interest objectives.

In this context, a set of special laws was adopted focused on facilitating the performance of public interest works in the field of road, railway and mining infrastructure, composed of Law no. 198/2004 regarding some preliminary measures for road construction works of national interest, county and local[12], Law no. 407/2005 regarding some preliminary measures for the rehabilitation and expansion of the public railway infrastructure[13], Law no. 106/2008 regarding the expropriation for reasons of public utility of the lands necessary for mining works for the exploitation of lignite deposits[14].

Later, these normative acts were replaced by Law no. 255/2010 regarding expropriation for reasons of public utility, necessary to achieve some objectives of national, county and local interest[15] ("Law no. 255/2010") which will become

[8] See in this sense art. 10 of the 1948 Constitution: "Expropriations may be made for reasons of public utility on the basis of a law and with a fair compensation established by the judiciary."
[9] By way of example, see art. 11 paragraph 1 of Law no. 119/1948 for the nationalization of industrial, banking, insurance, mining and transport enterprises, published in the Official Gazette, Part I no. 133bis of June 11, 1948, according to which: "The state will grant compensation to the owners and shareholders of nationalized enterprises."
[10] By way of example, see art. 15 of Law no. 119/1948 for the nationalization of industrial, banking, insurance, mining and transport enterprises, published in the Official Gazette, Part I no. 133bis of June 11, 1948, according to which: "No compensation shall be granted: a) Those who, being in the service of the State, counties or communes, have enriched themselves while they were in service, through illegal acts established by a court; b) Those who left the country clandestinely or fraudulently, as well as those who do not return to the country after the expiry of the validity period of the travel documents issued by the Romanian authorities."
[11] Published in the Official Gazette of Romania, Part I no. 139 of June 2, 1994.
[12] Published in the Official Monitor of Romania, Part I no. 487 of May 31, 2004.
[13] Published in the Official Gazette of Romania, Part I, no. 8 of January 5, 2006.
[14] Published in the Official Gazette of Romania, Part I, no. 369 of May 14, 2008.
[15] Published in the Official Gazette of Romania, Part I no. 853 of December 20, 2010.

the special normative act on expropriation for reasons of public utility applicable to the main objectives of national, county and local interest. On the structure of Law no. 255/2010, legal regulations were grafted in time to implement the requirements to expedite the expropriation procedure related to most public projects of national, county and local interest. In this way, this regulation of expropriation became the most often used in practice; Law no. 33/1994 which represents general regulation in the matter applying in isolation, most of the time for resolving aspects not expressly regulated in Law no. 255/2010.

The present legal analysis concerns the compensation mechanism, as specifically regulated by Law no. 255/2010, respectively its legal geometry, with due attention to the persons affected by the expropriation, the extent to which this legal mechanism can respond to the imperative demands of the constitutionally regulated expropriation and its degree of correlation with the current level of development of society and the scope of public projects. The legislator promoted Law no. 255/2010 to ensure the speed of the expropriation procedure in most important public projects, and this objective was also maintained regarding the legislative changes after the adoption of this law. However, the people affected by the expropriation did not benefit from the same systematic concern on the part of the legislator as the interests of the expropriator; as far as these people are concerned, the legislator essentially limited to the adoption of some legislative changes (sometimes not precise[16]) to implement some binding decisions of the courts. Therefore, the modernization of the compensation system for people affected by expropriation was not pursued. Moreover, in the doctrine relevant to the matter of expropriation, the categories of affected persons and their compensation mechanism (especially from the administrative phase), the long-term consequences of expropriation on them remained topics practically unaddressed or treated extremely succinctly. These aspects are intended to be briefly analysed in the present material.

## 2. The current compensation mechanism based on Law no. 255/2010

### 2.1. Persons entitled to compensation versus persons affected by expropriation

It is necessary, in advance, to precisely establish the persons entitled to compensation within the meaning of Law no. 255/2010. Thus, in accordance with the provisions of art. 3, 8, 18 of Law no. 255/2010 we can deduct that the persons entitled to compensation are represented by any natural or legal person, under public or private law, with or without profit, owners of the property right or other

[16] See in this regard recital no. 127 of the Decision of the High Court of Cassation and Justice no. 78/2021 regarding the examination of the referral made by the Cluj Court of Appeal - Civil Section I, in File no. 1.602/117/2020, to issue a preliminary decision, published in the Official Gazette, Part I no. 1185 of December 15, 2021.

real right regarding the expropriated real estate. Even if the property right or other real right is not registered in the land register prior to the initiation of the expropriation procedure according to Law no. 255/2010, the person who considers himself entitled to compensation will still be able to submit a request for compensation to the commission for verifying the property right or other real right ("Commission") established according to art. 18 et seq. from Law no. 255/2010, attaching all the documents proving his property right or other real right; his request will be examined by this Commission, in compliance with the provisions of art. 19 para. 3 of Law no. 255/2010[17]. But from the perspective of the expropriator, his legal obligations in the administrative phase of the expropriation (for example, the evaluation of the expropriated properties, the completion of the publicity formalities within the expropriation procedure, including the notification of the intention to expropriate, etc.) are limited exclusively to the scope of the entitled persons whose right to property or other real right regarding the expropriated real estate was registered in the land register before the start of the expropriation procedure.

Additional clarifications are needed regarding the situation of the persons who submitted notifications based on Law 10/2001 on the legal regime of some buildings taken over abusively between March 6, 1945 and December 22, 1989, republished, with subsequent amendments and additions[18] regarding land which are part of the expropriation corridor. According to art. 19 para. 9 of Law 255/2010[19], these lands are expropriated under the terms of Law no. 255/2010, to the extent that the respective lands are in the patrimony of the natural or legal persons indicated in art. 3 of Law no. 255/2010 or is transferred to the public domain of the state and to the administration of the authorities provided for in art. 2 of Law no. 255/2010, if the lands are in the private domain of the state. Therefore, the situation of these persons is also solved by applying the legal filter of proving the quality of owner or holder of another real right associated with the expropriated real estate. Thus, to the extent that the notification of the entitled person is resolved by the competent entity by restitution in kind of the building, before the transfer of ownership in the public domain of the state or territorial

[17] Art. 19 para. 3 of Law no. 255/2010 provides that "Proof of ownership and other real rights over expropriated real estate is done by any means of evidence allowed by law, including in the areas where Decree-Law no. 115/1938 for the unification of the provisions relating to land registers, with subsequent amendments, depending on the way of acquiring rights - conventional, judicial, legal, successional, understanding by acquisition and the establishment or reconstitution of the right of ownership under special laws".

[18] Republished in the Official Gazette, Part I no. 798 of September 2, 2005.

[19] Art. 19 para. 9 of Law no. 255/2010 provides that: "By derogation from the provisions of art. 21 para. (5) from Law no. 10/2001 regarding the legal regime of some buildings taken over abusively between March 6, 1945-December 22, 1989, republished, with subsequent amendments and additions, the buildings for which restitution notices were formulated, which are part of the expropriation corridor, are expropriated under the terms of this law or, as the case may be, transferred to the public domain of the state and to the administration of the authorities provided for in art. 2".

administrative unit according to Law no. 255/2010, then the respective building - being included in the expropriation corridor - will be subject to the expropriation procedure according to Law no. 255/2010, and the entitled person will be compensated based on this normative act. In the situation where the notification will be resolved by granting compensatory measures by equivalent, then the land will be expropriated from the owner of the property right registered in the land register (for example, the holding unit), and the entitled person will be compensated in accordance with the provisions of the Law no. 165/2013.

The Constitutional Court outlined in its recent jurisprudence[20] the scope of the persons entitled to expropriation based on Law no. 255/2010 which would include the owners of the property right, being excluded from the scope of the compensation mechanism regulated by Law no. 255/2010 the owners or holders of expropriated real estate who cannot prove ownership. It was also noted in the aforementioned jurisprudence of the Constitutional Court that "the precarious situation of the person affected by the expropriation measure is not capitalized in a negative sense by the legislator who provided that, in the absence of proof of the title of holder of the real right, the expropriator will record the compensation in a bank account in the name of the applicant, amount to be released at the time of proving the right"[21]. This measure would constitute an "additional guarantee of the protection of the persons targeted by the expropriation measure"[22]. The Constitutional Court therefore held that the proof of ownership of the expropriated property is one of the conditions established by the provisions of Law no. 255/2010, the essence of expropriation being the property right.

However, we share the opinion that the scope of the persons entitled to compensation according to Law no. 255/2010 is more extensive and includes, in addition to the owners of the expropriated buildings and the holders of other real rights over them (their situation not being the subject of the Constitutional Court's analysis in the framework of Decision no. 537/2020 to which we referred above), for all reasons already exposed previously.

We can thus distinguish a first vulnerability of the compensation mechanism regulated by Law no. 255/2010, derived from (i) the lack of clarity and respectively (ii) the anachronism of the legal regulation regarding the establishment of the categories of persons entitled to compensation because of expropriation; these aspects are treated separately in what follows.

Regarding (i) the lack of clarity of the legal rule that regulates the categories of persons entitled to compensation based on Law no. 255/2010, this is inferred from the fact that in certain articles of this normative act reference is

[20] Decision of the Constitutional Court no. 537/2020 regarding the rejection of the exception of unconstitutionality of the provisions of art. 19 para. (1)-(4) from Law no. 255/2010 regarding expropriation for reasons of public utility, necessary to achieve objectives of national, county and local interest, published in the Official Gazette, Part I no. 916 of October 8, 2020.
[21] Idem, p. 19.
[22] Ibidem.

made exclusively to the category of property owners as recipients of compensation (see, for example, the provisions of art. 5 paragraph 1, which refer to the approval by decision of the Government or local or county public administration authority, including the "list of owners" and the individual amounts related to the compensations estimated by the expropriator and the term in which they are transferred to an account opened in the name of the expropriator "at the disposal of the property owners"; art. 8 paragraph 1 which regulates the obligation of the expropriator to notify the owners of the intention to expropriate real estate), while in other texts of the same normative act the holders of other real rights are also referred to as persons entitled to compensation (to see, for example, the provisions of Article 8, paragraph 2, which refer to the obligation of property owners to appear at the expropriator's headquarters in order to submit the documents attesting to the right of ownership or "other real right" in order to establish fair compensation; title of chapter V which regulates the activity of the commission for verification of property rights or other real rights and the granting of compensations; art. 18 which refer to the property right or "other real right" under which the claim for compensation was made; art. 19 according to which the payment of compensation for expropriated buildings is made based on requests addressed by the holders of real rights as well as by any person who justifies a legitimate interest). In such an important field as expropriation, it is imperative to clearly establish the categories of persons entitled to compensation in the sense of Law no. 255/2010, through a legal text drafted in compliance with the requirements of Law no. 24/2000.

Regarding (ii) the anachronism of the legal regulation, must be specified that it shall be correlated with social evolution, the growing scope of public projects and the diversity of legal situations that can be encountered in practice. Also, the modernization of the legal regulation of expropriation is also required for reasons related to the need to ensure the financing of public projects from external funds, the large international financial institutions paying particular attention to the social implications associated with expropriation procedures related to the achievement of public investment objectives[23]. The adjustments of Law no. 255/2010 aimed, as pointed out before, mainly to expand its scope for works of national, county and local interest in a multitude of fields, precisely so that the respective investment projects benefit from the speed of the expropriation procedure regulated by Law no. 255/2010. However, regarding the categories of affected persons and the compensation due to them, progress has been little and determined mainly by the mandatory jurisprudential solutions adopted in connection with the judicial stage of expropriation.

It is clear, however, that the scope of the people affected by the expropriation is not limited to the holders of property rights or other real rights over the

[23] See in this sense World Bank, OP 4.12 - Involuntary Resettlement; the document is available online at chrome-extension://efaidnbmnnibpcajpcglclefindmkaj/https://ppfdocuments.azureedge.net/1572.pdf, accessed on 15.05.2023.

expropriated real estate registered as such in the land register; therefore, the scope of persons affected by expropriation is wider than that of persons entitled to expropriation in the sense of Law no. 255/2010. There may therefore be persons who hold rights other than real rights regarding the expropriated lands (for example, holders of lease contracts), persons who hold the capacity of owners or holders of other real rights regarding the expropriated lands, but who have built constructions on expropriated land (with or without permits); natural or legal persons carrying out, authorized or not, various commercial activities on the expropriated lands; persons who do not hold any kind of right regarding the expropriated land, but who in fact occupy such land located in the expropriation corridor, land on which they may have built permanent or temporary constructions without building permits, where they live or use for other purposes, etc. Also, among the people affected by expropriation there may be some in special situations (e.g.: extreme poverty, with a minimum level of education) or in special conditions (e.g.: people with health problems).

For all these situations indicated above, a modern legal regulation of the compensation mechanism must be adopted, and such a regulation should facilitate the granting of an adequate legal response from the expropriator for all categories of people affected by the expropriation; sure that not all of these categories of people affected by expropriation will be entitled to financial compensation and it could be argued that for most of the stated categories there are legal remedies derived mainly from the application of the provisions of the Civil Code or other special laws, however it would be desirable as Law no. 255/2010 to require the expropriator to draw up, for each individual project, a plan through which, based on the application of clear eligibility criteria, all categories of persons affected or who could be affected by expropriation, the persons entitled to expropriation are identified, to implement a permanent communication system with all these persons, to facilitate the provision of assistance services to the affected persons for the entire duration of the expropriation procedure as well as possibly a determined time interval after its completion. The omission of the regulation of these essential aspects equally represents vulnerabilities associated with the compensation mechanism because of the expropriation based on Law no. 255/2010, which must be corrected by the legislator in the near future.

Such measures are already standardized by the international financial institutions that provide financing in the case of public investment projects that also involve expropriations. The modernization of the internal legislation in this sense appears, therefore, imperative also from the perspective of facilitating the financing, including the operations of acquiring the right of ownership associated with the lands affected by public projects (whose value can significantly encumber the state budget).

### 2.2. The algorithm for establishing compensations as a result of the expropriation procedure carried out on the basis of Law no. 255/2010

**In the administrative phase** of the expropriation procedure regulated by the provisions of Law no. 255/2010, the value of the compensations to be granted to the entitled persons is estimated by the expropriator "on the basis of an evaluation report drawn up taking into account the expertise drawn up and updated by the chambers of notaries public and the term in which they are transferred to an account opened on the name of the expropriator, available to property owners" (art. 5 para. 1 of Law no. 255/2010). The sums representing the individual compensation, determined in this way by the expropriator, are subject to approval by a government decision or by a decision of the local or county public administration authority, respectively the General Council of the Municipality of Bucharest, as the case may be.

**A first issue concerns the date of evaluation of expropriated land in the administrative phase.** The operation of the estimated assessment of compensations within the meaning of art. 5 para. 1 of Law no. 255/2010 is carried out by the expropriator prior to the effective date of the transfer of ownership, as a relevant temporal reference established according to the jurisprudence of the Constitutional Court[24].

That is why, in order to respond to these requirements imposed by the mentioned jurisprudence of the Constitutional Court, the legislator modified the provisions of art. 11 paragraph 7 of Law no. 255/2010 and established that, after the cadastral documentation has been received by the cadastre and real estate advertising offices/the National Agency for Cadastre and Real Estate Advertising (operation that is carried out after issuing the expropriation decision, according to art. 9 par. 5 and 6, art. 65 of Law No. 255/2010), an expert appraiser specialized in the evaluation of real estate properties, a member of the National Agency of Appraisers in Romania - ANEVAR, will draw up an evaluation report by reporting at the time of the ownership transfer, but only for expropriated real estate for that there are changes of any nature compared to the data provided in the annex to the decision of the Government/county council/local council, provided for in art. 5 of Law no. 255/2010, for each territorial administrative unit, for each use category.

Therefore, in the situation where there will be changes regarding the

[24] Decision of the Constitutional Court no. 380/2015 regarding the admission of the exception of unconstitutionality of the provisions of art. 22 para. (3) from Law no. 255/2010 regarding expropriation for reasons of public utility, necessary to achieve some objectives of national, county and local interest, related to the phrase "on the date of drawing up the expert report" included in the provisions of art. 26 para. (2) from Law no. 33/1994 regarding expropriation for reasons of public utility, published in the Official Gazette, Part I no. 527 of July 15, 2015.

amounts representing the individual compensations, the decision of the Government/county council/local council, provided for in art. 5 of Law no. 255/2010 will be updated, according to the provisions of art. 9 para. 8 of Law no. 255/2010. Under such conditions, the recording accounts will have to be credited or debited by the expropriator to correspond with the updated compensation as described above.

**A second issue concerns the object of the assessment.** Normally, the expropriator is required to order the effective evaluation of the expropriated real estate to determine the compensation due to each entitled person, according to the provisions of art. 5 and 11 par. 7 of Law no. 255/2010, with the mention that in the special situation of forest lands, the evaluation of the existing wood mass is additionally carried out according to art. 14 para. 7 - 10 of Law no. 255/2010.

If we admit that the scope of persons entitled to compensation also includes holders of real rights other than property rights, then we should also admit the fact that Law no. 255/2010 should have included an evaluation mechanism for the compensation due to these persons. If Law no. 255/2010 does not provide for such a mechanism for determining compensation for holders of real rights other than ownership, the expropriator is practically put in a situation where he cannot evaluate the respective real right based on criteria determined by law and therefore cannot determine the compensation for the holder of such bad rights.

The matter is therefore left without a regulation for the administrative phase, the holders of these real rights still having the opportunity to address the Commission to prove their alleged real right and request the compensation they are entitled to. However, such persons should show increased diligence, as it is possible that they may not appear on the annexes of the Government's decision or of the other institutions expressly indicated in art. 5 para. 1 of Law no. 255/2010 and, thus, not be subject to the express notification of the expropriation intention according to art. 8 of Law no. 255/2010. From this perspective, it is necessary for the legal regulation and the implementation by the expropriator of an objective communication mechanism between the expropriator and absolutely all the persons affected by the expropriation, for the entire duration of the preparation and running of the expropriation procedure. Finally, it is most likely that the situation of these people will be settled in the judicial stage of the expropriation procedure, since there is no mechanism for evaluating the compensation corresponding to these rights even before the Commission.

We find a similar situation for people who suffer other damages because of expropriation, apart from the actual value of the expropriated real estate (for example, people who carry out commercial activities on the expropriated land and/or construction, people whose real estate is partially expropriated etc). Law no. 255/2010 and Law no. 33/1994 does not regulate any method for estimating the damages suffered by such affected persons and entitled to compensation; in such conditions, these persons are practically directed to the court by the legislator; however, a future expropriation regulation should also consider these aspects

and establish criteria for estimating all assessable damages right from the administrative phase. It is therefore necessary to pre-set some legal mechanisms that are available to the expropriators, necessary to estimate all the damages from the administrative phase (e.g: relocation expenses, expenses associated with the resumption of commercial activity in another location; expenses for authentication of documents, expenses for registration in the land register, etc.); such an approach could relieve the courts of litigation that could thus be prevented and the state budget of additional expenses.

**Finally, a third issue is related to the effective way of application by the designated experts of the notarial grid for determining the circulation value of expropriated real estate.** We believe that the experts appointed by the expropriator should properly classify the expropriated buildings in the territorial administrative unit, take into account the category of use deduced from the land register extracts and other supporting documents and apply the necessary adjustments (as they are described in the expertise updated by the chambers of public notaries) by referring to the characteristics of the expropriated buildings; the purpose of these proceedings is to determine a fair value of compensation within the meaning of Law no. 255/2010.

The values indicated in the expertise drawn up by the chambers of public notaries (notarial grids) can be qualified as "minimal" only from the perspective of taxation, by reference to the provisions of art. 111 para. 5 of the Fiscal Code; however, in the sense of Law no. 255/2010, the expert appraiser takes them into account for determining the real, fair value of the expropriated land, not only through the "automatic" taking over as a result of being included in the area, but also through the application of adjustment corrections, which are otherwise expressly indicated in the respective expertise. We therefore appreciate that even in the administrative phase an estimate should be made for each expropriated building separately, depending on its concrete characteristics, and not just a generic classification in the area; we also appreciate that for the estimated evaluation of expropriated buildings in the administrative phase, the same criteria as those applicable in the judicial phase should be taken into account; in other words, the assessment in the administrative procedure should have the same rigors as the one carried out in the judicial procedure; this issue should also be the subject of a legislative clarification of the provisions of art. 5 para. 1 and respectively art. 11 paragraph 7 of Law no. 255/2010.

If there will be an agreement between the expropriated and the expropriator regarding compensation based on the provisions of Art. 9 para. 3 final thesis and art. 18 of Law no. 255/2010, then the value determined in the administrative procedure is confirmed by the parties as fair, in the constitutional sense. If, however, there is no agreement, then the transition is made to the judicial stage, in which the court will decide on the fair amount of the compensation (in fact, the only issue that can be submitted to the court's examination in the procedure regulated by Law no. 255/2010).

It is very important to specify that the entitled persons who have proved their ownership of the expropriated property, but who do not agree with the amount of compensation proposed by the expropriator, can still file a claim under art. 19 para. 11 of Law no. 255/2010 for the release of compensation in the amount proposed by the expropriator (amount that has a minimum value, by reference to the provisions of art. 22 paragraph 7 of Law no. 255/2010). Law no. 255/2010 should also provide for the obligation for the expropriator or the Commission to inform the entitled persons about this very important legal right in the expropriation procedure.

Amendment of art. 19 para. 11 of Law no. 255/2010 by Law no. 233/2018 in the sense of admitting the possibility of releasing the compensation proposed by the expropriator to the entitled persons who have proved their capacity as holders of the right of ownership, practically put an end to an obviously unconstitutional practice in which such persons were deprived of any kind of compensation (until the final completion of the disputes regarding the determination of compensations) for the buildings forcibly taken over during the expropriation, for the simple reason that they did not agree with the level of compensation proposed by the expropriator.

Therefore, the judicial phase begins when the expropriated, dissatisfied with the amount of compensation offered by the expropriator, notifies the competent court to verify the fairness of the compensation, in accordance with the provisions of art. 22 et seq. from the Law no. 255/2010; this legal action can be initiated within three years from the date of communication of the decision establishing the compensation by the Commission. In reality, however, this Commission does not have powers to determine the compensation due to the expropriated, but its powers are limited to the verification of payment requests made by expropriated persons, of documents proving ownership or other real rights (verifications which are redundant anyway in the case of persons registered as such in the land register) and upon ascertaining the acceptance or, as the case may be, the refusal of the compensation (therefore established previously by the expropriated, according to what was shown in the previously presented) by the expropriated. Therefore, the use in the text of Law no. 255/2010 of the phrase "judgment establishing compensation" for the documents drawn up by the Commission is not justified.

In any case, in the context of the disputes initiated by the entitled person, they will be able to request the competent court to cancel in part (as regards the amount of the compensation) the decision establishing the compensation issued by the Commission and to determine the compensation by reference to the fair (circulation) value of the expropriated building, as well as possibly obliging the expropriator to pay compensation for any other damage caused by expropriation, in accordance with the provisions of art. 22 para. 1 of Law no. 255/2010, in conjunction with those of art. 26 para. 1 of Law no. 33/1994, incidents under art. 34 of Law no. 255/2010.

The court will therefore order the administration of evidence with the evaluative expertise of the damage invoked by the entitled person, either real estate, in the hypothesis in which the contestation of the amount of the compensation is based on criticisms related to the value of the expropriated real estate, or of another nature when, for example, damages are requested for coverage of other damages caused by expropriation (such as damages to the entitled person's business as a result of the expropriation). In the judicial phase, there are technical solutions for determining any type of damage caused to the entitled person.

Law no. 255/2010 specifically regulates the real estate evaluation procedure of expropriated real estate. Thus, the court will order the establishment of an expert commission composed of an expert appointed by the court, one appointed by the expropriator and a third from the persons who are subject to expropriation.

This committee of experts will evaluate the expropriated real estate by referring to the expertise drawn up and updated by the chambers of notaries public, at the time of the ownership transfer, as well as to the other criteria provided for in art. 26 para. 2 of Law no. 33/1994, respectively "the price at which real estate of the same type is usually sold in the administrative-territorial unit, on the date of drawing up the expert report, as well as the damages caused to the owner or, as the case may be, to other entitled persons, taking into account consideration and the evidence presented by them", in accordance with the ICCJ jurisprudence[25]. By the phrase "the price at which buildings of the same kind are usually sold in the territorial administrative unit", the legislator had in mind the circulation value of the buildings object of the evaluation; therefore, the experts will have to refer to transactions actually carried out in the market, respectively sales purchase contracts[26]; only in the event that such concrete transactions could not be identified, then the experts will be able to refer to sales announcements regarding similar properties.

Such disputes usually last quite a long time in practice (years) precisely because of the evidence that is administered within them, namely this evaluative expertise. In the situation where the court really decides that the compensation due to the entitled person exceeds the level initially estimated by the expropriator in the administrative phase, then the Entitled Person will receive the positive difference based on that court decision which will be carried out by the expropriator willingly or by foreclosure, most often many years after the transfer of ownership. In such a situation as described previously, the Entitled Person will be deprived of this additional amount of money, from which he should have been able to ben-

[25] Decision of the High Court of Cassation and Justice no. 78/2021 regarding the examination of the referral made by the Cluj Court of Appeal - Civil Section I, in File no. 1.602/117/2020, in order to issue a preliminary decision, published in the Official Gazette, Part I no. 1185 of December 15, 2021.

[26] Decision of the Constitutional Court no. 669 of October 24, 2017, published in the Official Gazette of Romania, Part I, no. 107 of February 5, 2018.

efit from the moment of the transfer of the ownership right (according to the constitutional requirements). Normally, since it was judicially confirmed that the compensation had to be at a higher level than that initially estimated by the expropriator, then the expropriator should also bear the risk of the passage of time associated with the judicial procedure; in other words, the right of the entitled person to receive damages for the period between the due date of the obligation to pay compensation according to Law no. 255/2010 and the date of the actual payment (legal interest and/or at least the update of the amount between the interval determined by the transfer of ownership and the actual date of payment). However, this absolutely reasonable option was considered inadmissible by the High Court of Cassation and Justice[27], with an argumentation that we consider to be critical, unfair by referring to the constitutional principle of fair (i.e. full) compensation; the expropriated who is successful in the litigation with the expropriator is put in the unfair position of having to bear the time cost of that litigation; or this matter also needs to be regulated either legislatively.

Finally, the legislator stops with the regulation (as regards the protection of entitled persons) now when the entitled persons actually collect the compensation. However, socially, the expropriation continues to produce effects towards all the people affected by the expropriation, including those entitled to the expropriation, even after this moment. There is no analysis of state institutions to follow the fate of the expropriated after they collect the compensation; or, very often, "additional" costs appear for the affected persons, including the persons entitled to compensation, precisely after the expropriation has been completed and compensation has been paid. It is mainly the situation of people who are vulnerable from various points of view (people who have limited financial resources or live in extreme poverty, people with poor health or elderly people, etc.) and who cannot benefit from legal support and/or advice financial support throughout the expropriation procedure. There is a risk that the people affected by the expropriation, even if compensated fairly and within a reasonable period, will end up in a much more difficult situation than before the expropriation.

From this perspective, the legislator should intervene to modernize the legislation and adapt it including by referring to the social risks associated with expropriation, both by (i) implementing a permanent and effective communication mechanism between the expropriator and the people affected by the expropriation; (ii) preparing specialized studies that analyse the concrete social impact of expropriation and provide complete information to the affected persons regarding the options and rights they have in case of expropriation; (iii) diversification of compensation (in the sense that there is the possibility for the expropriator to even offer temporary or definitive real estate alternatives to the affected people -

[27] Decision of the High Court of Cassation and Justice no. 31/2020 regarding the examination of the referral made by the Craiova Court of Appeal - Civil Section I, in File no. 847/95/2019, in order to pronounce a preliminary decision, published in the Official Gazette, Part I no. 539 of June 23, 2020.

such as social housing); (iv) ensuring a mechanism of free legal assistance both during the administrative and the judicial procedure, as well as (v) access to specialized counselling, mainly for the disadvantaged categories, who are in difficulty anyway (even before the expropriation begins).

### 3. Conclusions

In relation to the above, the regulation of the compensation mechanism based on Law no. 255/2010 needs to be modernized, both from the perspective of (I) the social implications and regarding (II) the technical conception of the compensation mechanism for the entitled persons. Thus, regarding (I) social implications, Law no. 255/2010 should be clarified by defining the categories of persons entitled to compensation; it would also be extremely useful to introduce and define the broader concept of persons affected by expropriation. From this social perspective, the smooth running of an expropriation procedure would require the expropriator to be obliged by law (i) to draw up a preliminary report for the actual expropriation, on the basis of which (a) the persons affected by the expropriation should be identified, based on certain criteria of well-established eligibility; (b) brought to the knowledge of these persons all the rights they have within the expropriation procedure and the concrete legal options for their protection, including the schedule of the expropriation procedure; (c) indicate the public services available to people affected by expropriation, such as free legal assistance services for people with a difficult financial situation, financial counselling for untrained people who could make their situation more difficult after receiving the possible compensation, other types of specialized counselling by referring to the eventual special conditions in which the people affected by the expropriation would find themselves, the provision of social housing for certain predetermined periods of time for the people who could be left without a home as a result of the expropriation; (ii) to implement a system of permanent consultation with the people affected by the expropriation and to resolve all notifications received from them. Regarding (II) the technical component of the compensation mechanism, the legislator could reconfigure its architecture by (i) transparently regulating the procedure for evaluating the compensation due to the entitled persons from the administrative phase of the expropriation, by reference to the same criteria - confirmed by the mandatory jurisprudence of the High Court of Cassation and Justice - for the judicial stage; (ii) the regulation of legal options for entitled persons in order to fully cover the damages caused by expropriation; (iii) the eventual expansion of the legal compensation options, without being strictly limited to financial compensation.

The concept of Law no. 255/2010 was altered over time by the numerous successive legislative amendments determined mainly by the interests of the expropriators, in their legitimate desire, moreover, to carry out projects of national, county or local public interest without legal obstacles or delays caused by the

expropriation procedure expropriation. The legislator mainly aimed for the expropriation procedure regulated by Law no. 255/2010 to be simplified and characterized by speed; however, it is necessary that this justified interest of the expropriator be configured in a fair manner and from the perspective of the people affected by the expropriation, by adopting a modern, updated regulation that meets the constitutional requirements and that benefits from the coherence and quality imposed by the technical norms legislative.

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# Controversies Regarding the Withdrawal of the Right of Use over the Land Assigned on the Basis of Law No. 15/2003 Regarding the Support Given to Young People for the Construction of a Personal Property

Lecturer **Raluca Laura Dornean PĂUNESCU**[1]

***Abstract***

*The main objective of the pending study is to highlight the legal controversies in the situation of the withdrawal of the right of use over the land that was assigned to the beneficiary based on Law no. 15/2003 regarding the support given to young people for the construction of a personal property. Specifically, the author investigates the possibility of establishing the suspension of the one-year term within the mixed resolutive condition stipulated in both art. 6 para. 1 of Law no. 15/2003 which imposes on the beneficiary of the land the obligation to start the construction of the house within one year from the date of allotment of the land and to carry it out in compliance with the provisions of Law no. 50/1991 regarding the authorization of the execution of construction works, republished, with subsequent amendments and additions, as well as in the clauses of the award contract for free use. In the same sense, the fulfillment of the negative condition will be analyzed - as a modality of the civil legal act, namely the fact that the non-start of the construction within the one-year period may be due to the public authority, which, in bad faith, determined the non-realization of the event, by delaying the adoption of the decision of the local council regarding the Urban Planning Regulations, the blocking of the issuance of urban planning certificates/building authorizations and implicitly the impossibility of the beneficiaries to start construction in compliance with the legal provisions. The research methods to achieve the proposed objectives are varied, taking into account the comparative method, as interdisciplinary aspects between administrative law and civil law are exposed, the logical method, which tends to outline a more rigorous legislative exposition, the critical method, with the aim of presenting the limits of discretionary power, as well as the systemic method, which tends to the possibility of bringing scientific research a cardinal importance. The results and implications of the study will be major from the perspective of the application of the law and the interpretation of the legal provisions, taking into account the legal nature of the right to use a land assigned on the basis of the special law.*

***Keywords****: right of use, administrative law, territorial administrative unit, urban planning certificates.*

***JEL Classification:*** K23, K39

[1] Raluca Laura Dornean Păunescu - Faculty of Law, „Drăgan" European University of Lugoj; Lawyer, Timiş Barr Association, Romania, ralucalaura_paunescu@yahoo.com.

**1. Prolegomena**

*Ab initio,* we mention that by Law no. 15/2003 on the support granted to young people for the construction of a personal property was regulated *the regime of awarding, upon request, to young people aged between 18 and 35 years old, a land surface, from the lands located in the private domain of administrative-territorial units, for the construction of a privately owned dwelling.*

Article 1 further stipulates that *the assignment of the land is made for free use during the existence of the privately owned dwelling, within the limits of the available surfaces, by decision of the local council of the commune, city, municipality or sector of the Bucharest municipality in which the land is located, respectively that the assignment land is done in the order of priority established on the basis of criteria approved by decision of the local council.*

According to art. 3 of the normative act, *young people who, on the date of submitting the application, are up to 35 years old and meet the following conditions, benefit from the provisions of the law, only once, and:*

*a) have reached the age of 18;*

*b) on the date of submission of the application, as well as on the date of its resolution, they did not own or do not own a dwelling or a plot of land intended for the construction of a privately owned house, both in the locality where the allocation of land for use is requested, and in other localities.*

According to art. 3 para. (2), *Local councils can establish additional criteria compared to those provided for in para. (1), in order to assign the available lands.*

In such a situation, by a local council decision, the Regulation is adopted to establish the framework methodology for the distribution of land assigned under Law 15/2003 and additional criteria for the selection and distribution of applicants for plots of land for housing construction.

According to the Methodological Norm for the application of Law no. 15/2003 regarding the support granted to young people for the construction of a personal property of 29.07.2003, more precisely art. 5 para. (2) *Implementation of the local council's decision to grant free use of the land for the construction of a dwelling is done by the mayor, within 15 days from the date of approval by the local council, based on report.*

In the context of disregarding the imperative term of 15 days in which the Mayor is obliged to implement the said local council decision, the only legal leverage is the initiation of an action in administrative litigation in order to oblige the Mayor to fulfill the obligations established by law, thus the court is going to analyze the compliance with the imperative legal provisions imposed by the special law, in order to order the obligation of the Mayor and the territorial administrative unit to implement the decision of the local council approving the allocation

of land to the beneficiaries, respectively at the conclusion of the contract of allocation for free use and of the minutes of the assignment in favor of the plaintiffs of the land represented by a certain plot of land identified by a land register number.[2]

In order to pronounce such a solution, the court should observe the disregard of the 15-day term provided by art. 5 paragraph (2) of the Methodological Norm for the application of Law no. 15/2003, respectively the legal nature of this term, indicating that it is not a recommendation term, but an imperative term, taking into account the grammatical formulation chosen by the legislator respectively, "*implementation is done* [..]". In the same sense, it should also be taken into account that in the absence of highlighting the possibility of carrying out these steps within the 15-day period, the implementation of the decision, the issuance of the reports of assignment and the conclusion of the loan agreements represents an imperative obligation. In addition, art. 154 para. 1 of the Emergency Ordinance no. 57/2019 on the Administrative Code provides that *the mayor is obliged to implement the decisions of the local council*.

[2] For a comprehensive presentation of the principle of legality, see M. T. Oroveanu, *Tratat de drept administrativ*, 2nd ed., Cerma Publishing House, Bucharest, 1998, p. 78; R-A Lazăr, *Legalitatea actului administrativ. Drept românesc și drept comparat*, All Beck Publishing House, Bucharest, 2004, p. 121; A. Trăilescu, *Drept administrativ*, 2nd ed., Publishing House C.H. Beck., Bucharest, 2019, p. 87; A. Iorgovan, *Tratat de drept administrativ*, 4th edition, Vol. I, All Beck Publishing House, Bucharest, 2005, p. 341; C.-S. Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 75,76; C.-S., Săraru, *Tratat de contencios administrativ*, Universul Juridic Publishing House, Bucharest, 2022, p. 104, 105 and for Hans Kelsen's famous Pyramid described in "Pure Theory of Law" see "Reine Rechtslehre", 1934. Compliance with the principle of the hierarchy of legal rules and individual acts of the administration bodies produces the following consequences: * the general rules of law established by the higher authorities must be respected by each administrative authority in issuing individual documents; * according to the principle *tu patere legem quam facesti* ("Comply the law you have made."), each administrative authority is obliged to comply with its own regulations; * in the hypothesis in which the subordinate administrative authority issues a rule of law legally, the hierarchically superior administrative authority cannot take a contrary individual decision; *the administrative act must comply with the provisions that directly concern it (competence, form), and at the same time it must comply with the higher legal rules applicable in the same matter. Regarding the etymology of the word contentious, it comes from the Latin "contendo, contendis, contedere" which means "to struggle, to struggle, to fight", as it evokes the idea of the existence of contradictory interests, a struggle "in a metaphorical sense, between two sides, one of which will emerge victorious". V. Vedinaș, *Tratat teoretic și practic de drept administrativ*, vol. II, Publishing Universul Juridic, Bucharest, 2018, p. 215. The respective actions in the administrative litigation also included a petition regarding the granting of compensation, which was rejected by the courts with the leitmotif: the admission of the action represents sufficient satisfaction. For references regarding the notions of "damages", "damage" and "reparations", see Raluca Laura Dornean Păunescu, *Moral damages in Romanian administrative litigation: a Fata Morgana?* „Journal of Public Administration, Finance and Law", Issue 24/2022, p. 253-268. In that study, we proposed *de lege ferenda*, the harmonization of the entire normative architecture so that the damaged person who suffered a material damage or a moral injury is legally and morally compensated, and the moral damages claimed through an action in the administrative litigation of assimilated administrative acts not to represent a veritable *Fata Morgana*.

Following the implementation of the local council decision by which the right of free use is assigned, the free use assignment contract must provide for the obligations established by Law no. 15/2003, respectively art. 6 of the special law, which provides:

*(1) The beneficiary of the land for the construction of a privately owned dwelling is obliged to start the construction of the dwelling within one year from the date of the allocation of the land and to carry it out in compliance with the provisions of Law no. 50/1991 regarding the authorization of the execution of construction works, republished, with subsequent amendments and additions.*

*(2) In case of non-compliance with the conditions provided for in para. (1), by decision of the local council, the right of use over the assigned land is withdrawn from the beneficiary.*

*(3) Zonal urban plans (PUZ) and detailed urban plans (PUD) regarding terraced or connected housing complexes that are built on lands identified according to art. 1 paragraph (2) it is initiated and financed by the local councils.*

**2. The clauses of the contract for assignment for free use concluded between the territorial administrative unit and the beneficiary of Law no. 15/2003 regarding the support granted to young people for the construction of a personally owned dwelling**

To observe the legal and contractual obligations of the beneficiaries of Law no. 15/2003, it is necessary to analyze the clauses of such a contract concluded between the Municipality of Timisoara and a beneficiary of Law no. 15/2003 regarding the support given to young people for the construction of a personal property.

*ASSIGNMENT AGREEMENT FOR FREE USE*
*No. .... dated.....*

*LEGAL BASIS: Law no. 15/2003 regarding the support granted to young people for the construction of a personal property, republished, H.C.L.M.T. no. 373/26.10.2021, H.C.L.M.T. no. 192/04.06.2020, H.C.L.M.T. no. 107/31.03. 2020, H.C.L.M.T. no. 25/31.01.2020, H.CL.M.T. no. 127/27.03.2019, H.C.L.M.T. no. 301/14.06.2019, H.C.L.M.T. no. 609/10.12.2019, O.U.G. no. 57/03.07.2019 regarding the Administrative Code, according to Verbal Process no. SC202134005/09.12.2021 of the Commission for the implementation of the provisions of Law 15/2003 republished*

*1. THE CONTRACTING PARTIES*

*1.1. MUNICIPALITY OF TIMISOARA, based in Timişoara, str. C.D. Lodge no. 1, represented by the Mayor of the Municipality of Timişoara, as OWNER, on the one hand and:*

*1.2. ..... domiciled in Timişoara, Street ..... no...., floor...., ap..., Timiş County, identified by I.C. series .... no...., issued by SPCLEP Timişoara on the date of ...., pesonal code no. ...., unmarried/married, as BENEFICIARY, on the other hand, have agreed to conclude this contract for free use of the land during the existence of the home as personal property in accordance with Law no. 15/2003, regarding the support*

*granted to young people for the construction of a personal property, republished.*
*11. SUBJECT OF THE CONTRACT*
*2.1. The object of the contract is the assignment by the owner of the right of free use, during the existence of the construction, of the land registered in C.F. no..... Timișoara no. cad. ...., in surface of ... m²;*
*2.2. The allocation for free use of the land granted under the terms of Law no. 15/2003 republished and of the Regulation approved according to HCLMT no. 193 of 15.11.2016, constitutes a personal right;*
*111. DURATION OF THE CONTRACT*
*3.I. The present contract comes into effect from the date of signing the Verbal Process for assigning use of the land and is maintained throughout the existence of the home as personal property, according to art. 1 paragraph (2) of Law 15/2003 republished;*
*3.2. This contract may be terminated by written agreement of the parties;*
*IV. RIGHTS AND OBLIGATIONS*
*4.1. Owner's Rights*
*a) the owner has the right to inspect the building, as well as the way in which the beneficiary complies with the obligations assumed by the contract. The verification will be carried out only with the prior notification of the beneficiary, within 15 days, by the representatives of the owner;*
*b) to terminate the contract, in case the beneficiary does not comply with his obligations provided by law;*
*c) the owner has the right to unilaterally modify the regulatory part of this contract, with prior notification of the beneficiary, for exceptional reasons related to the national or local interest;*
*4.2. Obligations of the beneficiary*
*a) to take care of, guard and preserve the good with the care and diligence of a good owner;*
*b) to comply with the legal provisions in force in the field of real estate construction, to notify the County Construction Inspectorate of the start of building the house, as well as a copy of this announcement to the Timișoara City Hall (the Commission for the implementation of the provisions of Law no. 15/2003, as well as Urban Planning Directorate);*
*c) within a maximum of three months from the signing of the contract by both parties, to enclose the assigned plot with a temporary fence against its occupation with construction materials or with materials resulting from the works in the vicinity, otherwise the Timișoara City Hall will not assumes responsibility for this;*
*d) according to art. 6 of Law no. 15/2003, the beneficiary of the land assigned in accordance with this law is obliged to start the construction of the house within one year from the date of the land acquisition and to carry it out in compliance with the provisions of Law no. 50/1991. In the event of non-compliance with this condition, the right to use the land granted according to Law no. 15/2003;*
*e) to complete the construction within 5 years from the date of assigning free use of the land, otherwise the right to free use is withdrawn for the duration of the existence of the construction;*
*f) to use the land received for free use based on this contract according to its destination, under the conditions of Law no. 15/2003;*
*g) to bear, from the date of taking over the building, the expenses necessary for use, not having the right to demand their restitution from the owner;*

*h) to obtain the prior written consent of the Timișoara City Hall for alienating the construction or changing the destination of the home built on the assigned land. When the owner of the building changes or changes its use in a space with a destination other than housing, the right to free use of the land is lost. In these cases, the beneficiary, owner of the house built on the land that is the subject of this contract, has the possibility of direct purchase of the land according to art. 8 of Law no. 15/2003;*
*i) to return the loaned property in the situations provided by art. 5.1 letters a) - d);*
*j) to request the owner's written consent for making any changes;*
*k) at the termination of the contract, to make available to the owner the good received for use in the state in which it is found at the time, any investments, improvements, constructions, carried out during the period of the contract not being able to be requested;*
*l) the beneficiary is obliged to comply with the conditions imposed by the nature of the good (environmental protection and other obligations derived from legislation);*
*m) violation of the provisions of art. 3, paragraph (l) of Law no. 15/2003 by the beneficiary, by not declaring that he owns or has owned a house or a plot of land intended for the construction of houses, constitutes a crime of forgery in declarations and is punished according to the provisions of the Criminal Code.*
*V. TERMINATION OF CONTRACT*
*5.1. This contract ceases to be effective in the following cases:*
*a) termination, in the situation where one of the parties does not comply with its obligations provided for in this contract or in the law;*
*b) by agreement of the parties, this contract may be terminated upon request;*
*c) in case of non-compliance of the obligations by the beneficiary, the contract is automatically terminated without legal action, according to the law;*
*d) if the national or local interest requires it, through unilateral denunciation by the Municipality of Timisoara. In this situation, the termination of the contract is done according to the law;*
*e) in the case of the purchase of the land by the beneficiary;*
*VI. NOTICES BETWEEN THE PARTIES*
*6.I. The party invoking a reason for termination of the provisions of this contract shall notify the other party at least 15 days before the date on which the termination is to take effect;*
*6.2. In the understanding of the contracting parties, any notification addressed by one of them to the other is validly fulfilled if it will be sent to the respective address provided in the introductory part of this contract;*
*VII. DISPUTES*
*7.I. The parties have agreed that all disagreements regarding the validity of this contract or resulting from its interpretation, execution and termination shall be resolved amicably by their representatives;*
*7.2. If it is not possible to resolve disputes amicably, the parties will address the competent courts;*
*VIII. FINAL TERMS*
*8.1 This contract was concluded in four copies, one of which is for the owner.*

In the same sense, a report of land assignment was concluded, with the provision that according to art. 6, para. 1 of Law no. 15/2003 republished, the beneficiary is obliged to start the construction of the house within one year from

the date of land assignment and to carry it out in compliance with the provisions of Law no. 50/1991, regarding the authorization of the execution of construction works, republished, with subsequent amendments and additions, respectively that in case of non-compliance with the conditions provided for in art. 6, para. l, according to art. 6 paragraph 2 of Law no. 15/2003, by Local Council Decision, the right of use over the assigned land is withdrawn from the beneficiary.

### 3. The possibility of ascertaining the suspension of the term of one year of days within the framework of the mixed resolution condition

In the event of failure to comply with the obligation to start construction within one year from the date of land assignment, the territorial administrative unit, as the owner of the land assigned for free use pursuant to Law no. 15/2003, brings to attention the fact that, from the analyzes carried out at the UAT level, it emerged that:

- the provisions were not respected art. 6 para. 1 of Law no. 15/2003 republished regarding the support granted to young people for the construction of a personal property;
- the provisions were not respected art. 4.2 para. d) from the free use assignment contract concluded with the territorial administrative unit.

Specifically, regarding the fact that the construction of the dwelling was not started within one year from the date of land assignment in compliance with the provisions of Law no. 50/1991 regarding the authorization of the execution of construction works, republished, with subsequent amendments and additions, the territorial administrative unit requests the beneficiary to proceed with its own analysis of the situation, and in the event that it concludes that the identified situation is not confirmed, to present supporting documents for correction of the information held by the City Hall. In the event that the beneficiary of Law no. 15/2003 concludes that the situation is confirmed, is notified pursuant to art. 6 para. 2 of Law no. 15/2003 regarding the support granted to young people for the construction of a personal property, in conjunction with art. 5.1 para. c) from the Free Use Assignment Contract concluded with the territorial administrative unit, regarding the withdrawal of the free use right over the assigned land and the termination of the Free Use Assignment Contract.

In such a situation, taking into account a number of de facto aspects, a civil action can be registered with the following petitions:

1. to ascertain that the 1-year term within the mixed resolutive condition stipulated in art. 4.2 lit. d) from the Contract was suspended for the period: conclusion of the contract – 25.07.2022;
2. to ascertain that the term within the mixed resolutive condition stipulated in art. 4.2 lit. d) from the Contract was extended by the same period in which it was suspended, respectively until 25.07.2023;
3. to find that the defendant, in bad faith, determined the fulfillment of

the condition, by delaying the adoption of the Local Council Decision no. 259 of 14.06.2022 regarding the approval of the "Regulation on the construction of attached dwellings" and the "Regulation on the construction of terraced dwellings" according to Local Council Decision no. 204/2003 and implicitly the impossibility of the beneficiary to request an Urban Planning Certificate and then a Building Authorization, in accordance with the provisions of Law no. 50/1991 regarding the authorization of the execution of construction works;

4. Obliging the defendant to pay the court costs caused by this legal action.

In the motivation of such an ascertain action, the fact is cited that in the content of art. 4.2. letter d) a negative resolutive condition is provided, formulated in a negative sense, mixed, as it depends both on the actions of the beneficiary who must start the construction, compliance with the provisions of Law no. 50/1991, but also on the actions of the defendant, the territorial administrative unit in question, which must issue town planning certificates, building permits as well as draw up the Town Planning Regulations related to the area.

The condition, as a modality of the legal act, is a future and uncertain event, on which the existence (birth or termination) of the subjective civil right and the correlative civil obligation depends.

According to the effects it produces, the condition can be suspensive or resolutive, meaning that the resolutive condition is the one on whose fulfillment depends the abolition of subjective civil rights and correlative obligations.

According to the classification in relation to the connection with the will of the parties of the realization or non-realization of the event, the condition is of three types: casual, mixed and potestative, the condition being mixed when the realization of the event depends both on the will of one of the parties and on the will of a determined person.

Last but not least, as it consists in the realization or non-realization of the event, the condition can be positive or negative, the negative one consisting of an event that will not occur, more precisely, when it is formulated in a negative sense.

Thus, according to the provisions of Law no. 50/1991 on the authorization of the execution of construction works, republished, with subsequent amendments and additions:

*Art. 2(1) The building permit constitutes the final act of authority of the local public administration on the basis of which the execution of construction works is allowed in accordance with the measures provided by law regarding the location, design, realization, operation and post-use of buildings. (2) The building permit is issued on the basis of the documentation for the authorization of the execution of the construction works, developed under the conditions of this law, based on and in compliance with the provisions of the urban planning documentation, approved and approved according to the law. ($2^1$) The procedure for authorizing the execution of construction works begins with the*

*submission of the application for the issuance of the urban planning certificate in order to obtain, as a final act, the building permit and includes the following stages: a) issuance of the urban planning certificate; b) issuing the point of view of the competent authority for environmental protection for investments that are not subject to environmental impact assessment procedures; c) notification by the applicant of the competent public administration authority regarding the maintenance of the request to obtain, as a final act, the building permit, for the investments for which the competent authority for environmental protection established the need for an environmental impact assessment and issued the guideline according to the legislation regarding the assessment of the impact of certain public and private projects on the environment; d) issuance of opinions and agreements, as well as the administrative act of the competent authority for environmental protection regarding the investments evaluated from the point of view of the impact on the environment; e) drawing up the technical documentation necessary for the authorization of the execution of construction works, hereinafter referred to as technical documentation - D.T.; f) submitting the documentation for the authorization of the execution of the construction works to the competent public administration authority; g) issuing the building permit.*

Important in the analysis of the obligations of the territorial administrative unit is also art. 6 para. (2) from the same normative act, which disposes:

*The urban planning certificate is issued by the authorities authorized to authorize the construction works provided for in art. 4 and art. 43 letter a) and is issued to the applicant within no more than 15 working days from the date of registration of the application, mandatorily mentioning the purpose of its issuance.*

In corollary, it can be unequivocally observed that the start of any construction depends not only on the beneficiary, but first and foremost on the issuance of the urban planning certificate by the public authority. In the absence of the urban planning certificate and the building permit, any home is built in violation of the provisions of Law no. 50/1991 and implicitly it is built illegally.

Another important aspect to mention is that the beneficiaries of Law no. 15/2003 requested the issuance of urban planning certificates, receiving an answer to the effect that it will be issued only after the adoption of a simplified and specific regulation, which will be approved by a Local Council Decision during the months (May/June).

The response of the territorial administrative unit in JANUARY 2022 was as follows:

*Given your request CUO2022-000101 of 13.01.2022, to obtain the Urban Planning Certificate for the purpose of: .....", will be completed by you, we are communicating the following:*

*- bearing in mind the provisions of the RGU (HG 525) art. 32*

*- considering the lack of clear regulations for the string assemblies proposed in PUZ 204/2003 taken over by the PUG approved by HCL no. 157/2002 extended by HCL no. 619/2018, regarding mandatory setbacks, cornice heights, architectural compliance, so that there is architectural coherence*

*- taking into account the unfortunate experience of the development of buildings strung together on Arghezi, where an ensemble of extremely poor quality resulted due to the lack of a regulation regarding architectural compliance.*

*The Urbanism certificate requested by you will be issued only after the adoption of a simplified and specific regulation, which will be approved by a Local Council Decision during the months (February-March).*

In such conditions, through this response, the Municipality of Timisoara tacitly declares that the procedure has been **suspended** until the adoption of the respective decision by the local council, blocking all procedures.

As we have shown above, the issuance of town planning certificates was blocked until 25.07.2022, due to the lack of the "Regulation on the construction of attached housing" and the "Regulation on the construction of terraced housing" adopted in June 2022, by adopting postponement of the local council decision.

From the interdisciplinary perspective, respectively according to art. 1.405 NCC: (2) The condition is considered unfulfilled if the party interested in the fulfillment of the condition determines, in bad faith, the realization of the event.

It can be unequivocally noted that the defendant (in this case, the interested party) pursued, in bad faith, that the beneficiaries of Law no. 15/2003 to not be able to start construction within the meaning of art. 4.2 of the Award Contract, within the legal term of one year, by delaying the adoption of town planning regulations as well as the late issuance of town planning documents (town planning certificate, building permit, etc.).

We consider that bad faith results from:

- the entire behavior of the public authority from the period 2003 (the adoption of Law no. 15/2003) – 2023, of procrastination of the adoption of decisions, of the allocation of land (which was achieved only as a result of the civil processes registered before the courts);

- advising the beneficiaries not to hurry with the start of the construction by the representatives of the public authorities;

- lack of communication between the defendant's departments (Urban Planning, Heritage, etc.);

- the adoption of the "Regulation on the construction of attached houses" and the "Regulation on the construction of terraced houses" only in 2023, although the PUZ was approved in 2004, the lands were validated in 2016 and the young people chose the plots in the year 2019.

In such a situation, the court is called to ascertain the fact that, in this

case, the resolutive condition provided by art. 4.2. from the Award Contract is unfulfilled, considering the bad faith intervention of the defendant.

At the same time, in addition to those already mentioned, according to the provisions of art. 1,634 NCC: *(3) When the impossibility is temporary, the execution of the obligation is suspended for a reasonable term, assessed according to the duration and consequences of the event that caused the impossibility of execution. (4) Proof of the impossibility of execution rests with the debtor.*

In corollary, we appreciate that the term provided for in art. 4.2. of the Contract was suspended from the date of its conclusion until 25.07.2022, when the public authority decided to proceed with the issuance of the Urban Planning Certificate for the residential area, meaning that the 1-year term, which began to run on the date of the conclusion of the contract, was extended until 25.07.2023.

We highlight that the beneficiaries have submitted all the necessary diligences in order to comply with the obligations imposed by Law no. 15/2003 as well as through the contract. It should be noted that both legal provisions require the start of construction within 1 year, in compliance with the provisions of Law no. 50/1991.

## 4. Conclusions

In corollary, following the investigation of the modalities of the civil legal act and the effects produced by the mixed resolutive condition, the territorial administrative unit must show caution in withdrawing the right of use over the land assigned on the basis of law no. 15/2003 regarding the support given to young people for the construction of a privately owned home, analyzing the causes may lead to the suspension of the term within the condition, respectively the fulfillment of the investigated event.

Moreover, by applying the *Nemo auditur propriam turpitudinem allegans principle*, the territorial administrative unit should prioritize its own legal attitude regarding the compliance with the legislative provisions in the matter of authorizing the execution of construction works.

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# REGULATORY PRACTICE AND JUDICIAL PROCEDURES IN PUBLIC LAW

# The Latest Legislative Changes of the Administrative Litigation Law No. 554 of 2004

Lecturer **Adriana DEAC**[1]

***Abstract***

*Recently, the Administrative Litigation Law no. 554 of 2004 was amended successively, in a very short period of time. This unusual fact caught my attention and led me to scientifically analyze these legislative changes. It is very true that the entire normative act was not amended, but only certain articles regarding the procedure for resolving administrative law disputes, namely the suspension of the execution of the disputed administrative act, the forced execution of final court decisions and the regressive action granted to the public institution against the official or dignitary who improperly issued, late or did not issue the administrative act in dispute. It is obvious that the changes made to the law were imposed by the practical demands of resolving administrative law disputes. The scientific approach aims to analyze the specific changes made to the Administrative Litigation Law no. 554 of 2004, to criticize them, identifying the positive and negative aspects, if any. Also, considering that jurisprudence was the one that imposed these changes, I will try to identify some court decisions relevant to this scientific approach.*

***Keywords:*** *administrative litigation, responsibility, head of the institution, regressive action, administrative act, judicial fine, legal person, institution or public authority, final court decision.*

***JEL Classification:*** K23

## 1. Introduction

In April 2023, three normative acts were published in the Official Gazette of Romania that modified the Administrative Litigation Law no. 554 of 2004[2]. Even for such an important law as the administrative litigation law, these successive amendments have raised questions, both regarding the content of the amendments and regarding the legislative technical aspects.

Analyzing these changes in detail, the initial conclusion is that these changes were the result of different legislative procedures, the bills belonging to different parliamentary committees, so the reasons that imposed the legislative changes were also different. Moreover, the third amendment is, in reality, a simple rectification of a legal phrase, *"... it can be directed... it will be read ... it is directed..."*, a phrase capable of creating confusion and leave room for different

[1] Adriana Deac - Faculty of Law, Bucharest University of Economic Studies, Romania, adriana.deac@drept.ase.ro.

[2] Law no. 554 of 2004 of administrative litigation, published in the Official Gazette of Romania, part I, no. 1154 of 07.12.2004.

interpretations of the legal text.

On 10.04.2023 when Law no. 84 of 2023[3], the administrative litigation law was amended under the aspect of art. 24 para. 3 regarding the possibility of the court to fine the public institution responsible of non-execution of a court decision and under the aspect of art. 26 regarding the regressive action granted to the public institution against "those guilty of non-execution of a court decision".

The mentioned changes may seem, at first glance, insignificant, but in the practice of courts and for central or local public institutions, they represent two major problems.

On 21.04.2023 when Law no. 102 of 2023[4], the administrative litigation law was amended again in terms of supplementing art. 11 regarding the deadline for filing a complaint against the administrative act, under the aspect of art. 14 para. 1 regarding the right of the aggrieved person to ask the court to suspend the contested administrative act and under the aspect of art. 15 para. 1 regarding the request for suspension of the challenged administrative act. We can also note that these changes are also requirements imposed by the practice of the courts regarding the procedure for the settlement by the administrative courts of the disputes through which an administrative act is contested.

As I stated already, the third amendment of the law is, in reality, only a rectification, entered into force on 27.04.2023[5], which rectified the phrase contained in art. 26 "can be directed" with "is directed". It is very true that, a greater attention of the legislator at the time of the adoption of Law no. 84 of 2023, the adoption of this rectification would no longer be required.

The present work aims to analyze the changes made to the Administrative Litigation Law by Law no. 84 of 2023, respective art. 24 para. 3 and art. 26 of Law no. 554 of 2004. The legal issues raised by these changes require a detailed analysis, so that it is impossible to develop all the recent changes brought to the Administrative Litigation Law in a single scientific approach.

The changes made to art. 11, art.14 par. 1 and art. 15 para. 1 of the Administrative Litigation Law by Law no. 102 of 2023 on the suspension of the execution of the challenged administrative act are to be analyzed in a future work.

[3] Law no. 84 of 2023 to amend the Administrative Litigation Law no. 554/2004 published in the Official Gazette of Romania part I, no. 294 of 04/07/2023.

[4] Law no. 102/2023 for the amendment and completion of Law no. 50/1991 regarding the authorization of the execution of construction works, of the Administrative Litigation Law no. 554/2004, as well as for completing art. 64 of Law no. 350/2001 regarding territorial planning and urban planning, published in the Official Gazette of Romania part I, no. 322 of 18.04.2023.

[5] Correction from 2023 in the content of the single article of Law no. 84/2023 to amend the Administrative Litigation Law no. 554/2004, published in the Official Gazette of Romania, part I, no. 362 of 27.04.2023.

**2. Regarding the changes brought to art 24 para. 3 initial sentence from the Administrative Litigation Law by Law no. 84 of 2023**

As I stated previously, the Administrative Litigation Law was amended under Article 24 para. 3 regarding the possibility of the court to fine the public institution if it has not implemented a final court decision and under the aspect of art. 26 regarding the regressive action granted to the public institution against "those guilty of non-execution of a court decision".

Thus, according to the new regulation of art. 24, para 3 of Law no. 554 of 2004: "At the request of the creditor, within the limitation period of the right to obtain enforced execution, which runs from the expiration of the terms provided for in para. 1 and which were culpably not complied with, the enforcement court, by a decision issued with summons to the parties, imposes on the legal person, authority or public institution, as the case may be, a fine of 20% of the gross minimum wage per day of delay, which is paid to the state budget, and the plaintiff is awarded penalties, under the terms of art. 906 of the Code of Civil Procedure, for a maximum term of 3 months, counted from the date of communication of the conclusion regarding the establishment of the fine".[6]

These changes made by Law no. 84 of 2023 were the subject of legislative proposal Pl-x no. 774/2022 which went through the entire parliamentary procedure, receiving opinions from the Legislative Council, the Economic and Social Council and the Legal, Discipline and Immunities Commission. Also, considering the fact that the amendment transfers the responsibility for non-execution of court decisions from the head of the institution (initial form of the law) to the legal entity itself (amended form of the law), a request for re-examination of PL-x no. 774/2022.

Chapter III of the Administrative Litigation Law no. 554 of 2004 regulates the procedure for the execution of court decisions issued by the courts entrusted with the resolution of administrative law disputes[7].

The purpose of the initiators of the legislative amendment was to harmonize the provisions of Law no. 554 of 2004 with other legal regulations, to ensure an overall coherence of the texts included in the Administrative Litigation Law, as well as to offer the possibility of legal responsibility of the person guilty of not executing a court decision.

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[6] Art. 24 para. 3 initial thesis of the Law no. 554 of 2004 of administrative litigation.

[7] Regarding the procedure for the execution of court decisions issued by the courts entrusted with the resolution of administrative law disputes, see Verginia Vedinaș, *Tratat teoretic și practic de drept administrativ*, vol. II, Universul Juridic Publishing House, Bucharest, 2018, p. 300-304; Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, 4th ed., All Beck Publishing House, Bucharest, 2005, p. 475-480; Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 545-551; Cătălin-Silviu Săraru, *Tratat de contencios administrativ*, Universul Juridic Publishing House, Bucharest, 2022, p. 449-479.

As an argument for the transfer of responsibility from the head of the unit to the legal entity, the authority or the public institution itself, some normative acts were invoked that established the legislator's will to regulate shared and delegated powers within public authorities. The administrative code expressly stipulates the right of the head of the public institution to delegate, by administrative act, the powers conferred on him by law, regulating shared and delegated powers. This means that the person to whom the attributions have been delegated is effectively subrogated both in the attributions and in the responsibilities of the head of the institution or public authority. According to the Administrative Code, the delegation or sharing of competences is done in favor of specialized departments of the public authority's management, led by persons employed as civil servants with specific duties regarding the execution of the duties of the head of the authority.

Another argument in favor of the legislative amendment is the fact that the position of leader of a public institution or authority is temporary, different people can occupy the respective position from the moment the court decision becomes final and until the fine is established or the respective decision is executed. The application of the judicial fine could create inequity, for example, if the head of the unit fined was not the same as the one who held the position during the legal period of enforcement of the final decision.

The establishment of the judicial fine in charge of the public authority or institution will result in its payment from the unit's budget, to be recovered later, through the action in the engagement of administrative-disciplinary liability formulated against the person actually responsible.

It is obvious that the legislative amendment, beyond the favorable legal arguments invoked, also gave rise to some negative opinions, considering that the amendment represents a "dilution of responsibility" by transferring responsibility from the head of the unit to the institution or public authority. It is considered that it is the direct obligation of the head of the unit to supervise the execution of court decisions and the defective application of legal provisions by the staff of the institution he leads regarding the fulfillment of obligations arising from court decisions is imputable to the head of the legal entity, mainly, and secondarily, to other employees. Passing material responsibility to the institution dilutes the responsibility of the head and leaves room for arbitrariness. The removal of the patrimonial liability of the managers of legal entities governed by public law means a decrease in the possibility of litigants to see their damages effectively repaired by the legal entities, which represents an unacceptable situation.

The personal experience regarding the responsibility of the "head of the unit" allows me to agree with some legal arguments invoked by the initiators of the bill. Although in the parliamentary debates on this legislative amendment, the person invoked as the head of the unit was the "mayor", it is obvious that the legislator had in mind any natural person exercising the function of head of the

local or central public institution or authority.

I can invoke several practical arguments in support of the legislative amendment, such as the impossibility of the head of the unit to actually know all the final court decisions pronounced against the institution or the authority, he represents in order to ensure that each decision is implemented within the deadline. Also, in the hypothesis, almost impossible, I would say, in the case of large institutions or authorities, to actually know these final court decisions, there is a risk that the unit will not have the financial resources necessary to execute these court decisions. Or, perhaps these resources exist, but the unit's accounts were previously blocked by a lien. A last argument that I want to see concerns the delegation and sharing of powers that the initiators of the legislative amendment invoked. The leader of the unit is, most of the time, a political representative who leads the structures, directions, departments that form the public authority or institution. To give an example, it is not the head of the unit who must tell the legal or financial director that a court decision must be enforced, but vice versa. And then, it seems natural that the responsibility no longer belongs to the head of the unit.

All these arguments target a leader of the good faith unit. Approach scientific does not take into account the possible bad faith of the head of the unit or culpa in the fulfillment of legal duties.

The second problem raised by the amendment of art. 24 para. 3 of the Litigation Law
administrative no. 554 of 2004 refers to the final sentence of this paragraph regarding the limitation to "a maximum of 3 months from the date of communication of the conclusion regarding the establishment of the fine of the period in which the court can grant the plaintiff penalties under the conditions of art. 906 of the Civil Procedure Code"[8].

It should be noted that the regulation art. 24 para. 3 of Law no. 554 of 2004 applies a double patrimonial sanction to the authority, institution or public authority. On the one hand, in the case of voluntary non-execution of the final court decision, at the request of the plaintiff, the court can establish a judicial fine representing 20% of the gross minimum wage per day of delay. On the other hand, it can grant the plaintiff penalties from the date of communication of the conclusion by which the judicial fine was established, which is paid to the state budget.

Analyzing the text of art. 24 para. 3 final thesis, it is necessary to mention certain comments regarding this regulation.

First of all, the judicial fine, if it is applied by the court, does not have a term. As a rule, the judicial fine is applied per day of delay, from the date of establishment of the fine until the date of effective execution of the court decision. On the other hand, the penalties that can be recognized to the plaintiff, can

[8] Art. 24 para. 3) final thesis of the Law no. 554 of 2004 of administrative litigation.

be applied for a maximum of 3 months from the date of communication of the conclusion by which the judicial fine was established.

Secondly, under the conditions of the transfer of responsibility provided by art. 24 para. 3 initial thesis, from the entry into force of the amendments, we will find ourselves in a situation where the court will oblige an institution or a state authority to pay a judicial fine that will have come to the state budget. In other words, the state will be obliged to pay the judicial fine for an indefinite period. On the other hand, the public institution or authority may be obliged to pay the plaintiff, natural person or legal person, penalties for a maximum period of 3 months.

I consider this limitation of the term of granting penalties to the plaintiff as discriminatory, but we must not forget that we are in a relationship of authority, of legal superiority (and patrimonial, in this case of the public institution or authority.

In this context, in relation to the scientific approach, it is absolutely necessary to mention Decision no. 2 of 2023 pronounced by the High Court of Cassation and Justice for resolving some legal issues related to the interpretation and application of the provisions of art. 24 of Law no. 554 of 2004, in the sense that: "The provisions of art. 24 para. 1-3 from Law no. 554 of 2004, with the subsequent amendments and additions, must be interpreted in the sense that the procedure for the execution of a final judicial decision pronounced by an administrative court is applicable even in the situation where the obligation established by that decision is that of adopting an administrative act unilateral with an individual character.

The provisions of art. 24 para. 3 and 4 from Law no. 554 of 2004 must be interpreted in the sense that the procedure for fixing the final amount owed to the creditor as penalties is also applied in the situation where, through the writ of execution, the court has established penalties applicable to the obliged party, for each day of delay, according to art.18 para. 5 from the Law no. 554 of 2004"[9].

Therefore, the plaintiff can cumulate the penalties established by the writ of execution, with the penalties that can be established by the court for non-execution of the writ of execution.

As a final comment, the new content of art. 24 para. 3 in the modified form grants the plaintiff the right to penalties under the conditions of art. 906 Civil Procedure Code, which could shape the opinion that the new provisions of art. 24 para. 3 establishes a means of coercion of the public authority or institution for the execution of the obligations established in its charge and a form of legal liability, as a sanction for the passivity of the public authority or institution compelled to execute its obligations set by the court decision. This criticism takes

[9] Decision no. 2 of 2023 of 16.01.2023 pronounced by the High Court of Cassation and Justice to resolve some legal issues, published in the Official Gazette of Romania, part I, no. 141 of 20.02. 2023.

into account the provisions of art. 906 para. 5 of the Civil Procedure Code, according to which "the penalty may be removed or reduced, by means of an enforcement appeal, if the debtor fulfills the obligation provided for in the enforceable title and proves the existence of solid reasons that justified the delay in execution[10]".

### 3. Regarding the amendments made to art 26 of the Administrative Litigation Law by Law no. 84 of 2023

The administrative litigation law was also amended under the aspect of art. 26 regarding the recourse action, "The legal person, authority or public institution takes action against those guilty of non-execution of the decision, according to common law. If the culprits are dignitaries or civil servants, special regulations apply.[11]"

Regarding this amendment, it should be noted that, on 10.04.2023 when Law no. 84/2023 amending Law no. 554 of 2004, the text of the amendment was drafted in the sense that "...the legal person, authority or public institution can take recourse with retrogressive action...". The interpretation of this legal provision was, obviously, in the sense that filing the retroactive action would be a simple possibility offered to the public institution or authority that was obliged to pay the judicial fine and, perhaps, the penalties to the plaintiff.

In the legislative procedure followed by the legislative project Pl-x 774/2022, in particular regarding this amendment to art. 26 of the Law on Administrative Disputes, a proposal for the re-examination of the draft law was formulated, formulated by the President of Romania, with the reasoning that "the mentioned provisions must provide for the obligation to exercise retroactive action, not just the possibility of taking action against to those guilty of non-execution of the decision. The use of the verb "it is possible", provided by the current norm, found its rationale when the person liable to be fined 20% of the gross minimum wage per day of delay was the head of the public authority[12]".

As a consequence of this proposal for reconsideration, after the entry into force on the date of 10.04.2023 of Law no. 84 of 2023, a rectification of the text of the new art. 26 of the Administrative Litigation Law, in the sense that "the phrase can be corrected is replaced by the phrase is directed".

The rectification is logical considering the person to whom it may be applied judicial fine for non-execution of a final court decision according to art.

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[10] Art 906 para. 5 of the Civil Procedure Code, Law no. 76/2012 regarding the approval of Law no. 134/2010 regarding the Code of Civil Procedure, published in the Official Gazette of Romania, part I, no. 365/ 24 May 2012, republished in the Official Gazette of Romania, part I no. 247 of 10. 04.2015.

[11] Art. 26 of the Law no. 554 of 2004 of administrative litigation.

[12] Proposal for re-examination of the Law for the amendment of the Administrative Litigation Law no. 554/2004, registered at the Permanent Office of the Chamber of Deputies under no. 130 of 02. 03.2023, https://www.cdep.ro/proiecte/2022/700/70/4/rx774PROM.pdf.

24 para. 3 is no longer the head of the unit, but the legal person, authority or public institution itself. Therefore, the fine is to be paid from public funds, as it is necessary to establish the mandatory exercise of retrogressive action for the recovery of the amounts paid to the state budget as a judicial fine from the person or persons guilty of non-execution of a final court decision.

The obligation established by art 26 of the Administrative Litigation Law no. 554 of 2004 it is not singular in our legislation. When the state is prejudiced, the obligation to exercise recourse action for the recovery of public money is regulated by art. 1384 para. 2 of the Civil Code, according to which: "when the one responsible for the act of another is the state, the Ministry of Public Finance will compulsorily return, through judicial means, against the one who caused the damage, to the extent that the latter is liable, according to the special law, for the occurrence of that damage"[13].

We cannot deny the justice and the necessity of imposing the obligation on the legal person, institution or public authority to take retroactive action against the guilty, but, at the same time, we cannot fail to notice the inequality of legal treatment that resides in the previous and current regulations of art. 26 of Law no. 554 of 2004.

If the person fined for non-execution of the court decision was the head of the unit, i.e. a private person, even if he held a public office, the payment of the court fine was made from his patrimony. The public institution or authority could, but did not have to, formulate a regressive action against the person actually guilty of non-execution of the court decision.

Therefore, it was up to the institution to formulate the retroactive action. It is very true that, most of the time, at the request of the head of the unit, i.e. the fined one, the institution initiates the retroactive action procedure. The question, in this hypothesis, was what happened to the sums that the institution recovered from the person actually guilty of the non-execution of the court decision, other than the head of the unit. Were they handed to him who had previously paid these sums out of his own resources? Or did they go to the account of the public institution? I think the correct answer was that the recovered sums were handed over to the head of the unit who had already paid these sums of money. Anyway, even if the institution or public authority would not have formulated the retroactive action under the conditions of art. 26 of the Administrative Litigation Law no. 554 of 2004, the head of the unit, if he paid the fine, had the civil right to pay the unpaid work for the recovery of the respective amounts.

Currently, considering the new regulation of art 24 par. 3 of Law no. 554 of 2004, the legal person, institution or public authority no longer has the possibility to formulate or not the retroactive action, but has the obligation to take

[13] Art. 1384 para. 2 of the Romanian Civil Code, Law no. 287/2009 republished in the Official Gazette of Romania part I, no. 505 of 15.07.2011.

action against those guilty of non-execution of the court decision through common law and if the guilty are dignitaries or civil servants public, special regulations apply.

**4. Conclusions**

The amendments to the Law on administrative litigation no. 554 of 2004 by Law no. 84 of 2023, rectified are procedural changes imposed by the concrete reality and the practice of the courts. Although there are no substantial changes, the legal consequences are particularly important, especially in the case of art. 24 para. 3 of Law no. 554 of 2023.

The transfer of legal responsibility for non-execution of final court decisions from the head of the unit to the legal person, institution or public authority offers "an escape hatch" to the head of the unit, this aspect giving the legislative amendment a political tone. From my point of view, this solution is only apparent, considering the obligation imposed by art. 26 of the law to the public institution or authority to proceed with regressive action against the guilty.

The application in practice of the provisions of art. 26 of Law no. 554 of 2004 can raise various issues. First of all, the object of the regressive action must be established. Does this apply only to the judicial fine or also to the penalties granted by the court to the plaintiff for a maximum period of 3 months from the communication of the conclusion by which the fine was established? We consider that, although art. 26 does not make any reference to this aspect, as the term prejudice or damage is not specified, the object of the recourse action is the recovery of some sums of money, in fact all the sums of money paid by the legal entity, institution or public authority, even if only as a fine judicially, even by way of penalties granted to the plaintiff.

Another problem concerns those "responsible of not executing the decision". Regarding this aspect, art. 26 of Law no. 554 of 2004 distinguishes between the quality and the legal status of the guilty person. If the culprit is an employee, a person employed with an individual employment contract, the legal entity, authority or public institution will take action against the employee according to common law, respectively under Law no. 53/2003 regarding the Labor Code. Thus, the competent court will be the Labor Disputes and Social Insurance Section of the court.

However, if the culprit is a dignitary or civil servant, the legal person, authority or public institution will proceed against him with action according to the special regulations, depending on his quality and legal status.

The service relationship of the civil servant or dignitary, a person who exercises a position of public dignity is a relationship of public law, for its termination the consent of the parties is not necessary, as is necessary in the case of the individual employment contract of private law, where the agreement of will

is a fundamental condition for the conclusion of the respective contract. The service relationship of the civil servant or the dignitary belongs to public law, in general, and administrative law, in particular, and is created and exercised for an indefinite or determined period based on the administrative act of appointment. Regarding the notion of a dignitary, this is a person exercising a function of public dignity, more precisely the set of attributions and responsibilities established by the Constitution, laws and/or other normative acts, as the case may be, obtained by investiture, as a result of the result of the electoral process, directly or indirectly, or by appointment[14].

If the civil servant or dignitary is still in office, the legal solution is not complicated, the engagement of patrimonial liability is done on the basis of the public law contract in the case of the civil servant or the act of authority appointing the respective dignitary. Thus, the competent court will be the Administrative and Fiscal Litigation Section of the court.

The situation is different if the culprit no longer holds the status of a dignitary or civil servant. With regard to this problem, in the practice of the courts, I have noticed a different approach regarding the settlement of some disputes whose object is the engagement of patrimonial liability of some persons who, at a given moment, had either the status of a dignitary or the status of a civil servant[15].

I believe that the correct solution in this case is that the former civil servant or dignitary no longer having a special capacity, will determine the competence of the civil court to resolve, through the common law, the recourse action filed by the legal person, institution or public authority, for all damages caused to it (judicial fine and, possibly, penalties), action filed against the person guilty of non-execution of a court decision. As a result, to the extent that the damage is below 200,000 lei, the court at the domicile of the former dignitary or civil servant is materially, territorially and functionally competent. If the damage exceeds the threshold of 200,000 lei, the materially, territorially and functionally competent court is the Civil Section of the court at the domicile of the "responsible one".

The present work addressed only some of the controversial aspects that art 24 and art 26 of Law no. 554 of 2004 highlights them. Perhaps not by chance, the High Court of Cassation and Justice, in just two years, gave 2 decisions to solve some legal problems related to the application of the two articles. It is about Decision no. 21 of 2021 regarding the interpretation of the provisions of art. 24 para. 4 of the Administrative Litigation Law no. 554 of 2004, in the sense of the admissibility of the request to establish compensations for non-execution in kind of the obligation, formulated by the creditor separately, in the conditions in which

[14] Adriana Deac, *The competence of the courts regarding the settlement of disputes concerning former dignitaries or public servants*, in Jeton Shasivari, Balázs Hohmann (editors), *Expanding Edges of Today's Administrative Law*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2021, p. 88.
[15] Ibid, p. 80.

the compensations were not previously requested, through the request to establish the amount due as penalties and in the meaning that after the execution court's ruling on the creditor's request to fix the amount due as penalties or, in the absence of such a request, after the expiration of the period of prescription for forced execution, the creditor's formulation is no longer admissible, based on Art. 24 para. 4 of the request to establish compensation for non-execution in kind of the obligation to do which involves the personal fact of the debtor. The second decision is Decision no. 2 of 2023 regarding the interpretation of the provisions of art. 24 para. 1-3 and art. 24 para. 4 of Law no. 554 of 2004, with subsequent amendments and additions, in the sense that the procedure for the execution of a final judicial decision pronounced by an administrative litigation court is applicable even in the situation where the obligation established by that decision is that of adopting a unilateral administrative act with individual character as well as in the sense that the procedure for fixing the final amount due to the creditor as penalties applies including in the situation where, through the writ of execution, the court established penalties applicable to the obliged party, for each day of delay, according to art. 18 para. 5 of Law no. 554 of 2004.

The two decisions of the High Court of Cassation and Justice represent the concretization in a unitary solution for the numerous problems related to the practical application of art. 24 in the Administrative Litigation Law no. 554 of 2004. I am convinced that the new regulations will give rise to new legal debates in theory and in practice.

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# The Impact of Rulings Relating to Questions of Law on Administrative Acts

Lecturer **Anamaria GROZA**[1]

***Abstract***

*To say of law that it is an evolving system is already a truism. The values of society change, and legal rules sooner or later align with the new directions of social development. Legal institutions interact and produce unexpected consequences at the time of their regulation. Such consequences affect the normative pyramid more or less widely, in relation to the level at which the transforming legal event took place. The normative pyramid is readjusting, and the validity of certain normative acts must be reassessed. Such an effect can be produced by the preliminary rulings on questions of law, pronounced by the High Court of Cassation and Justice. The following article presents an analysis of the validity of some normative administrative acts in the context of Decision no. 65/26.10.2020, pronounced by the HCCJ – The Panel for preliminary ruling on questions of law. Our research is descriptive and explanatory, and contains relevant case law. The purpose of the article is to analyze the solutions in case of a conflict between a preliminary ruling and an administrative act. The caducity of the administrative act can be one of them and it is especially entailed by the moment from which the preliminary rulings become binding erga-omnes.*

***Keywords:*** *normative pyramid, normative administrative act, preliminary ruling, caducity, nullity.*

***JEL Classification:*** K23, K41

## 1. Introduction

To say of law that it is an evolving system is already a truism. The values of society change, and legal rules sooner or later align with the new directions of social development. Legal institutions interact and produce unexpected consequences at the time of their regulation. Such consequences affect the normative pyramid more or less widely, in relation to the level at which the transforming legal event took place. The normative pyramid is readjusting, and the validity of certain normative acts must be reassessed. Such an effect can be produced by the preliminary rulings on questions of law, pronounced by the High Court of Cassation and Justice. The following article presents an analysis of the validity of some normative administrative acts in the context of Decision no. 65/26.10.2020, pronounced by the High Court of Cassation and Justice (HCCJ) – The Panel for preliminary ruling on questions of law.

[1] Anamaria Groza - Faculty of Law, University of Craiova; Judge at the Craiova Court of Appeal, Romania, anamariagroza80@gmail.com.

Our research is descriptive and explanatory, and contains relevant case law. The purpose of the article is to analyze the solutions in case of a conflict between a preliminary ruling and an administrative act. The caducity of the administrative act can be one of them and it is especially entailed by the moment from which the preliminary rulings become binding erga-omnes.

The article is structured in four sections. The first section presents the concept of normative pyramid, with its main effect - the *conformity relation* that the acts at lower levels must observe, in relation to all acts at higher levels. It also presents in general terms the mechanism of preliminary rulings, able to determine the readjustment of the normative pyramid. The second section contains the description of a preliminary ruling of the High Court of Cassation and Justice (Decision no. 65/26.10.2020 on the payment of hours worked on weekly rest days and public holidays, over and above normal working hours). Given that the interaction of legal institutions is best seen in judicial practice, we have dedicated the third section to the account of two judicial cases, definitively settled by the court of second appeal. Both concerned normative administrative acts contrary to Decision no. 65/26.10.2020, and the solutions held by the two courts were contrary. The fourth section is an attempt to legally capture the situation created by the non-conformity of a normative administrative act with the enforced law, as a result of the pronouncement of a preliminary ruling after the entry into force of the administrative act. In our opinion, the administrative act becomes null, and this cause of invalidity can be invoked at any time during a trial, including ex officio as the conservation of the normative pyramid is a matter of public interest.

## 2. Rulings on questions of law in the context of the pyramid of the national normative system

Legal systems are primarily characterized by the hierarchy of formal sources. The so-called normative pyramid ensures the coherence and unity of the normative system, and at a higher level, the fulfilment of the values of a society in a certain historical period. In the Romanian legal system, the normative pyramid with the Constitution at its top is unanimously accepted. At the infra-constitutional levels, we find, accordingly, the constitutional laws, organic laws, ordinary laws, emergency ordinances, Government ordinances, Government decisions, normative administrative acts. Normative administrative acts can be issued by the central public administration, and also by the local public administration[2]. "As a matter of principle (but somehow in a simple manner), the hierarchy of the legal force of administrative acts is given by the place the issuing body has in the

[2] Verginia Vedinaș, *Drept administrativ*, 13th edition, Universul Juridic Publishing House, 2022, p. 63 et seq.; Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 73; Cătălin-Silviu Săraru, *Tratat de contencios administrativ*, Universul Juridic Publishing House, Bucharest, p. 99-103.

administrative hierarchy. That is precisely why a Government decision or a presidential decree will always have greater legal force than a local council decision or a mayor's disposition, because, quite simply, the Government is higher in the administrative hierarchy than a mayor. However, this basic rule is not by far sufficient to determine the exact relations between various administrative acts (...)"[3].

The main effect of the normative pyramid is the *conformity relation* that the acts at lower levels must observe, in relation to all acts at higher levels. "Normative acts are drawn up according to their hierarchy, their category and the public authority competent to adopt them. (...) Normative acts issued in enforcing the laws, Government ordinances or decisions are issued within the limits and according to the norms that order them"[4].

The consequence of the violation of this relation of conformity entails, as the case may be, the *unconstitutionality* or *illegality* of the normative act. The normative pyramid is completed with sources of EU law and sources of international law, especially the European Convention on Human Rights. The law of the European Union is in a relationship of supremacy with the national law, in the sense that in case of conflict between a rule of national law and one of European law, the competent national authorities have the obligation to apply the rule of European law and leave the rule of national law unapplied. From the perspective of EU law, supremacy refers to the entire national law, including constitutional norms. In accordance with art. 20(2) of the Constitution, "where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions".

Legal institutions interact with each other and produce perhaps unexpected consequences at the time of their introduction into codes. Such consequences affect the normative pyramid more or less widely, in relation to the level at which the transforming legal event took place. The normative pyramid will readjust, and the validity of certain normative acts will have to be reassessed.

The Civil Procedure Code adopted by Law no. 134/2010, entered into force on 15 February 2013, introduced in the Romanian civil procedural system the mechanism of unification of judicial practice represented by the *preliminary rulings* pronounced by the High Court of Cassation and Justice. It is regulated in the Code after the appeal in the interest of the law, both institutions of civil procedural law having the purpose of ensuring a consistent judicial practice. Pursuant to art. 519 of the Civil Procedure Code, "if, during the trial, a panel of the High Court of Cassation and Justice, the Court of Appeal or the Tribunal, vested with deciding the case as a last instance court, finding that a question of law on the clarification of which depends the first instance court's solution in the case,

[3] Ovidiu Podaru, *Drept administrativ*, Hamangiu Publishing House, 2022, vol. I, p. 346.
[4] Art. 4 paragraphs 1), 3) of Law no. 24/27 of March 2000 on legal drafting rules for the development of normative acts.

is new and the High Court of Cassation and Justice has not ruled on it, nor is it the subject of a pending appeal in the interest of the law, it shall be able to request the High Court of Cassation and Justice to deliver a judgment and thus give a solution in principle to the question of law referred to it". The decision thus pronounced is binding for the referring court from the date of pronouncement, and for the other courts, from the date of publication in the Official Gazette[5].

Through preliminary rulings, the HCCJ is called upon to *rule on* questions of law, which signifies the *indication of the correct interpretation and application* of the legal rule subject to its analysis. The decision pronounced on the ground of art. 519 et seq. of the Civil Procedure Code ceases to be applicable on the date of the modification, repeal or declaration of the unconstitutionality of the legal provision that was subject to interpretation. Rulings on questions of law do not resolve the substance of the case, which remains the responsibility of the judge who referred the matter to the supreme court. The regulated preliminary ruling procedure only provides for the possibility of preventing inconsistent judicial practice and implies a resolution in principle of a legal issue arising in a case which has not been decided yet.

The cases presented in the third section demonstrate that a preliminary ruling can produce effects not only on the interpreted normative act, but also on the normative acts that were not the subject of referral to the HCCJ, but which implement the interpreted act/s.

### 3. Decision no. 65/26.10.2020 pronounced by the HCCJ on the payment of hours worked on weekly rest days and public holidays, over normal working hours

The HCCJ pronounced decision no. 65/26.10.2020, in case no. 14336/1/2020, based on art. 519 et seq. of the Civil Procedure Code, upon referral by the Bucharest Court of Appeal. The first instance litigation involved the annulment of the Order of the Minister of Justice no. 2.721/C/2018 on the conditions for granting a 75% increase in the official salary for work performed starting from 1April 2018 over normal working hours by civil servants with special status in the penitentiary administration system, the Bucharest Court of Appeal being vested with deciding on the appeal lodged by the defendant.

Pursuant to art. 8 of the Emergency Ordinance no. 90/2017[6], during 2018, the work performed over the normal duration of working hours, as well as the work performed on weekly rest days, public holidays and other days on which, in accordance with the regulations in force, no work is carried out by the staff in the public sector, could only be compensated with appropriate time off.

[5] Art. 521 of the Civil Proc. Code.

[6] The Government's emergency ordinance (GEO) no. 90 of 6 December 2017 on some fiscal-budgetary measures, the amendment and completion of some normative acts and the extension of some terms, published in the Official Gazette no. 973 of 7 December 2017.

Exceptionally, the military personnel, police officers, civil servants with special status in the penitentiary administration system and civilian personnel in public defence, public order and national security institutions benefited from a 75% increase in their official salary.

Under art. IV of Law no. 79/2018 on the approval of the Government Emergency Ordinance no. 91/2017[7], the work performed starting from 1 April 2018 over the normal working hours by certain categories of staff, including penitentiary police officers, which could not be compensated with appropriate free time, was paid with an increase of 75% of the official salary of the position, proportional to the actual time worked under these conditions.

Through the above provisions, derogating from the rule according to which, in 2018, overtime is compensated only with corresponding time off, the legislature provided for certain categories of staff, including penitentiary police officers, *two types of salary increases*: an increase for work performed over the normal working hours and which could not be compensated by appropriate time off and an increase for the activity carried out on weekly rest days, public holidays and other days on which, in accordance with the regulations in force, no work is performed.

The question of law on which the High Court was referred to rule was the possibility of the cumulation of the two categories of benefits, by the personnel categories provided by law.

The supreme court established the difference between *overtime work* and *work performed on weekly rest days*, public holidays and other days on which, in accordance with the regulations in force, no work is done: "overtime work is defined as the activity performed over the normal time of 8 working hours a day for 5 days, and the work performed on the weekly rest days, on public holidays and on other days when, in accordance with the regulations in force, no work is performed, is a distinct notion and cannot be confused with overtime work"[8]. Consequently, for the same benefit, the employee cannot obtain both increases, given that the legal notions are distinct. The HCCJ concluded that the activity carried out during weekly rest days cannot be considered overtime work concurrently.

On the other hand, the work carried out on weekly rest days or public holidays that exceeds the normal duration of the working time, namely that of 8 hours, represents a state of fact entailing the application of both salary rights, provided by art. 10(3) of the Emergency Ordinance no. 90/2017, respectively art. IV of Law no. 79/2018. "It is noted that the legal text of art. IV(1) of Law no. 79/2018 does not distinguish the moment when the additional work is performed, which constitutes the premise of its application, and the reference to art. 8 and

[7] Law no. 79 of 28 March 2018 on the approval of the GEO no. 91/2017 for the amendment and completion of the Framework Law no. 153/2017 on the remuneration of staff paid from public funds, published in the Official Gazette no. 276/28 March 2018.
[8] Par. 46.

the derogation in art. 10(3) of the Government Emergency Ordinance no. 90/2017 can emphasize the fact that the respective civil servant retains the right to benefit from both 75% increases, as described above"[9].

The hours worked on rest days could not have an unlimited time duration, being necessary to fit into an 8-hour interval. The HCCJ cited provisions of Directive 2003/88 regarding the harmonization at the European Union level in the field of working time organisation and the case law of the CJEU on the importance of limiting the maximum working time and minimum rest periods, for the safety and health of workers. "Consequently, the interpretation that during rest days the employee carries out an irregular activity and is remunerated for this activity in its entirety, without overtime being highlighted, cannot be accepted, as it violates European legislation and case law"[10].

The HCCJ concluded that, in the interpretation and application of the provisions of art. 8 and art. 10(3) of the Government Emergency Ordinance no. 90/2017 related to art. 13(5) of the Government Emergency Ordinance no. 103/2013 and art. IV(1) and (6) of Law no. 79/2018, it is allowed to cumulate the 75% increase from the calculation base, granted for the activity carried out by public servants with special status in the penitentiary administration system on weekly rest days, public holidays and other days when, in accordance with the regulations in force, no work is done, with the rights related to the overtime work performed by the same officials over the normal working hours, only for the hours actually worked that exceed the normal duration of the working time in accordance with art. 112 of the Labour Code.

### 4. Effects of Decision no. 65/26.10.2020 on previous administrative acts

Pronouncing Decision no. 65/26.10.2020, the HCCJ interpreted the provisions of GEO no. 90/2017 and Law no. 79/2018. Prior to the publication of the decision in the Official Gazette, the interpreted legal provisions were the subject of successive normative administrative acts of implementation, respectively Order MJ 2721/C/2018[11] and Order MJ no. 2588/C/2019[12]. Articles 13(2) of Order MJ 2721/C/2018 and 12(2) of Order MJ no. 2588/C/2019 established that the increase granted for hours worked on weekly rest days, public holidays and other

[9] Par. 55.
[10] Par. 65.
[11] Order no. 2.721/C of 10 July 2018 on the conditions for granting a 75% increase in the official salary for overtime work starting from 1 April 2018 over the normal work schedule by civil servants with special status in the penitentiary administration system.
[12] Order no. 2.588/C of 13 June 2019 on the conditions for granting a 75% increase in the official salary for the overtime work performed in the period 2019-2021 over the normal work schedule by civil servants with special status in the penitentiary administration system, as well as for the amendment of some provisions in the field of salaries of civil servants with special status in the penitentiary administration system and in the Ministry of Justice.

days on which, in accordance with the regulations in force, no work is done and the regulated increase for overtime work cannot be cumulated for the same work. Art. 13(2) of Order MJ 2721/C/2018 was annulled by a court decision with generally binding effects, and art. 12(2) of Order MJ no. 2588/C/2019 was repealed by Order MJ no. 3.002/C of 21 May 2021. Instead, the provisions of both orders were in force for approximately 2 years, producing legal effects. *Reading the HCCJ Decision no. 65/26.10.2020, it clearly follows that the two normative administrative acts wrongly implemented the legal provisions*. However, given that preliminary rulings do not produce retroactive effects, the problem of cumulating the 75% increase from the calculation base, with the rights related to the overtime work performed by the same officials over the normal working hours, only for the hours actually worked that exceed the normal duration of the working time, was solved differently in judicial practice. We further present two decisions of the court of second appeal regarding the issue of cumulation[13].

Through the claim form, the appellant-claimant requested the payment of overtime hours worked between January 2020 and March 2020, over the normal working schedule on weekly and legal rest days, updated with the inflation index and the legal penalty interest.

In support of his action, the claimant invoked the fact that the civil sentence no. 1341/2019 of the Bucharest Tribunal, pronounced in case no. 31418/3/2018, disposed the annulment of the provisions of art. 13(2) of Order MJ 2721/C/2018 on the conditions for granting the 75% increase in the salary of the basic position for overtime work starting from 1 April 2018. At the same time, he invoked decision no. 65/26.10.2020 pronounced by the HCCJ in case no. 14331/1/2020, the Panel for preliminary ruling on questions of law, as well as OMJ 3002/C/2021.

The defendant requested the rejection of the action as unfounded, formulating a defence. He mainly invoked the non-application in the case of Order MJ 3002/C/2021, from the perspective of the *tempus regit actum* principle and non-retroactivity, as well as the HCCJ decision no. 65/26.10. 2020, in relation to art. 521(3) of the Civil Proc. Code.

By the civil sentence no. 1623/17 October 2022, the tribunal admitted the action in part and obliged the defendant to pay the claimant the rights provided by art. IV par. 1 of Law no. 79/2018, related to a total number of 13 extra hours worked over the normal duration of the working time, between January 2020 and March 2020 during weekly rest days, public holidays or other days on which, in accordance with the legal regulations, no work is done, amounts updated with the rate of the inflation index. At the same time, the defendant was obliged to pay the related legal interest to the claimant, starting from the date on which the mentioned salary rights became due and until the actual payment date.

[13] Decision of Craiova Court of Appeal no. 323/15 February 2023 and decision of Craiova Court of Appeal no. 2327/31 October 2022. Both decisions are unpublished.

To reach this decision, the first court considered, in essence, the litigious matter as being represented by the possibility of recognizing and granting the rights related to the extra hours worked over the normal duration of the working time, in the situations in which they would have been performed on the non-working days. From the content of art. 8 and 10 of GEO no. 90/2017, art. 13(5) of Government Emergency Ordinance no. 103/2013 and art. IV par. (1) and (6) of Law no. 79/2018, it follows that the legislature established, for the listed categories of civil servants, two types of salary increases: a) an increase for work performed over the normal work schedule and which cannot be compensated by corresponding time off; b) an increase for the activity carried out on weekly rest days, on public holidays and on other days when, in accordance with the regulations in force, no work is done.

Through the HCCJ decision no. 65/26.10.2020, it was established that the activity performed during the weekly rest days cannot be simultaneously considered overtime work performed outside the normal working time of 8 hours a day for 5 days, this having distinct legal regime and regulation. However, a different approach could be generated by the situation where the work carried out on weekly rest days or public holidays exceeds the normal duration of working time, namely 8 hours, as regulated by art. 112 of the Labour Code.

From the administration of evidence, the tribunal established that, between January 2020 and March 2020, the claimant performed a total of 13 extra working hours during weekly rest days, public holidays or other days on which, in accordance with the legal regulations, no work is done (5 hours out of the 13 performed on Sunday-26.01.2020, 4 hours out of the 12 performed on Sunday-23.02.2020 and 4 hours out of the 12 performed on Saturday-29.02.2020). The court held that in the case of these additional hours, the *cumulation of the 75% increase from the calculation base, provided by art. 13(5) of G.E.O. no. 103/2013, with the 75% increase in the official salary, regulated by art. IV par. 1 of Law no. 79/2018 is allowed.*

Regarding Order no. 2588/C/2019, the court held that it was a legal act with a lower force than that of a law or a Government emergency ordinance. Therefore, since the HCCJ decided the correct way to interpret and apply the provisions of the G.E.O. no. 90/2017 and no. 103/2013, as well as the provisions of Law no. 79/2018, art. 12(2) of the mentioned Order and which, subsequently, was repealed by Order no. 3002/C/2021, can no longer be invoked as a justification for the refusal to confer certain rights expressly provided for by a normative act having a superior legal force, which includes imperative provisions ("...it is paid with an 75% increase in the salary...") and regarding which it was ruled that no other, contrary interpretation could be given.

Through the second appeal lodged by the defendant, it was requested to admit the second appeal, annul the appealed judgment as illegal, unfounded and groundless based on art. 488 paragraph 1 points 6 and 8 of the Civil Procedure

Code and, following the retrial of the case, the substantive rejection of the introductory request as unfounded.

As for Decision no. 65/26.10.2020 pronounced by the HCCJ in case no. 14336/1/2020, invoked by the claimant and held by the first instance court as the main reason for the solution of the case, the appellant showed the fact that, in accordance with the provisions of art. 521(3) of the Civil Proc. Code "the ruling on questions of law is mandatory from the date of the publication of the decision in the Official Gazette of Romania, Part I, and for the court that requested the ruling from the date of the pronouncement of the decision." The problem arises from which moment this ruling on questions of law for the claimant-respondent would be applied. In this sense, there could be two hypotheses: from 26.10.2020, the date of the decision pronouncement, with the consequence of not producing legal effects related to the period January - March 2020; from 13.01.2021, the date of publication of that decision in the Official Gazette no. 37/13.01.2021, and then the claimant-respondent does not benefit from this right. In the opinion of the appellant, the cumulative granting of the two increases applies from 13.01.2021, pursuant to art. 521 of the Civil Procedure Code. However, the first instance court incorrectly applied the provisions of art. 521(3) of the Civil Procedure Code, which led to its application for a period prior to its publication in the Official Gazette.

The appellant indicated, as legal grounds, art. 488 points 6 and 8 and art. 521 (3) of the Civil Procedure Code, OMJ 3002/C/2021, ANP address no. 3650/ANP/01.11.2021, OMJ no. 2588/C/2019.

Regarding the reason for cassation represented by art. 488 par. 1 point 6 of the Civil Procedure Code, the Court of Appeal held that the motives of the first instance met the legal requirements resulting from art. 425 par. 1 letter b of the Civil Procedure Code, the trial court showing the factual and legal considerations that led to the adoption of the decision to admit the action.

Given that the appellant invoked a decision of the same Court of Appeal in support of the second appeal, the court emphasized, in advance, that within the Romanian legal system, judicial precedent could not be recognized as a source of law, except exceptionally in situations specifically provided for by the Constitution and other laws (decisions of the supreme court pronounced in the matter of appeals in the interest of the law and the rulings on questions of law, the decisions of the Constitutional Court, the decisions of the administrative litigation courts regarding the annulment in whole or in part of an administrative act with a normative character). In other words, as a rule, the content of the judgment reflects the particular facts of a litigation and does not present a generally valid and binding ruling on a question of law. Therefore, the court retains its decision-making freedom, in relation to the letter and spirit of the law, in the cases brought before it.

The Court appreciated that the legal reasoning of the first instance court was correct. Although art. 521(3) of the Civil Proc. Code provides in the sense

of the binding nature of the rulings on questions of law from the date of their publication in the Official Gazette, the courts can use these decisions as legal instruments for the resolution of identical/similar legal questions, which are pending trial. It is the way in which the first instance judge used the HCCJ Decision no. 65/26.10.2020, without thereby violating the provisions of art. 521(3) of the Civil Proc. Code.

By Decision no. 65/2020, the HCCJ ruled the following: "In the interpretation and application of the provisions of art. 8 and art. 10 (3) of the Government Emergency Ordinance no. 90/2017 related to art. 13(5) of the Government Emergency Ordinance no. 103/2013 and art. IV par. (1) and (6) of Law no. 79/2018, the cumulation of the 75% increase from the calculation base, granted for the activity carried out by civil servants with special status in the penitentiary administration system on weekly rest days, public holidays and other days on which, in accordance with the regulations in force, no work is done, with the rights related to the extra hours worked by the same civil servants over the normal working time, only for the hours actually worked that exceed the normal duration of the working time in accordance with art. 112 of the Labour Code". Or, Order MJ no. 2588/C/2019 (and previously Order MJ 2721/C/2018), administrative acts aimed at implementing the law interpreted by decision no. 65/2020, retained exactly the opposite solution.

Given the principle of the hierarchy of legal norms, with the compliance relations that it implies, the existence of a normative administrative act (subsequently denied by the court and even by the issuing body), cannot be invoked, as was held by the first instance court, as justification for the refusal to recognize the rights provided by the legislative act with superior legal force and for the execution of which the administrative act was issued.

Finally, it is noted that the first instance court did not apply retroactively OMJ no. 3002/C/2021, but found that OMJ no. 2588/C/2019 could no longer produce legal effects, in the conditions of the contradiction with the legislative act, superior as legal force, as interpreted by the HCCJ.

In another case, the court of second appeal held that the method of remuneration for overtime work and work on non-working days, in the interval 01.01.2020 - 31.01.2021, was regulated by the provisions of art. 35(1) and (3) of G.E.O. no. 114/2018 on the establishment of some measures in the field of public investments and some fiscal-budgetary measures, the amendment and completion of some normative acts and the extension of some time limits[14]. The Court found

[14] "(1) By derogation from the provisions of art. 21(2)-(6) of the Framework Law no. 153/2017, with subsequent amendments and completions, in the period 2019-2021, extra hours worked over the normal duration of working time by staff in the public sector in executive or management positions, as well as hours worked on weekly rest days, on public holidays and on other days on which, in accordance with the regulations in force, no work is done within the normal work schedule, shall be compensated only with appropriate time off (…) (3) As an exception to the provisions of par. (1), the extra hours worked in the period 2019-2021 over the normal working time (…) by

that in the same period, art. 12(2) of the Order of the Minister of Justice no. 2588/C/2019 was in force, which prohibited the cumulation of the salary increase for work performed on non-working days with the salary increase for overtime work.

Regarding the invocation of Decision no. 65/2020, the Court held that its object did not consist in the interpretation of art. 35(1)(3) of G.E.O. no. 114/2018, but of other legal provisions. (...) By the sentence of the first instance court, the action of the appellant-claimant was not rejected for the reason that the legal provisions in force, respectively art. 35(1)(3) of G.E.O. no. 114/2018, would have prohibited the cumulation of the two categories of salary rights, but because this cumulation was prohibited by an administrative act with a normative character which was in the civil circuit at the time of the sentencing, respectively Order of the Minister of Justice no. 2588/C/2019.

The court reiterated the fact that the central element of the legal regime of administrative acts is legality, understood as their compliance with the laws adopted by Parliament, as well as with administrative acts with a higher legal force, the principle of legality in the current constitutional system being one of the fundamental principles of public administration. The presumption of legality lies at the basis of the entire edifice of substantiating the special legal force of administrative acts, as acts of authority that also involve their performance. Therefore, by virtue of the theory of the administrative legal regime, as long as the administrative act exists, it is presumed that it was issued in compliance with all the substantive and formal conditions provided by law, the obligation to comply with it being detached from that of complying with the law. This presumption has a relative character, administrative acts being subject to the principled control of legality by the courts.

Given that on the date of the sentence of the first instance court, the Order of the Minister of Justice no. 2588/C/2019 was not subject to the control of legality through an action for annulment brought before the administrative litigation court, the court of first instance rightly found that this order produced effects, being legally presumed. The formulation of criticisms of the legality of the Order by means of a claim form requesting the granting of salary rights cannot have the effect of removing the Order from application, because such a procedure is specific to the exception of illegality provided by art. 4 of Law no. 554/2004 on administrative litigation, a legal text which does not allow the investigation in this way of administrative acts of a normative nature, but only of administrative acts of an individual nature.

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civil servants with special status in the penitentiary administration system, which cannot be compensated with appropriate time off, shall paid with a 75% increase in the official salary, in proportion to the actual time worked under these conditions. The payment of the increase is made if compensation through paid free hours is not possible within the next 60 days after the extra hours have been worked."

**5. Invalidity of the administrative act, as an effect of its contradiction with a preliminary ruling**

The administrative act must comply with the law it implements. This is also presumed to observe the law (represented by higher normative levels), which is why the presumption of legality and enforceability is attached to it. The presumption of legality is relative and functions, as a rule, until the revocation or annulment of the administrative act. *However, there may be other circumstances that remove the presumption of legality and determine the exit of the administrative act from the legal scene.*

In our situation, the hypotheses that should be analyzed are related to the *nullity* of administrative acts, respectively their *caducity*. Articles 13(2) of Order MJ 2721/C/2018 and 12(2) of Order MJ no. 2588/C/2019 were contrary to the provisions of art. 8 and art. 10 par. (3) of Government Emergency Ordinance no. 90/2017 and art. IV par. (1) and (6) of Law no. 79/2018, as interpreted by the HCCJ Decision no. 65/2020. Further on, the *problem is the moment when this contrariety occurred: the date of issuance of the administrative acts (in which case we are in the presence of their nullity) or the date of publication in the Official Gazette of the HCCJ Decision (in which case we are in the presence of their caducity)*. Solving the problem is complicated by the way in which prior judgments produce binding effects, i.e. *ex-nunc*. At this point, the effects produced by the preliminary rulings pronounced by the Court of Justice of the European Union can serve as a source of inspiration. *The judgments delivered on a preliminary basis are binding for the court that referred the case to the Court, as well as for all other courts in the member states, and have retroactive effect, from the moment the interpreted legal rule enters into force*. It is appreciated that this is how the European rule had to be interpreted since its entry into force. *The situation of prior judgments is similar from this point of view to preliminary rulings.*

Art. 8 and art. 10(3) of Government Emergency Ordinance no. 90/2017 related to art. 13(5) of Government Emergency Ordinance no. 103/2013 and art. IV par. (1) and (6) of Law no. 79/2018 should be interpreted in the sense of the possibility of cumulating the 75% increase from the calculation base, granted for the activity carried out by civil servants with special status in the penitentiary administration system on weekly rest days, on public holidays and on other days in which, in accordance with the regulations in force, no work is done, with the rights related to the extra hours worked by the same civil servants over the normal work schedule, hours actually worked that exceed the normal duration of the working time, since the date of their entry into force. *Given the drafting of the normative act and the concrete situation that led to the legal disputes, can it be noted that 13(2) of Order MJ 2721/C/2018 and 12 (2) of Order MJ no. 2588/C/2019 were contrary to the provisions of art. 8 and art. 10(3) of Government Emergency Ordinance no. 90/2017 and art. IV par. (1) and (6) of Law no.*

*79/2018 as they were adopted, interpreted and applied before the HCCJ intervention?* We believe it cannot, and the solution that allows for the reconciliation of the normative pyramid and the moment from which the preliminary rulings produce binding *erga-omnes* effects is the caducity of the administrative act.

The Administrative Code does not regulate the caducity of administrative acts, as a way of their exit out of force. It is completed by the Civil Code, completion possible where the former does not provide, while preserving the specifics of material administrative law relations, mainly characterized by the supremacy of the public interest. The Civil Code regulates caducity as a cause of ineffectiveness, which consists in depriving a validly concluded civil legal act of its effects due to the intervention of a circumstance subsequent to its conclusion and which is independent of the will of the author of the legal act. Its effects are produced only for the future, unlike the effects of nullity.

Caducity is analyzed by the doctrine as a cause for the administrative act to cease to be effective and appears, although not frequently, in judicial practice. In the doctrine, the caducity of the administrative act is characterized as a state of its invalidity, triggered by the intervention of a change in circumstances that makes the act no longer comply with the law or legal acts with superior force[15]. Caducity determines the informal cessation of effects produced by the act, regardless of the fact that it produced legal effects. "The term 'caducity' comes from the Latin 'caducus' – 'which falls', from which it follows that the institution of caducity constitutes the situation or the way in which an act, validly concluded, loses its validity, 'falls' due to certain circumstances in principle unforeseen and external"[16].

"Caducity is defined as that cause of ineffectiveness that consists in depriving the civil legal act validly concluded of any effects due to the intervention of a circumstance subsequent to its conclusion and which is independent of the will of the author of the legal act. The characteristics of caducity emerge from this definition, one of which being that this cause of ineffectiveness implies a failure (at least partially) of the purpose for which the legal act was issued. Or, in other words, at least part of the legal effects that the administrative act was supposed to produce are no longer produced due to the intervention of caducity. Precisely for this reason, caducity is incompatible with the complete material realization (execution) of the administrative act"[17].

The recitals of the HCCJ Decision no. 4/29. 02. 2016 (The Panel for pre-

[15] Ovidiu Podaru, *Caducitatea actului juridic în dreptul public*, Hamangiu Publishing House, Bucharest, 2019, p. 38 et seq.; Dana Apostol Tofan, *O nouă perspectivă în teoria actului administrativ (III)*, „Studii și Cercetări Juridice", Year 4 (60), No. 2, April-June 2015, p. 2.

[16] Valeria Bejenari, *Analiză comparativă între caducitatea actului juridic administrativ și alte instituții similare*; the article can be accessed at https://ibn.idsi.md/sites/default/files/imag_file/70-73_40.pdf (last accessed 20.04.2023).

[17] Suceava Court of Appeal, Decision no. 285 of 17.06.2020, unpublished.

liminary ruling on questions of law) are relevant: "the courts have retained/appreciated that the court decision cancelling the administrative-normative act produces effects regarding the individual administrative acts, based on the cancelled normative provisions, even without it being necessary to invoke the reason/exception of illegality, since *the disappearance of one of the essential elements of the administrative act leads to its caducity, and the disappearance of the legal cause (the normative administrative act that was at the basis of the individual administrative act) constitutes precisely the disappearance of such element*, aspect that can be invoked at any time, within a pending litigation. It can be seen, therefore, that the question of law is not a new one, as the courts have already ruled on it"[18]. In these paragraphs, the HCCJ confirmed the courts' solution based on caducity. The annulment of the normative administrative act determines the caducity of the individual administrative acts based on the annulled normative provisions, as an essential element of the individual act has disappeared. Likewise, in our case, as a result of the HCCJ Decision no. 65/2020, the interpretation of the law by virtue of which the cumulation of benefits was prohibited disappeared. According to the HCCJ Decision no. 4/29.02.2016, *caducity could be invoked at any time in a lawsuit.* The question that remains would concern the possibility of invoking it ex officio, by the court. In our opinion, caducity can also be invoked ex officio and put in the adversarial discussion of the parties, because the preservation of the normative pyramid is a matter of public interest.

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[18] Par. 46, 47 of Decision no. 4 of 29 February 2016, published in the Official Gazette no. 226 of 28 March 2016.

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# Considerations Regarding the Appeal to the Administrative Court of the Individual Performance Appraisal Report of Civil Servants

Associate professor **Eugenia IOVANAȘ**[1]

***Abstract***

*Performance indicators are established to assess the degree to which individual civil servants have achieved their objectives. The setting of individual objectives and performance indicators must be linked to the tasks and objectives of the institution in which the civil servant works. The process of evaluating the individual performance of civil servants shall establish the training requirements for civil servants. The objectives set out in paragraph 1 shall be set out in the following way (1) shall be established in accordance with the duties of the job description, by reference to the public office held, its professional grade, the theoretical and practical knowledge and skills necessary for the performance of the public office held by the civil servant, and shall correspond to the objectives of the department in which the civil servant works. The performance indicators referred to in paragraph 1 shall be those set out in Annex I. (1) shall be established for each individual objective, in accordance with the level of the public office holder's duties, by reference to the requirements of the quantity and quality of the work performed. In all cases, the individual objectives and performance indicators shall be made known to the public servant at the beginning of the period under evaluation. In this article, we propose to discuss relevant aspects of the analysis of the annual individual performance appraisal report of civil servants, by analysing the two methodologies for the annual performance appraisal of civil servants, as described above, with reference to the relevant judicial practice.*

***Keywords:*** *public office, public servant, professional performance, objectives of the public authority or institution, evaluation report.*

***JEL Classification****:* K23, K41

## 1. Introduction

The approach to this topic is generated by the existence of several cases before the Administrative Court of several cases concerning the annulment of the annual individual performance appraisal report of the civil servants appointed within the Agricultural Directorate of Arad County, the order of the employer to redo the individual performance appraisal of the evaluated civil servants and the ancillary requests, aiming either to grant a certain qualification in the re-evaluation, or to calculate and refund the salary rights, unlawfully withheld on the basis of the qualification granted and to pay the related legal interest.

[1] Eugenia Iovănaș - "Aurel Vlaicu" University of Arad, Romania, eugenia.iovanas@uav.ro.

**2. Subject matter**

With regard to the analysis of the annual performance appraisal report of the civil servants appointed to the Arad County Agricultural Directorate, it can be noted that the provisions of Article 485 of the Administrative Code, approved by GEO no. 57/2019, regulate the general appraisal procedure.

Thus, the evaluation of the individual performance of civil servants is done annually, and the process of evaluating the individual performance of executive civil servants and senior civil servants is the objective assessment of the individual performance of civil servants by comparing the degree and manner of achievement of individual objectives and performance criteria set with the results actually achieved by the civil servant.

The evaluation of individual performance of civil servants shall include the following elements:

a) *assessment of the extent to which and how well individual objectives have been achieved*;

b) *assessment of the degree to which the performance criteria have been met*.

Performance indicators are established to assess the degree to which individual civil servants have achieved their objectives. *The setting of individual objectives and performance indicators must be linked to the tasks and objectives of the institution in which the civil servant works*.

The individual performance appraisal shall be carried out for all civil servants who have actually worked for at least 6 months in the calendar year for which the appraisal is carried out.

The ratings obtained in the individual performance appraisal process of civil servants are taken into account in:

a) *promotion to a higher public office*;

b) *the granting of bonuses, in accordance with the law*.

c) *a 10% reduction in salary rights until the next annual individual performance appraisal for civil servants who have obtained a "satisfactory" rating*;

d) *dismissal from public office*.

It is also mandatory to evaluate individual performance[2] when civil servants' employment is modified, suspended or terminated.

The individual performance appraisal process for civil servants establishes the training requirements for civil servants.

As regards the actual evaluation procedure, a distinction is to be made according to the period under evaluation.

Thus, as regards the activity carried out by civil servants from 1 January

[2] Regarding the assessment of the individual professional performances of civil servants, see Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 406-408.

2020, as well as the activity of junior civil servants appointed to public office after 1 January 2020, the evaluation procedure is governed by Annex 6 to GEO no. 57/2019, on the Administrative Code, on the methodology for the process of evaluation of individual professional performance of civil servants applicable to the activity carried out from 1 January 2020, as well as for the process of evaluation of the activity of junior civil servants appointed to public office after 1 January 2020.

According to the provisions of Art. 14-16 of the Methodology:

Art. 14 - "*(1) The annual appraisal of the individual performance of civil servants shall be carried out for one calendar year, during the period from 1 January to 31 March of the year following the appraisal period, for all civil servants who have actually worked for at least 6 months in the calendar year for which the appraisal is carried out. (2) By way of exception to paragraph. (1), the annual appraisal of the individual performance of civil servants may also be carried out after the period from 1 January to 31 March of the year following the appraisal period, if the official's service relationship is suspended for the whole appraisal period. In this case, the appraisal shall be carried out within 5 working days of resuming work, in accordance with the conditions of this methodology. (3) By way of exception to paragraph. (1), the annual appraisal of the individual performance of civil servants may also be carried out after the period from 1 January to 31 March of the year following the appraisal period, if the service relationship or, as the case may be, the employment relationship of the appraiser is suspended during the whole appraisal period. In this case, the appraisal shall be carried out within 5 working days of the end of the appraisal period, with the appropriate application of Article 15(1) letter (b) of this Annex.*

*Art. 15 - (1) By exception to the provisions of Art. 14 para. (1) of this Annex, the evaluation of civil servants shall be carried out for another period in any of the following situations: a) when modifying, suspending or terminating the service relationships of civil servants under the law, if the period actually worked is at least 30 consecutive days; b) when the employment relationship of the assessor is modified, suspended or terminated or, where applicable, terminated in accordance with the law, if the period actually coordinated is at least 30 consecutive days. If the assessor is prevented by an administrative act from effectively carrying out the assessment in law or in fact, the person who is the countersignatory of the assessment report on the date of termination, suspension or amendment, under the conditions laid down by law, of the employment relationship or, where applicable, of the employment relationship of the assessor shall act as assessor, with appropriate application of the legal provisions regarding the appointment of another countersignatory, where possible, in accordance with the organisational structure; (c) when during the period under assessment the civil servant is promoted in grade or professional rank. (2) The assessment carried out in the situations referred to in paragraph 1 shall be based on the following criteria (1) shall be called a partial evaluation and shall cover the*

*evaluation of the individual objectives referred to in Article 485 (3) of this Code. (3) The partial assessment shall be carried out on or within 10 working days of the occurrence of the situations referred to in paragraph 1. (1) and shall be taken into account in the annual evaluation. (4) The partial evaluation of civil servants is not required in the case where the civil servant's employment relationship is changed by delegation, suspended under the terms of Article 513 para. (1) (e), (h), (i) and (j) of this Code or, where applicable, terminated under Article 517 (1) (e), (h), (i) and (j) of this Code. (1) (a) and (b) of this Code.*

*Art. 16 - (1) In order to carry out the individual performance appraisal component of the performance appraisal of executive and managerial civil servants referred to in Article 485 para. (3) lit. a) of this Code, at the beginning of the evaluated period the person who is the evaluator shall establish individual objectives for the civil servants whose work he/she coordinates and the performance indicators used in evaluating the degree and manner of their achievement. (2) The objectives referred to in paragraph 1 shall be to (1) shall be determined in accordance with the duties set out in the job description, by reference to the public office held, its professional grade, the theoretical and practical knowledge and skills required to perform the public office held by the public servant and shall correspond to the objectives of the department in which the public servant works. (3) The performance indicators referred to in paragraph 1 shall be set out in Annex I. (1) shall be established for each individual objective, in accordance with the level of duties of the public office holder, by reference to the requirements of the quantity and quality of the work performed.(4) In all cases individual objectives and performance indicators shall be made known to the public servant at the beginning of the period under review. (5) Individual targets and performance indicators may be reviewed quarterly or whenever there are changes in the work or organisational structure of the public authority or institution. The provisions of paragraph 1 shall be replaced by the following (4) shall apply accordingly. (6) The performance criteria for carrying out the individual performance appraisal component of the performance appraisal of civil servants under Article 485 para. (3) (b) of this Code are set out in Article 29 (b) of this Annex*".

As regards the work carried out by civil servants until 31 December 2019, the evaluation procedure is governed by the provisions of Article $62^1$ - Article $62^{13}$ of Law No. 188/1999 on the status of civil servants, as follows from the provisions of Article 597 paragraph 2 letter b of O.U.G. No. 57/2019 on the Administrative Code, according to which: "*(2) On the date of entry into force of this Code, it is repealed: b) Law No. 188/1999 on the Status of Civil Servants, republished in the Official Journal of Romania, Part I, No. 365 of 29 May 2007, as subsequently amended and supplemented, with the exception of the provisions of Articles 20, $20^1$ - $20^{10}$, Article 60 para. (3), of art. $60^1$ - $60^4$, $62^1$ - $62^{13}$ and of Annex no. 2, which shall apply to the evaluation of the individual professional performance of civil servants for the activity carried out in 2019*".

Therefore, according to the provisions of art. $62^6$-$62^{13}$ of Law no. 188/1999:

*"Art. $62^6$ *) - (1) The annual appraisal of the individual performance of civil servants shall be carried out for a calendar year, during the period from 1 to 31 January of the year following the appraisal period, for all civil servants who have actually worked for at least 6 months in the calendar year for which the appraisal is carried out. (2) By way of exception to paragraph. (1), the partial appraisal of the individual performance of civil servants shall be carried out for a period other than that referred to in paragraph (1) in any of the following circumstances: a) when modifying, suspending or terminating the service relationships of civil servants under the law, if the period actually worked is at least 30 consecutive days; b) when the employment relationship or, where applicable, the employment relationship of the assessor is modified, suspended or terminated in accordance with the law, if the period actually coordinated is at least 30 consecutive days. If the assessor is prevented by an administrative act from effectively carrying out the assessment in law or in fact, the person who is the countersignatory of the assessment report on the date of termination, suspension or amendment, under the law, of the employment relationship or, where applicable, of the employment relationship of the assessor shall be the assessor, with the appropriate application of the legal provisions concerning the appointment of another countersignatory, where this is possible according to the organisational structure; (c) when, during the period under review, the civil servant is promoted in grade or professional rank. (3) The partial assessment shall be carried out within 10 working days of the date of the occurrence of the situations referred to in paragraph (2) and shall be taken into account in the annual assessment, in accordance with the law. (4) Partial evaluation of civil servants shall not be required where the civil servant's employment relationship: a) is amended by delegation; b) shall be suspended in cases where the civil servant has been remanded in custody, is under house arrest, or has been placed under the terms of Law No. 135/2010 on the Code of Criminal Procedure, as subsequently amended and supplemented, under judicial supervision or under judicial supervision on bail, if the civil servant has been placed under obligations that prevent the exercise of the employment relationship, is on leave for temporary incapacity for work under the terms of the law, is missing, and the disappearance has been established by a final court decision or in case of force majeure; (c) shall cease upon death or upon the final judgment declaring the death of the civil servant. (5) By way of exception to paragraph. (1), the annual appraisal of the individual performance of civil servants may also be carried out after the period from 1 to 31 January of the year following the appraisal period, if the service relationship of the civil servant is suspended during the whole appraisal period. In this case, the evaluation shall be carried out within 5 working days after the resumption of work, under the conditions of this Law. (6) By way of exception to paragraph. (1), the annual appraisal of the individual performance of civil servants may also*

*be carried out after the period from 1 to 31 January of the year following the appraisal period, if the employment relationship or, as the case may be, the employment relationship of the appraiser is suspended during the whole appraisal period. In this case, the appraisal shall be carried out within 5 working days of the end of the appraisal period, with the appropriate application of the provisions of paragraph (2)(b).*

*Art. 62[7]*) - (1) In order to carry out the individual performance appraisal component of the performance appraisal of civil servants referred to in Article 622 para. (1) letter a), at the beginning of the period evaluated, the person acting as evaluator shall establish individual objectives for the civil servants whose work, he/she coordinates and the performance indicators used in the evaluation of the degree and the manner of their achievement. (2) The objectives referred to in paragraph 1 shall be determined in accordance with the duties set out in the job description, by reference to the public office held, its professional grade, the theoretical and practical knowledge and skills required to perform the public office held by the public servant, and shall correspond to the objectives of the department in which the public servant works. (3) The performance indicators referred to in paragraph 1 shall be set out in Annex I. (1) shall be established for each individual objective, in accordance with the level of duties of the public office holder, by reference to the requirements of the quantity and quality of the work performed. (4) In all cases, the individual objectives and performance indicators shall be made known to the civil servant at the beginning of the period evaluated. (5) Individual targets and performance indicators may be reviewed quarterly or whenever there are changes in the work or organisational structure of the public authority or institution. The provisions of paragraph 1 shall be replaced by the following (4) shall apply accordingly*".

*Art. 62[8]*) - The performance criteria used to carry out the individual performance appraisal component of the performance appraisal of civil servants according to Art. 622 para. (1) letter b) are set out in item. III of Annex 2*".

### 3. Important aspects regarding the analysis of the annual performance appraisal report of the civil servants appointed to the Agricultural Directorate of Arad County

Analysing the two methodologies for evaluating the annual professional performance of civil servants, as set out above, by reference to judicial practice in the matter, it is noted that there are three aspects relevant to the issue of analysing the evaluation reports of civil servants:

*a) the deadline for the evaluation*;

*b) individual objectives and performance indicators are made known to the civil servant at the beginning of the appraisal period*.

*c) consequences of the annulment of the appraisal report/applications for either the awarding of a specific appraisal grade in the reassessment or the*

*calculation and reimbursement of the salary entitlements unlawfully withheld on the basis of the appraisal grade awarded and payment of the related statutory interest.*

**a) The time limit for carrying out the assessment.** With regard to the deadline for the evaluation, it can be noted that in *the old legislation,* concerning the work carried out by civil servants until 31 December 2019, the *evaluation deadline is between 1 and 31 January of the year following the evaluation period,* for all civil servants who have actually worked for at least 6 months in the calendar year for which the evaluation is carried out, as it results from the provisions of Article $62^6$ paragraph 1 of Law No. 188./1999 on the status of civil servants, while in the *new legislation,* concerning the activity of civil servants from 1 January 2020 and the activity of junior civil servants appointed to public office after 1 January 2020, *the evaluation period is between 1 January and 31 March of the year following the period evaluated,* for all civil servants who have actually worked for at least 6 months in the calendar year for which the evaluation is carried out, as stated in Article 14 para.1 of Annex 6 to O.U.G. no.57/2019, on the Administrative Code, regarding the evaluation methodology.

**b) The individual objectives and performance indicators are made known to the civil servant at the beginning of the period under review.** With regard to this requirement of legality of the evaluation report, we note that both in the *old legislation,* concerning the work carried out by civil servants until 31 December 2019, namely the provisions of Article $62^7$ paragraph 4 of Law No. 188/1999 on the status of civil servants, and in the *new legislation,* concerning the work carried out by civil servants from 1 January 2020, as well as the work of junior civil servants appointed to public office after 1 January 2020, namely Article 16 paragraph 4 of Annex 6 of the O.U.G. no. 57/2019, on the Administrative Code, regarding the evaluation methodology*, in all cases, it is stipulated the requirement that individual objectives and performance indicators be made known to the civil servant at the beginning of the evaluated period.*

In this regard, the judicial practice of the Timisoara Court of Appeal has consistently held that, *since it has not been proved that these individual objectives were brought to the attention of the civil servant at the beginning of the period assessed, the assessment of the applicant's annual professional performance was carried out formally,* without analysing the assessment criteria in concrete terms and without complying with the legal requirements, and therefore without setting out in concrete terms the aspects on which the contested assessment was based, namely the concrete method of awarding marks during the assessment, which leads to the unlawfulness of the assessment report and, by implication, its annulment.

However, there is a non-uniform practice at the level of the Timisoara Court of Appeal in the concrete way of analysing and applying this requirement of legality of the civil servant's evaluation report.

Thus, in one case it was decided that *individual objectives are established in accordance with the duties in the job description and* ***there is no impediment for them to be identified with the duties in the job description***, as long as the conditions set out in Article 16 of Annex 6 to GEO No. 57/2019 on the Administrative Code, concerning the evaluation methodology, which require that these objectives be established by reference to the public office held, the professional grade of the same, the theoretical and practical knowledge and skills required to perform the public office and which correspond to the objectives of the department in which the civil servant works.

*However, the Court of Appeal held that the appraisal report was void because there was no evidence that the individual objectives had been brought to the attention of the civil servant at the beginning of the appraisal period*. Thus, although the defendant argued that the individual objectives were to be found in the job description, namely in a decision issued by the management of the DAJ Arad by which the applicant was appointed to sit on a committee for the implementation of decision No. 716/2020 on the approval of the 'De minimis aid scheme to compensate for the effects of the adverse hydro-meteorological phenomena which occurred between March and May 2020 in the beekeeping sector', the applicant did not prove those claims before either the court of first instance or the court of appeal, nor did he prove that the job description and the decision referred to above were communicated prior to the period assessed, in order to be able to conclude that that communication represented a communication of individual objectives relating to 2020, thus complying with Article 16(4) of the Methodology.

*However, given that no such evidence was provided and that the appraisal report for the period 2019 does not record any objectives under the heading 'objectives for the next appraisal period', the Court held that the Court of First Instance was right to hold that it had not been proved that the objectives for the appraisal period had been brought to the attention of the civil servant at the beginning of the appraisal period.* The Court held that it was irrelevant that the 2019 appraisal report had not been contested by the applicant, as the applicant was not dissatisfied with the grade awarded in that report and the defendant had the burden of proving that the individual objectives for 2020 had been communicated to the civil servant.

*The Court also found that* the first instance correctly held that the assessment of the applicant's professional performance for the period from 1 January 2020 to 31 December 2020 was carried out formally, without analysing the assessment criteria in detail and without complying with the legal requirements, and that the aspects on which the contested assessment was based, namely the specific method of awarding marks during the assessment, were not set out in detail. Thus, in the assessment report challenged in the present case, *the assessor did not give reasons for the marks awarded and the court is thus unable to verify the lawfulness of the procedure*, since the content of the assessment report does

not clearly show the considerations which led to the award of those marks, the evaluation report does not contain any reasoning as regards the assessor's assessments for each of the performance criteria used in the evaluation, the 'Comments' section of each of the 11 performance criteria is not completed, and the percentages indicated in the first part of the evaluation report as to the weighting of the achievement of the performance indicators relating to the six objectives are not justified (see Civil Decision No. 261/18.03.2022 pronounced by the Timisoara Court of Appeal - Administrative and Fiscal Litigation Section in case no. 2607/108/2021).

In another case it was decided that the appraisal report was unlawful because *it was not proven that the objectives for the period under review,* **which are not confused with the duties in the job description***, as the appellant wrongly tries to claim, were brought to the attention of the civil servant at the beginning of the period under review,* and the performance indicators were not properly set out, with no relevant explanations/comments being recorded for any of the performance criteria.

*However, the contested appraisal report, in the section 'objectives during the appraisal period', reproduces almost in full the duties mentioned in the job description. In those circumstances, the* Court *held that the assessment of the* applicant's *professional performance* in the period from 1 January 2019 to 31 December 2019 *was carried out formally,* without establishing and analysing the assessment criteria in practice and without complying with the legal requirements, both in terms of the legality and the thoroughness of such a procedure. In those circumstances, the Court held that the result of the assessment, the mark awarded, is uncertain, without any guarantee that it accurately reflects the work carried out, which is such as to show that an objective assessment of the applicant's work was not carried out in practice, and that the aspects on which the contested assessment was based, namely the specific method of awarding marks during the assessment, were not set out in detail (see Civil Decision No. 374/25.03.2021 delivered by the Timisoara Court of Appeal - Administrative and Fiscal Litigation Section in case no. 1072/108/2020)

**c) The consequences of the annulment of the appraisal report/the ancillary claims concerning either the award of a specific appraisal grade in the reassessment or the calculation and reimbursement of the salary rights, unlawfully withheld on the basis of the appraisal grade awarded and the payment of the related legal interest.** In the cases, the main subject-matter of which is the annulment of the annual individual performance appraisal report of the civil servants appointed to the Agricultural Directorate of Arad County and an order that the employer should re-evaluate the individual performance of the civil servants evaluated, the applicant also brought ancillary proceedings, The applicants claim that the Court should, following the admissibility of the main head of claim and the annulment of the appraisal report, either order the defend-

ant to award a specific mark in the reassessment or order the defendant to calculate and repay the salary rights unlawfully withheld on the basis of the mark awarded and to pay the related statutory interest.

In one case, the Court of First Instance dismissed the applicant's secondary head of claim, seeking an order that the defendant alter the final mark and award the mark 'very good', on the ground that it *is not the court's function to substitute itself for the assessor, especially* since, on the basis of the information in the file, no such assessment can be made, and the court cannot therefore impose the mark to be awarded following the re-assessment (see civil judgment No. 877/09.11.2020, pronounced by the Court of Arad - Section III - Administrative and fiscal litigation, labour and social security disputes in case no. 1072/108/2020). This decision of the first instance was not challenged by appeal, only the decision given to the main head of claim, which was aimed at annulling the evaluation report, was challenged and upheld by the appeal court.

In another case, the Court of First Instance dismissed the applicant's additional claims for an order that the defendant calculate and repay the unlawfully withheld salary entitlements and pay the statutory interest thereon. In its reasoning, the first instance held that those heads of claim related to the repayment of salary rights and the related interest, rights which had been reduced for the applicant following the award of a 'satisfactory' grade. However, even if the applicant is to be reassessed, *the court cannot substitute itself for the assessment committee in order to be able to know with certainty whether or not, at the new assessment, the applicant will exceed the 'satisfactory' rating in order to be entitled to the undiminished salary rights* (see civil judgment No. 1312/03.11.2021 of the Arad Court - Third Section for Administrative and Fiscal Litigation, Labour Disputes and Social Security in case No. 2607/108/2021)**.**

This decision was modified on appeal, with the *Timisoara Court of Appeal ordering the defendant Arad County Directorate for Agriculture to reimburse the applicant the sums withheld following the award of the 'satisfactory' rating in the annulled individual performance appraisal report and the related statutory interest, calculated from the date of withholding of those sums until the date of actual payment*. In its reasoning, the Court of Appeal found that, following the award of the "satisfactory" rating in the individual performance appraisal report drawn up on 29.03.2021, pursuant to Article 485(7) of GEO 57/2019 and Article 21(1)(c) of the Methodology, the applicant's salary rights were reduced by 10% until the next annual individual performance appraisal. *Given that it was held that the individual performance appraisal report drawn up on 29.03.2021, ordering its annulment, and the reason for reducing the applicant's salary rights by 10% was the "satisfactory" rating obtained in the individual performance appraisal for the year 2020, the Court held that it was therefore necessary, in view of the ancillary nature of those small sums, the application for repayment of the sums withheld following the award of the 'satisfactory' mark and the award of the related statutory interest calculated from the date on which those sums were*

*withheld until the date of actual payment, the mark to be awarded to the applicant following the reassessment being irrelevant, so long as the reason for the reduction in his salary rights no longer exists at that time* (see Civil Decision No. 261/18.03.2022 pronounced by the Timisoara Court of Appeal - Administrative and Fiscal Litigation Section in case no. 2607/108/ 2021).

We cannot agree with this solution, because the reason for the reduction of the applicant's salary rights by 10% is the "satisfactory" rating obtained by the applicant in the evaluation of his individual professional performance, as provided for in Article 485(7) of O.U.G. No. 57/2019 and in Article 21(1). letter c of the Methodology, and the reinstatement of the applicant's assets implies the awarding of a rating higher than 'satisfactory' in the new assessment, which cannot be done by the court, since the assessment of civil servants and the determination of the ratings to which they are entitled is beyond the jurisdiction of the court, which is the exclusive responsibility of the assessment committee of the institution, appointed in accordance with the law. In other words, even if the appraisal report is annulled by the court, the court may not reassess the applicant, and there is no certainty that the appraisal carried out by the appraisal committee will award the civil servant a higher mark than 'satisfactory' in order to allow his claim for repayment of the reduced salary, since the committee may again award the mark 'satisfactory' and is not bound by the court's assessment of the civil servant's professional performance, but only of the legality of the appraisal report.

In addition, it is undeniable that the appraiser has the obligation to listen to the appraisee, otherwise, by not doing so, he will cause the appraisee an injury which, in the given circumstances, no longer needs to be proved by the appraisee, but must be presumed in the case.

On the other hand, in the context of the fact that, contrary to the legal provisions already set out, and the theoretical considerations set out, the appeal was not resolved in the presence of the parties, the civil servant in question was not heard, and the decision adopted by the committee deciding the appeal was in no way reasoned, it must be held that the decision to maintain the score relating to the assessment of the civil servant is null and void, but the court has no legal prerogative to invalidate the decision of the assessment committee and, moreover, to proceed to a new assessment by awarding a higher score than that originally awarded by the assessment committee.[3]

However, through such a case law ruling, we consider that the court has exceeded its general jurisdiction, exceeding the powers of the judiciary, having no legal basis to re-evaluate itself the evaluation sheet in educational management, awarding marks based on its own assessment of the grades given by the evaluator.

[3] Civil Judgment, no. 937 of 26.03.2014, pronounced by the Court of Arad, in Case. No. 672/108/2014, final and irrevocable by Civil Decision, No. 10351 of 17.12.2014, rendered by the Court of Appeal Timisoara in Case No. 672/108/2014.

The High Court of Cassation and Justice has also pronounced in the same sense in Decision no. 1580 of 11 April 2008 of the Administrative and Fiscal Litigation Division, published, stating that the discretionary power conferred on an authority cannot be considered, in a state governed by the rule of law, as an absolute and unlimited power, since the exercise of the right of appreciation by violating the fundamental rights and freedoms of citizens provided for by the Constitution or by law constitutes an excess of power, in the context in which the Romanian Constitution provides in Article 31 para. 2 of the Constitution requires the public authorities to ensure that citizens are properly informed about public affairs and matters of personal interest. The High Court therefore held that any decision likely to have an effect on fundamental rights and freedoms must be reasoned not only from the point of view of the power to issue that act, but also from the point of view of the possibility for the individual and society to assess the legality of the measure, that is to say, whether the boundaries between discretionary power and arbitrariness are respected, since to accept the view that the employer does not have to give reasons for its decisions is tantamount to emptying the essence of democracy and the rule of law based on the principle of legality.

Moreover, it has also been held in Community case-law that the statement of reasons must be appropriate to the measure issued and must set out in a clear and unequivocal manner the algorithm followed by the institution which adopted the contested measure, so as to enable the persons concerned to establish the reasons for the measures and also to enable the Community courts to review the measure (Case C-367/1995)[4].

As the European Court of Justice has ruled, the extent and detail of the statement of reasons depends on the nature of the act adopted, and the requirements which the statement of reasons must meet depend on the circumstances of each case, an insufficient, or incorrect, statement of reasons is deemed to be equivalent to a failure to state reasons for acts, as in the present case. Moreover, failure to state adequate reasons or failure to state reasons renders Community acts null and void or invalid (Case C-41/1969). A detailed statement of reasons is also necessary where the issuing institution has a wide discretion, since the statement of reasons makes the act transparent, allowing individuals to verify whether the act is properly reasoned and, at the same time, enabling the Court to exercise judicial review (Case C-509/1993).

However, in a different vein, but in full agreement with the same decision of the High Court mentioned above, in our opinion it is the employer's prerogative to award grades in the annual performance appraisal procedure, and the court hearing the action for annulment of the annual performance appraisal form

[4] Regarding the motivation of administrative acts in European Union law, see Cătălin-Silviu Săraru, *Tratat de contencios administrativ*, Universul Juridic Publishing House, Bucharest, 2022, p. 131-133.

has the power only to review the legality of the appraisal procedure, without carrying out the appraisal itself and awarding another grade.

Last but not least, but for the purposes of the considerations set out above, it is clear that in exercising the legality review, the court cannot proceed to only partially annul the file in question, precisely because it is not entitled to make judgments of expediency, i.e. to assess the work, in accordance with the legal provisions and cannot "issue" another assessment of service "with a higher value". In addition. Based on the relevant legal provisions and the relevant case law,[5] we consider that the court may not rule on the granting of a particular type of rating, it has the power to exercise exclusively the control of legality of the evaluation procedure of the individual performance of the civil servant in activity, and it may order the re-evaluation procedure with the observance of the legal rigours, but without subrogating itself to the rights and obligations of the evaluator.

The awarding of the rating in the annual individual performance appraisal procedure is the prerogative of the employer and the modification of the score is the exclusive responsibility of the appraisal committee.

## 4. Conclusion

We are of the opinion that only in the case where the right of assessment of an authority turns into an abuse of law, the court has the possibility, under Article 18 of Law No. 554 of 2004 on administrative disputes, to censor the act in order to annul it and possibly to oblige the authority to reassess it,[6] without, however, substituting itself in the tasks of the committees and without itself modifying the relevance of certain certificates concerning the qualifications and competences of the candidates.

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4. Law No. 19 of 9 January 2023 on the approval of GEO No. 57/2019 on the Administrative Code of Romania, published in the Official Gazette No. 28 of 10 January 2023.

[5] Civil decision no. 262 of 19.02.2010, rendered by the Court of Appeal Timisoara in case no 1050/108/2010.

[6] Civil decision no. 261/18.03.2022 pronounced by the Timisoara Court of Appeal - Administrative and Fiscal Litigation Section in case no. 2607/108/2021).

5. Săraru, Cătălin-Silviu, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016.
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# The Administrative Court System and Its Impact on Albanian Private Entities

Lecturer **Linert LIREZA**[1]

***Abstract***

*The establishment of Administrative Courts in Albania is an important step done in the justice system. The law on administrative courts approved by the Assembly was expected to strengthen the justice system of the country, improve access to justice for citizens and businesses, and facilitate faster procedural actions and trials. Administrative Courts decisions have a direct influence in creating an appropriate climate between public administration and private entities and solving with efficiency the disputes between them. This reform was considered as necessity with the sole purpose of creating a more peaceful climate for the progress of the reports between Public Administration and Private Entities. The purpose of this paper is to investigate the impact of administrative court on Albanian private entities. The Law on Administrative Courts has defined and directed the limits of judicial control over the legality of administrative actions towards three aspects: facts, time and discretionary power. The paper analyzes the activity of the Administrative Court and innovations of this law. Judicial control constitutes the strongest guarantee for individuals in their dealings with the administration in particular and with any public powers in general that their rights will be upheld. At the end, the paper presents the findings produced by survey data collected.*

***Keywords****: administrative court, private entities, judicial control, access to justice.*

***JEL Classification****:* K23, K41

## 1. Introduction

In Albanian administrative law, the judicial control, as one of the main types of control through which the activity of the public administration must undergo, should be understood as a compliance control of administrative acts with the constitutional, conventional and legal provisions. This control is what the legal doctrine calls the judicial review of administrative acts or the control over the legality.[2] The Administrative Court System is a relatively new addition to the Court System of Albania, having been established in 2012, by virtue of Law no. 49/2012 *"On the organization and functioning of administrative courts and administrative disputes"*. The law has approved the creation and functioning of

[1] Linert Lireza - Head of Law Department, Faculty of Political Science and Law, University Aleksander Moisiu, Durrës, Albania, linert_lireza@yahoo.com, ORCID ID: https://orcid. org/0009 -0000-6182-1265.

[2] Ermir Dobjani, E. Toska, E. Puto, Erajd Dobjani, *Administrative Law, Control over the Public Administration*, EMAL, Tirana, 2013, p. 74.

the Administrative Courts, at all the three levels of judiciary, including the Supreme Court's Administrative College. The first-instance administrative courts are organized in terms of their number and territory like appeal civil courts, specifically located in six cities: Tirana, Shkodra, Durres, Korca, Gjirokastra and Vlora. While, the Appeal Administrative Court is a single institution, headquartered in Tirana. Administrative Courts aim to strengthen the justice system of the country, improve access to justice for citizens and businesses and facilitate faster procedural actions and trial.[3] The implementation and the procedure of specialized courts for the judgment of administrative cases influenced the performance of administrative bodies, and as a consequence it creates conditions to improve the climate for the business activity, by increasing the possibility to appeal to an administrative act or decision considered unlawful or unfair. Administrative courts, like every other institution, are composed of institutional tools as well as legal tools. Different models of institutional design using different institutional tools have been used over time and differ across countries. A court's institutional characteristics are the different manners in which a court as a whole can be arranged; they include the ascription of the court (judiciary or executive branch), specialization of judges, tenure, appointment processes, salary protection, and any other independence guarantee the legal system provides. A court's legal tools include all the rules that administrative judges may use to decide cases. These rules include procedural and substantive rules that differ from one system to the other[4].

## 2. Models of administrative adjudication

The design of administrative courts is not uniform and varies over time and across countries. As a result, there are different models of administrative adjudication[5]. In order to explain these models, we will first define administrative justice to better describe these models. Although scholars have studied administrative adjudications for years,[6] the term administrative justice is recent. Michael Adler defines administrative justice as the justice inherent to administrative decision-making. This definition implies procedural fairness as well as substantive justice. Mashaw describes administrative justice as "the qualities of a decision process that provide arguments for the acceptability of governments' decisions and it is referred to initial and internal decision-making". Other authors describe administrative justice as that concerned with the extent to which individuals affected by agencies' decisions are treated fairly and have the ability to redress

[3] OSCE Presence in Albania Report, 2013.
[4] Sergio López-Ayllón, Adriana García, Ana Elena Fierro, *A Comparative-Empirical analysis of administrative courts in Mexico*, „Mexican Law Review", Vol. 7, Issue 2, 2015, p. 27.
[5] Tom Mullen, *A Holistic Approach to Administrative Justice?* In: Adler, M. (ed.) *Administrative Justice in Context.* Hart Publishing: Oxford, 2010, pp. 383-420.
[6] Sergio López-Ayllón, Adriana García, Ana Elena Fierro, *op. cit.*, p. 28.

grievances in cases of a breach of fairness.[7] Civil law tradition administrative justice is generally associated with all administrative adjudication processes.

Regarding administrative justice functions, Buck, Kirkham and Thomson proposed a typology based on three rings that mark its functional landscape.[8] The inner ring, "getting it right," refers to the initial decision-making process by public bodies, encompassing the relevant law and procedure. The middle ring, "putting it right," refers to the whole range of redress mechanisms available to citizens who question the initial decision-making process (courts, tribunals, ombudsman or other independent complaint-handlers). The outer ring, "setting it right," refers to the network of governance and accountability relationships surrounding both the public bodies tasked with first-instance decision-making and those responsible for providing remedies[9].

Following the above mentioned authors, we will use administrative justice as a broad term that encompasses the three main functions/rings and will focus on the middle ring related to the different mechanisms of redress. Some scholars classify tribunals as specialized mechanisms and courts as general ones. Tribunals are sometimes referred to as court substitutes, in that they have the power to make legally enforceable decisions, but they are regarded as having the advantages over courts in terms of speed, low cost, informality and expertise.[10] Other scholars[11] classify tribunals as redress mechanisms within the executive branch and courts as mechanisms within the judicial branch. Regarding the purpose of administrative redress mechanisms, scholars agree with the idea that this purpose is dual: (i) individuals' redress and (ii) the achievement of better standards of public service and administration[12] fulfill these purposes, administrative courts should decide specific cases in which one of the parties is the government, acting as the problem-solver, and working like a fire alarm system to allow courts to monitor agency performance and create incentives so that bureaucrats do not harm citizens.[13]

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[7] Michael Adler, Understanding and Analyzing Administrative Justice, Hart Publishing 2010. p. 89.
[8] Trevor Buck, Richard Kirkham, Brian Thompson, *The Ombudsman Enterprise and Administrative Justice*, London, 2010. p. 48.
[9] Sergio López-Ayllón, Adriana García, Ana Elena Fierro, *op. cit.* p. 30.
[10] Diane Longley, Rhonda James, *Administrative Justice: Central Issues in UK and European Administrative Law*, Cavendish Publishing Limited, 1999, p. 74.
[11] Cane, Peter, *Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals* in Rose-Ackerman, Susan; Lindseth, L. Peter (eds), *Comparative Administrative Law*, Edward Elgar Publishing, 2010, p. 87.
[12] Sir Andrew Leggatt, Tribunals for Users: One System; One Service, Stationery Office, 2001, p. 221.
[13] Marc Hertogh, Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands, „Law & Policy", Vol. 23, No. 1, January 2001, p. 48.

### 2.1. Institutional design of administrative courts

Two institutional designs characterize most administrative courts: one in which specialized judges operate within the executive branch and one in which common-law judges provide judicial review of administrative decisions. The French model represents one of the extremes of the spectrum because, since its origins, administrative adjudication has been a function placed within France's executive branch. French law prohibits judges from controlling executive activities.[14] "French tradition refused to allow courts to review administrative decisions citing the principle of separation of powers but really was being worried of any limitation to the exercise of executive power."[15] The designers of the French model believed that the executive branch is best suited to decide on substantive issues in the relationship between government and citizens.

The common-law tradition, in contrast to the French model, arises from the principle that government and citizens should be judged by the same rules and under equal conditions. Therefore, any authority can be brought before the common courts and judged. The judiciary has the power to protect the Rule of Law and the Constitution; any dispute in the law should be brought before it. This is an appellate review model.

The US courts' role in reviewing agency action reflects a bipolar view of administrative action.[16] The first view stated that courts should review administrators' actions de novo. The second view stated that no judicial review should take place, and that Congress and the agencies should analyze these cases. England also follows a common-law tradition. In this tradition, the separation of powers dictates that the general regime is part of the rule of law, and public authorities

[14] Patrick Rambaud, *La justicia administrativa en Francia (I): introducción: organización, medidas cautelares*, in Javier Barnés (coord.), *La justicia administrativa en el derecho comparado*, Civitas, 1993, pp. 277-302.

[15] Roberto Caranta, Evolving Patterns and Change in the EU Governance and their Consequences on Judicial Protection, in R. Caranta and A. Gerbrandy, *Traditions and Change in European Law*, Europa Law Publishing, 2011, p. 172.

[16] Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, „Columbia Law Review", vol. 111, No. 5, June 2011, p. 941.

have no special legal regime.[17] As noted above, administrative tribunals following each model have proliferated. The cases of Germany[18], Italy[19], Spain[20], Japan[21] and Morocco[22] exemplify this in that administrative adjudication has changed over time in all of these countries, all of which have placed it within the judiciary at some times and within the executive branch at others. In Albania, since the establishment of administrative courts, specialized judges provide judicial review of administrative decisions. However, institutional design of administrative courts also includes variables related to the independence of judges. The variables affecting court independence include the process of judge's appointments, tenure, and salary security.

### 3. An overview of administrative courts in Republic of Albania

The Constitution of the Republic of Albania is prohibited the creation of exceptional courts. This reflected in Article135, paragraph 2 states: "The Assembly may by law establish the Court for specific fields, but in no case Exceptional Courts". This is reflected in the third paragraph of Article 11 of Law 8436, dated 28.12.1998 *on the Organization of the Judiciary in the Republic of Albania*. In the context of reforms in the field of Justice and the Legal Administrative Reform in Albania suggested by the European Union conditions have been set for obtaining the Status of an EU candidate country. One of these conditions was also the establishment of the Administrative Court, as the Administrative Justice plays an important role for the economic development of a country. The Law no. 49/2012 *"on the organization and functioning of administrative courts and administrative disputes"* provides the general principles of administrative adjudication and procedural norms relating to the jurisdiction, the competence of the Ad-

[17] William Wade, Hans Ragnemalm, Peter L. Strauss, *Administrative Law the Problem of Justice*, Giuffrè, 1991, p. 89.

[18] The German original model of administrative justice was based on the French system. Currently German administrative courts are specialized, but form part of the judicial branch. See Karl-Peter Sommermann, La justicia administrativa alemana, in Javier Barnés (coord.), *op. cit.*, p. 120.

[19] Italy has also tried both systems. Before 1865, administrative justice in Italy followed the French model. After 1865, administrative justice was part of ordinary justice made by generalist judges. In 1889, administrative justice was mixed. This implied that some administrative cases were assigned to a State Council (like the French system) while the judicial branch courts solved the rest of the cases. Currently, specialized courts within the executive branch provide administrative justice in Italy, but rules to provide independence to judges are in place. See Giandomenico Falcon, Italia. La justicia administrativa, in Javier Barnés (coord.), *op. cit.*, p. 220.

[20] Escribano Collado, España. Técnicas de control judicial de la actividad administrativa, in Javier Barnés (coord.), *op. cit.*, p. 360.

[21] Takenori Murakami, La justicia administrativa en Japón, in Javier Barnés (coord.), *op. cit.*, p. 598.

[22] Abderramán El Bakriui, La reforma de la justicia administrativa en Marruecos, in Javier Barnés (coord.), *op. cit.*, p. 618.

ministrative Courts, the composition of the court under the trial rates and the nature of the cases, as well as procedural stages of the trial until the execution of the decision. So, in general, this law is procedural in nature, but not at the expected level, because no earlier than two months after the entry into force of this law, it was made the adjustment of the legal space by the Supreme Court with the unifying decision with no. 3, dated 06.12.2013, concerning the competence of the ordinary courts to review the administrative cases that were on trial, by shifting these cases to the administrative Court, notwithstanding the trial phase in which these cases were found; decision which addressed the case of the implementation of substantive and procedural law.[23]

In the Law no.49/2012 for the establishment of special Administrative Courts of First Instance, the Administrative Court of Appeal and the College in the Supreme Court, for the judgement of administrative disagreements and the Organization of Administrative Justice, it addresses with priority the principles of Administrative Judgment in general, but it devotes importance to:

*1. Effective Protection of the subjective rights of individuals and their legitimate interests.*

*2. The right to a fair trial and within reasonable terms.*

*3. Principle of trial in absentia without the presence of the plaintiff, as a result of the failure of the parties to appear in the process. The Administrative Court In the following judges on written acts and the failure of the parties to appear in the process does not constitute a reason to the court recess.*

*4. The burden of proof, the obligation of the party that truly has the evidences to submit by imposing sanctions on parties that reject their submission.*

### 4. The impact of the Law no. 49/2012 on private entities

The establishment of Administrative Court System brings new innovations under the adjudication of the administrative disputes regarding the obligation of public authorities to present the evidence that enabled the issuance of acts or performance of administrative actions, which afterwards have brought the violation of legal person's rights. Establishment of this court in Albania brings an innovation within the judgment of the Administrative Disputes, regarding the obligation of public bodies to present the evidence which provided issuance of acts or performance of administrative actions, which then have brought the violation of legal persons' rights (including private entities)**.** Public authority has the obligation to prove the legitimacy of administrative acts. Public authority has the obligation to prove the legitimacy of operations in labor relations, from which the dispute has arisen, subject to judgment. In other cases, the party has the obligation to prove the facts on which bases its claim. But even in these cases, the Court

[23] Arjan Qafa, *An Overview of the Administrative Court and of the Law of Its Establishment in the Republic of Albania,* „Academic Journal of Interdisciplinary Studies", Vol. 3, No. 3 (2014), p. 180.

primarily, with an interim decision, may decide shifting the burden of proof to the public body, when there are reasonable suspicions, based on the written evidence, certifying that the public body hides or does not intentionally present facts and evidence relevant to the dispute resolution.

While the failure of private entities to appear in session does not constitute a due for the cessation of the adjudication of the case. The acts and evidences may be considered by the Court in the consultation room without the presence of the parties, which is not a due for their review. From the other side, the law creates the possibility of speedy trial within reasonable terms. Administrative Court judgment provides legal protection of rights, constitutional and legal freedoms and interests of various entities, through a fair trial and within quick and reasonable terms. In this context, the law allows the Administrative Court to carry out some urgent operations without even the presence of the parties, such as defining security measures of the claim, assigning of experts.

At least, the Law no. 49/2012 foresees another interesting innovation, which was not applicable before. Some of the decisions of the court are not appealable, such as:

a. the penalty for administrative violations, amounting to less than twenty times the value of the minimum wage;

b. the administrative act that consists in monetary obligations amounting to less than twenty times the value of the minimum wage;

c. the administrative act that has refused to deliver a monetary obligation amounting to less than twenty times the value of the minimum wage; and

d. administrative disputes stemming from social and health insurance, economic aid and disability payments, worth less than twenty times the value of the minimum wage.

### 4.1. Case study: Albania

The research design includes a survey of private entities that have appealed administrative decisions to administrative court. The sample consists of private entities in Albania that have had a case by administrative court in the past year. Data was collected using an online survey. The survey included questions about the type of case, the outcome of the case, and the impact of administrative court on the private entity. The data was analyzed using descriptive statistics.

*Results*. The survey yielded responses from 100 private entities that had appealed administrative decisions to administrative court. The results show that 70% of respondents reported that administrative court had improved their access to justice. While 60% of respondents, reported that administrative court had reduced corruption in their case. From the other side, 50% of respondents reported that administrative court had improved the legal environment for their business. The results also show that the most common type of case by administrative court

was related to tax issues. Therefore, the findings of the study suggest that administrative court has a positive effect on private entities in Albania.

First, private entities can have confidence in the legal system and the ability of administrative court to resolve disputes fairly and efficiently. Second, private entities can use administrative court as a means to challenge administrative decisions that are unfair or unlawful. Third, private entities can benefit from the improved legal environment that results from the decisions of administrative court.

## 5. Conclusions

It is obvious the positive progress from the establishment of administrative courts. A considerable number of issues remain to be solved and a legal debate would be valid. The effect of administrative court on Albanian private entities is significant, with the court providing an avenue for resolving disputes between private entities and the government. The administrative court has a positive effect on private entities, improving access to justice, reducing corruption, and improving the legal environment for business. The findings of the study provide important insights into the effect of administrative court on Albanian private entities. By improving access to justice, reducing corruption, and improving the legal environment for business, administrative court plays a critical role in promoting the rule of law and democratic governance in Albania.

It is important for policymakers in Albania to continue investing in administrative court to improve its capacity and efficiency. Private entities should also continue to make use of administrative court as a means to challenge administrative decisions that are unfair or unlawful. Future research could further investigate the impact of administrative court on other stakeholders such as the government and civil society. The findings survey of private entities has implications for policymakers in Albania. Policymakers can use the findings to identify areas for reform and improvement in the administrative court system. From the other side, the policymakers can also use the findings to justify investments in administrative court to improve its capacity and efficiency.

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# Authority of *Res Judicata* of the Decision of the Administrative Court before the Criminal Court

Lecturer **Costel Cristinel GHIGHECI**[1]
PhD. student **Vlad Mihai NEAGOE**[2]

***Abstract***

*A long-standing issue discussed in judicial practice is that of the effects that a final judgment of an administrative court should have when it has decided a question of fact or law that would be relevant to the existence of an offence that is the subject of a criminal case. The restriction before the criminal court of the authority of res judicata of a judgment of the civil court relating to a preliminary issue in criminal proceedings – in view of valid, substantial and compelling reasons, such as the lack of identity of the parties (including the prosecutor), the differences between the two actions, the distinction between the legal interests protected and the application of the principle that fraud corrupts everything (fraus omnia corrumpit) – is without prejudice to the principle of legal certainty as the basis of res judicata. From an objective point of view, the criminal court, which has the benefit of specific procedural means and special procedural safeguards, would have the power to overturn the civil court's ruling in order to restore legality and not to abolish the legal relationships established on the basis of the civil judgment. From a subjective point of view, the person concerned would have no legitimate expectation of opposing in criminal proceedings the right he had won before the civil court, since the fundamental differences between criminal proceedings and civil proceedings are well known.*

***Keywords****: res judicata, preliminary issue in criminal proceedings, administrative litigation, suspension of proceedings.*

***JEL Classification:*** K14

## 1. Introduction

An issue often discussed recently in judicial practice is that of the effects that a final judgment of an administrative court should have when it has decided a question of fact or law that would be relevant to the existence of an offence that is the subject of a criminal case. There are situations in which the parties appeal to the administrative court against acts which form the basis for the initiation of criminal proceedings against those who are also parties to the administrative proceedings or against other natural or legal persons with whom they have a connection (e.g., the legal person in the administrative proceedings has the defendant

[1] Costel Cristinel Ghigheci - Transylvania University of Brasov; Judge of the Court of Appeal Brasov, Romania, cristinelghigheci@yahoo.com.
[2] Vlad Mihai Neagoe - „Titu Maiorescu" University of Bucharest; Judge of the Court of Appeal Brasov, Romania, vlad_mihai03@yahoo.com.

in the criminal proceedings as a partner, shareholder or director). The factual or legal issues before the administrative court may be collateral issues, which only affect the amount of the damage caused by the offence, or they may be issues which are related to the very existence of the offence.

In order to better illustrate the complexity and importance of the legal issue under discussion, we will briefly present a pending criminal case in the field of health and safety at work (labor protection), which is currently under appeal, at which stage the Court of Justice of the European Union has even been asked to give a preliminary ruling on the interpretation of Article 1(1) and (2) and Article 5(1) of the Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, published in the Official Journal of the European Communities (OJEC) No. L. 183/1989[3].

In this case, the prosecution alleged in the indictment that, at the end of working hours, the defendant gave the victim worker under his supervision a work order consisting of carrying out a specific intervention (changing an outdoor light fitting) without taking occupational health and safety measures, resulting in the death of the victim worker by electrocution.

In acquitting the defendant of the offences of failure to comply with legal occupational safety and health measures and manslaughter, the first instance held that there was reasonable doubt as to the work order of the defendant manager of the workplace towards the victim worker and that the event occurred after the end of working hours, considering that it could not be qualified as an accident at work.

Before the first court pronounced the criminal sentence, another procedure took place before the administrative court, in which the employer of the victim worker and of the defendant manager of the workplace, who was also a civilly liable party in the criminal case, brought an action against the Territorial Labor Inspectorate of Brasov, requesting the annulment of the investigation report drawn up by the latter. In the grounds of the judgment of the administrative court upholding the action[4] it is stated that, in order for there to be an accident at work, the injury must have occurred during the work process or in the performance of work duties, and it is clear from the statements of the witnesses heard that the incident took place outside working hours and there is no evidence to confirm that the foreman in charge of the workplace (the defendant in the criminal case) gave the verbal order to carry out the unauthorized intervention. The

[3] Decision no. 154 of 24.12.2021, pronounced by the Rupea District Court in case no. 1796/293/2020 (unpublished), appealed to the Court of Appeal of Brasov, Criminal Section, procedural framework in which the matter was referred to the Court of Justice of the European Union by judgment of 24.06.2022 (unpublished), registered under no. C-792/22.

[4] Decision no. 56 of 10.02.2021, pronounced by the Court of Appeal Sibiu - Second Civil, Administrative and Fiscal Division (unpublished).

judgment thus delivered was appealed by the defendant Territorial Labor Inspectorate, but the appeal was annulled on the grounds that it did not fall within the grounds of illegality of public policy expressly and restrictively regulated by the Civil Procedure Code, holding that the grounds of illegality cannot be upheld on appeal[5].

**2. Decisions that may be handed down by the criminal courts in connection with preliminary questions finally settled by the administrative courts**

In French law, the civil court is not obliged to suspend the trial unless it is vested with a civil action requesting the reparation of the damage resulting directly from the crime investigated separately; in the other cases the suspension of the trial is optional[6].

Romanian law provides for the possibility of *suspending the trial* before the administrative court, following the well-known rule that the criminal law has precedence over the civil law (*le criminel tient le civil en l'état),* enshrined in Article 413 paragraph 1 point 2 of the Romanian Civil Procedure Code[7]. If this text does not prove effective in preventing a final civil judgment from being handed down, the criminal courts faced with such judgments have three possible solutions: to always take account of the issues determined by the judgments of the administrative courts, to never take account of these judgments, or to take them into account only in cases where they decide on specific issues which do not fall within the typical elements of the offences referred to them.

As a famous American judge stated: "… despite frequent statements to the contrary, we do not really look for subjective legislative intent. We look for a sort of «objectified» intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*"[8].

The interpretation of legal texts will contribute to the correct identification of the legislative intent. We believe that the analysis of the purpose and consequences of the previously mentioned legal provision is particularly important

[5] Decision no. 692 of 14.06.2021, pronounced by the Court of Appeal Alba Iulia, Administrative and Fiscal Division (unpublished).

[6] Alain Coeuret, Élisabeth Fortis and François Duquesne, *Droit pénal du travail. Infractions, responsabilités, procédure pénale en droit du travail et de la sécurité sociale,* Paris: LexisNexis, 2016, p. 115.

[7] Art. 413 paragraph 1 point 2 of the Romanian Civil Procedure Code has the following content "The court can suspend the trial: […] 2. when the criminal investigation has started for a crime that would have a decisive influence on the decision to be given, if the law does not provide otherwise".

[8] Antonin Scalia, *A Matter of Interpretation*, Princeton and Oxford: Princeton University Press, 1997, p. 17.

for achieving this goal[9].

*Arguments for giving full effect to final judgments of the administrative courts before the criminal courts.* The text that could have contributed to the establishment of limits within which the decisions of the administrative court are binding on the criminal courts is Art. 52 paragraph (3) of the Romanian Criminal Procedure Code - according to which "Final judgments of courts other than criminal courts on a preliminary issue in criminal proceedings have res judicata authority before the criminal court, except for circumstances concerning the existence of the offence."

However, this legal provision was subject to an analysis by the Constitutional Court of Romania, which ruled in Decision No 102/2021 of 17 February 2021[10] that the phrase "except in circumstances relating to the existence of the offence" in the provisions of Article 52 paragraph (3) of the Romanian Criminal Procedure Code is unconstitutional.

In order to do so, the Constitutional Court of Romania has held that the criminal courts should always take into account issues finally decided by the civil courts, including in cases where they relate to factual or legal circumstances which concern the very existence of the offence.

Thus, the Constitutional Court of Romania stated in the reasoning of the decision that if the criminal court could re-examine questions relating to the existence of aspects that condition the applicability of the incriminating rule, the problem would arise of "potential violation of the principle of res judicata of final civil judgments by the criminal court and, as a result, the problem of violation of the principle of security of legal relationships" (paragraph 33). It was also argued that in this way "the criminal court may pronounce decisions contrary to those which have become final, with a serious impairment of the principle of res judicata, which is a guarantee of the right to a fair trial as laid down in Article 6 of the Convention" (paragraph 44).

The same arguments were also put forward by the European Court of Human Rights in its judgment of 21 October 2014 in Lungu v Romania, in which it ruled that, by going back on a matter in dispute which had already been settled and which had been the subject of a final judgment and in the absence of any valid reason, the national court had breached the principle of the certainty of legal relations, and therefore the applicants' right to a fair trial, within the meaning of Article 6(1) of the Convention, had been infringed. The European Court, even if it accepted that there was neither identity of parties nor identity of subject-matter of the two domestic proceedings, found in that case that the two sets of proceedings (tax and criminal proceedings) nevertheless concerned the same issue which

[9] Stephen Breyer, *Making Our Democracy Work. A Judge's View*, New York: Vintage Books, 2010, p. 88; Stephen Breyer, *Active Liberty. Interpreting Our Democratic Constitution*, New York: Vintage Books, 2005, p. 85-88.

[10] Published in the Official Monitor of Romania No. 357 of 7 April 2021.

was decisive for their resolution (namely the legal classification of the same operations of conversion and resale of tyres).

The courts of the European Union have modeled some general principles, extracted from the treaties, among them the principle of legal certainty[11].

Romanian doctrine has stressed that the principle of authority to act is based on the need to respect legal certainty, since the social interest requires that the decisions of the courts in the disputes submitted to them be considered as expressing the truth (*res judecata pro veritate habetur*), so that litigious situations cannot be maintained indefinitely, its source being found in Roman law itself, as it is written in Justinian's Code that a cause once ended must not be restarted (*nec enim instaurari finita rerum iudicatarum patitur auctoritas* - CJ.7.52.5). Otherwise, cases would resemble Penelope's web[12].

As has been said, "in short, res judicata means that a litigious matter settled cannot be retried - *contra rem judicatam non audietur*"[13].

In French law, there is the principle of res judicata of criminal judgments in civil proceedings, but not of civil judgments in criminal proceedings[14].

*Arguments for not granting full effect before the criminal courts to final judgments of the administrative courts. Lack of identity of the parties.* With regard to the condition of triple identity, the classical Romanian doctrine has shown that: "therefore, even if in both lawsuits, there would be identity of object and cause, there is no res judicata, if the parties are not, legally speaking, the same. Judgments, like agreements, produce their effects only between the parties to the dispute; they neither benefit nor harm third parties (*nec inter alios res judicata alii prodesse aut nocere solet*). ... Court judgments are therefore individual and relative in character; like agreements, they bind only the parties who have appeared in the case, but not those for whom they are *res inter alios acta*".

Also there, with regard to the need to fulfil the triple condition, it speaks of "the principle of the relativity of the thing judged"[15].

As a preliminary point, it should be emphasized that the invocation of the res judicata effect of a civil judgment in criminal proceedings, both as a negative aspect of the res judicata exception and as a positive aspect of the presumption of truth, is *a matter of public policy*, regardless of the procedural position of the parties involved in the proceedings. It is thus unanimously accepted that, because of its importance and the subject matter to which it applies, the principle is

[11] Paul Craig and Grainne de Búrca, *Dreptul Uniunii Europene. Comentarii, jurisprudenţă şi doctrină*, Bucharest: Hamangiu, 2017, p. 123.
[12] Ion Deleanu, *Tratat de procedură civilă*, Bucharest: Universul Juridic, 2013, Vol. 2, p. 71.
[13] Xavier Groussot and Timo Minssen, "Res Judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality?" (2007) 3 European Constitutional Law Review, p. 385-417.
[14] Alain Coeuret, Élisabeth Fortis and François Duquesne, *op. cit.*, p. 118-129.
[15] Dimitrie Alexandresco, *Explicațiune teoretică și practică a dreptului civil român în comparațiune cu legile vechi și cu principalele legislațiuni străine*, Iași: Tipografia Națională, 1903, Vol. 7, p. 539 and 562.

clearly a matter of public policy, which is also recognized by the old French doctrine, which has shown that "in criminal matters the exception of res judicata is entirely and essentially a matter of public policy, the maxim *nemo auditur perire volens* applying"[16].

As regards the negative effect of res judicata, it could be considered that the plea of res judicata cannot be invoked because the condition concerning the *identity of the parties* is lacking, since the judgment of the administrative court was not delivered in a case in which the civil parties in the criminal proceedings were also parties. They are prevented from having access to justice in order to defend rights inherent in European Union law, both in the case of the victim of the crime and in the case of his successors in title when he has died. In this respect, the European Court considers that: "access to justice, but only for the purpose of having an action declared inadmissible by operation of law, does not comply with the imperatives of Article 6 (1) of the Convention and that the applicant was thus deprived of the clear and concrete possibility of having access to a court to rule on his/her challenge to civil rights and obligations"[17].

It can be seen that the Constitutional Court's decision on Article 52 paragraph 3 of the Romanian Criminal Procedure Code did not make any distinction in this respect, considering that the authority of res judicata of the civil judgment is imposed before the criminal court regardless of the parties in the two proceedings, the Constitutional Court expressly stating that: "the principle of res judicata prevents not only the retrial of a completed trial, having the same subject-matter, the same cause of action and between the same parties, but also contradictions between two judgments, in the sense that the rights recognized by a final judgment may not be contradicted by a subsequent judgment given in another trial" (para. 35 of Decision No. 102/2021).

However, applying the relevant legal text as it stands after the constitutionality review and taking into account these binding considerations of the decision of the Constitutional Court, it could be noted that there is no longer any exception concerning the authority of res judicata of the civil judgment on preliminary issues before the criminal court, not even from the point of view of the identity of the parties, which would lead to the absolute authority of the civil judgment on the preliminary issue in the criminal proceedings.

Moreover, the prosecutor, as a party to the proceedings in the broad sense (in Romanian criminal proceedings, the prosecutor has the quality of participant, and not as a party in the narrow sense, which is only the case of the accused, and the civil party), does not participate in the civil proceedings (*lato sensu*) in which the decision on the preliminary issue in the case is pronounced, the doctrine emphasizing that: "the court decision is not enforceable against the prosecutor, since

[16] Paul Lacoste and Ph. Bonnecarrère, *De la Chose jugée en matière civile, criminelle, disciplinaire et administrative*, Paris: Librairie de la société du recueil Sirey, 1914, p. 407.
[17] Decision of 26 January 2006 of the ECHR in Lungoci v. Romania (Application No. 62.710/00), paragraph 43.

he does not acquire the status of party to the proceedings if he participates in the trial, under the conditions allowed by Article 92 of the Civil Procedure Code[18]..., remaining alien to the substantial legal relationship resolved by the judgment"[19].

However, beyond the lack of identity of the parties, the domestic doctrine on the matter has noted that: "there are other elements of res judicata than those indicated in Article 431 para. 1 of the Civil Procedure Code[20], as there is no identity of object (application of a penalty and, respectively, civil compensation), identity of cause (violation of criminal law and, respectively, violation of civil law) and, often, no identity of parties (the Public Prosecutor's Office, respectively, the plaintiff), the most that can be said is an identity on some contentious issues (*aedem quaestio*)"[21].

As regards the positive effect of res judicata, on the basis of which the civil judgment is presumed to reflect the truth of the case, as is apparent from the relevant legal provisions laid down in Article 431 paragraph (2) of the Romanian Civil Procedure Code[22] and Article 435 paragraph (2) of the Romanian Civil Procedure Code[23], although it seems that the triple identity of elements is not necessary, the civil judgment may be opposed to third parties in another (civil) trial, but with the possibility of proof to the contrary. All the more, therefore, the civil judgment on a preliminary issue in *criminal* proceedings should not be absolute, given the autonomy and specific features of criminal proceedings in relation to all other legal actions, as will be explained below.

### 3. Different principles characterizing administrative and criminal proceedings

In French law, the administrative procedure is clearly inquisitorial, the judge having sufficient powers to restore the balance[24]. In Romanian law, administrative cases are tried according to the civil procedure, which is accusatory, in

[18] Article 92 paragraph 1 of the Romanian Civil Procedure Code has the following content: "The prosecutor can initiate any civil action, whenever necessary, to defend the rights, freedoms and legitimate interests of minors, persons benefiting from judicial counseling or special guardianship and the disappeared, as well as in other cases expressly provided by law".

[19] Gabriel Boroi and others, *Noul Cod de procedură civilă - Comentarii pe articole*, Bucharest: Hamangiu, 2016, Vol. 1, p. 963.

[20] Article 431 paragraph 1 of the Romanian Civil Procedure Code has the following content: "No one can be sued twice in the same capacity, under the same cause and for the same object.".

[21] Ion Deleanu, *Tratat de procedură civilă*, p. 99.

[22] Article 431 paragraph 2 of the Romanian Civil Procedure Code has the following content: „Any of the parties may oppose the previously adjudicated matter in another litigation, if it is related to the settlement of the latter."

[23] Article 435 paragraph 2 of the Romanian Civil Procedure Code has the following content: "The decision is enforceable against any third party as long as the latter does not, under the law, provide evidence to the contrary."

[24] Jean-Louis Bergel, *Théorie générale du droit*, Paris: Dalloz, 2012, p. 365.

the tradition of the Napoleonic codes; the criminal procedure has a hybrid character, the investigation phase being inquisitorial, and the trial phase having an accusatory character[25].

The decision of the administrative court is rendered in a civil process (*lato sensu*), which is characterized, by its nature, by specific principles, fundamentally different from those of the criminal process. Thus, in civil proceedings, the availability of the civil action is specific, which is initiated at the initiative of the interested party, who establishes the procedural framework deemed necessary in terms of the parties, the subject-matter and the cause of the civil action, the parties being free to base their claims or formulate their defenses as they see fit. Moreover, there are judgments acknowledging the plaintiff's claims (art. 436 paragraph 1 of the Romanian Civil Procedure Code[26]) or those confirming an agreement between the parties (so-called *expedient judgments*, in art. 438 of the Romanian Civil Procedure Code[27]), on which the doctrine is divided as to whether or not they bear the authority of res judicata, especially in the silence of the law in this respect[28].

On the contrary, in criminal proceedings, criminal action is of a completely different nature, being a public law action (a state action exercised by bodies specially empowered by procedural and procedural provisions, such as the Public Prosecutor's Office, which exercises its powers through prosecutors constituted as public prosecutors' offices), with a binding character (in principle, with the exceptions provided for by law, the public prosecutor is obliged to initiate criminal proceedings in the cases provided for by law), unavailable (once initiated, it cannot be withdrawn), indivisible and personal (it concerns all the participants in the offence and only them personally).

For these reasons, it has been pointed out in classical criminal Romanian doctrine that: "as a general rule, the civil judgment has no bearing on the criminal, and the reason is that the public action cannot be bound by settlements or even judgments between private parties. The civil judgment between two persons is *res inter alios judicata* with the Public Prosecutor's Office, and therefore it cannot be opposed to it. Our Court of Cassation rightly said in 1882: «In general, judgments given in civil cases have no influence on the criminal courts». It is only natural that this should be so, and that the civil judgment should not be opposed even by the party who has appeared in the civil proceedings, for it may be that he has neglected the civil proceedings, believing that only civil interests

[25] Ibid, p. 365-366.

[26] Article 436 paragraph 1 of the Romanian Civil Procedure Code has the following content: "When the defendant has fully or partially recognized the plaintiff's claims, the court, at the latter's request, will issue a decision to the extent of the recognition."

[27] Article 438 paragraph 1 of the Romanian Civil Procedure Code has the following content: "The parties can appear at any time during the trial, even without having been subpoenaed, to ask for a judgment to be given to confirm their transaction."

[28] Dimitrie Alexandresco, *Explicațiune teoretică și practică a dreptului civil român în comparațiune cu legile vechi și cu principalele legislațiuni străine*, p. 430.

are involved, and then be bitterly surprised when the civil judgment is opposed in the criminal proceedings as a judgment. It has been admitted that even if a civil judgment has declared that the deposit did not exist, it does not preclude public action for violation of this deposit"[29].

In this context, given the different nature of the two types of legal proceedings, it is clearly in the interest of the parties responsible to follow the legal route in which the general interest is less or not at all represented or in which one of the opposing parties does not participate at all, given that the judgment given in such circumstances would in any event be res judicata in the other proceedings. Thus, the civil judgment would be handed down in a case in which the public interest is represented only by the administrative authority in charge and not by the Public Prosecutor's Office through public prosecutors, the only institution which, according to Article 131(1)(b) of the Romanian Constitution, is entitled to represent the public interest in the proceedings in question. Moreover, the opposing parties, i.e., the civil parties in the criminal proceedings, do not as a rule participate in the civil proceedings in which a final decision would be taken on the preliminary issue in the criminal proceedings.

In addition, it is necessary to underline *the guarantees specific to criminal proceedings*, which differentiate them from civil proceedings (*lato sensu*), as they emerge at the conventional level from the ECHR case law on Art. 6 of the Convention, such as the active role of the criminal court and the principle of non-disclosure in the administration of evidence in the criminal case, the right of the accused to remain silent and not to incriminate himself (with the addition of domestic law on the prohibition of drawing from this any negative consequences for the accused), the obligation of double jurisdiction on the merits and, finally, the publicity of the criminal trial.

### 4. The English doctrine

As pointed out in the English doctrine: "In a complex institution such as the criminal process, which involves many different actors, procedure has a coordinating function. It allows different decision makers to work together by giving them some knowledge of what other actors will have done. Set procedures also allow for transparency: they allow rules to be made accessible to the public as well as to the actors in the process. Thus, procedure should serve the rule of law, by making decisions more consistent, more predictable and less arbitrary."[30].

Such procedural safeguards could be completely denied to a defendant if, in the reverse hypothesis that the action were dismissed by a final civil judgment, we were to consider - along the same lines of reasoning - that this judgment

[29] Ion Tanoviceanu and others, *Tratat de drept și procedură penală*, Bucharest: Tipografia Curierul Judiciar, 1924-1927, Vol. 5, p. 747.
[30] Andrew Ashworth and M. Redmayne, *The Criminal Process*, Oxford: Oxford University Press, 2010, p. 22.

would be res judicata before the criminal court (bearing in mind that res judicata also applies to such judgments dismissing the action). This solution would put the accused in the absurd situation of being deprived of any possibility of defense in the criminal trial, given the need to respect the previous decision of the civil court on a prior issue in the criminal trial, to his disadvantage, which would thus turn the criminal trial into *justice à la Piso*.

In addition, even the presumption of guilt in fiscal matters is accepted, which led to a reversal of the burden of proof, criticized in the doctrine[31]. However, in the criminal process, such a presumption cannot be accepted, nor can a conviction be pronounced based on it.

With regard to *the principle of immediacy (direct adduction of evidence) in criminal proceedings*, the criminal court is obliged, in order to comply with this principle, to make every effort to bring witnesses before the court and to hear them directly, in particular when their statements have a specific role in the case, in order to form a sound perspective on the credibility of witnesses in criminal proceedings (*Beraru v. Romania* and *Cutean v. Romania*). That is why, in criminal cases, the courts summon and hear witnesses directly, whereas hearing them could be rejected as pointless by the civil court.

It should also be stressed that the criminal court has at its disposal, in addition to the application of the special guarantees of the criminal proceedings mentioned above, *much more effective procedural means for the discovery of the truth and the fair resolution of the case*. For example, special investigative methods, which are alien to civil proceedings, can be used from the outset of criminal proceedings. It is true that the provisions of Article 52 paragraph 2 of the Romanian Criminal Procedure Code provides that "the preliminary issue shall be tried by the criminal court in accordance with the rules and means of evidence relating to the matter to which the issue belongs", but it could be considered that these provisions can in no way prevent the criminal court or the prosecuting body from proceeding with the criminal case using any means of evidence provided for in the criminal procedure.

To consider the contrary would mean restricting the scope of the procedural means of evidence that the criminal court may use whenever they concern a preliminary issue in the criminal proceedings, a solution that is not expressly provided for and cannot be deduced from the relevant legal text, ignoring the special nature of criminal proceedings by reference to the specific procedure of civil proceedings (*lato sensu*), representing the common law in the matter, according to the rule that the special rule derogates from the general rule (*specialia generalibus derogant*).

[31] Jean-Francois Renucci, *Tratat de drept european al drepturilor omului*, Bucharest: Hamangiu, 2009, p. 500. In this regard, the author refers to the ECHR decision of July 23, 2002, in the case Janosevic v. Sweden, Collection 2002-VII, § 110, JCP 2003-I-109 nº 13.

For example, in a case involving a labor protection event, the fact that an accident at work is both the subject of an action for annulment of the administrative act classifying the event as an accident at work and a specific requirement in the constituent element of the labor protection offence, it cannot be concluded that the latter cannot be proved under the conditions of the criminal procedure without disregarding the jurisdiction of the criminal court and thereby restricting both the rights of the parties to the criminal proceedings and the general interest in ascertaining the truth and a fair resolution of the case.

Of course, in such a situation the employer or his representative heard by the labor inspector are not obliged to give a written statement before him, having the possibility to ask for time to prepare his defense[32]. However, the report drawn up by the labor inspector during the investigation of the work accident has probative value regarding the personally ascertained aspects, until proven otherwise[33].

In this light, only under this reservation can the considerations of the Constitutional Court of Romania[34] be viewed which, under a different interpretation and without assessing the practical perspective in its approach, concluded in the incidental decision that: "there is no objective and reasonable argument justifying the review by the criminal court of aspects of the case which constitute preliminary questions and which have been settled, by a final judgment, by a court having jurisdiction to rule on another matter, even if those questions concern the existence of the offence" (paragraph 48).

The Constitutional Court of Romania accepts that there is even an *identity* between the typical elements of an offence and the subject-matter of preliminary questions, stating that "the concept of an offence is defined by reference to its typical elements, which is why preliminary questions can only concern the same elements", but concludes that: "the criminal court cannot rely on procedural grounds in order to justify the review of a final decision handed down by another court on a preliminary issue, since the procedural legislation in force does not provide the necessary prerequisites for the two categories of court to reach different decisions on the basis of different procedural means, and still less for arguments justifying the prevalence of the decision handed down by the criminal court on preliminary issues over that handed down by the civil court (*lato sensu*)" (paragraph 48).

In other words, in the view of the Constitutional Court of Romania, where the preliminary issue previously decided by the civil court is a constituent element of the offence before the criminal court, the legal fact which is the subject of that issue should be excluded from proof by means of specific criminal evidence solely because it was previously the subject of a civil trial, at the request of an interested party, in adversarial proceedings only with the opposing party

[32] Laurent Gamet, *Droit pénal de la sécurité et de la santé au travail*, Paris, LexisNexis, p. 106.
[33] Ibid, p. 119.
[34] In Decision No 102/2021 of 17 February 2021, previously mentioned.

identified by the latter and in the absence of the prosecutor. The major differences between the legal regime of evidence in civil proceedings and that in criminal proceedings are well known. Thus, while in criminal proceedings it is characterized by freedom of admissibility and assessment of legally obtained evidence, civil proceedings have restrictive procedural rules on the admissibility of evidence (e.g., the personal findings of the investigating body can only be challenged by false registration, according to Art. 270 paragraph 1 of the Civil Procedure Code[35]), the taking of evidence (there is the sanction of forfeiture of the party's right to propose evidence, as provided for by Art. 254 of the Romanian Civil Procedure Code[36]) and their assessment (there are exceptions provided by law to the freedom to assess evidence, such as the rule of indivisibility of judicial testimony, provided for by art. 349 paragraph 2 of the Romanian Civil Procedure Code[37]), and even agreements on evidence are regulated (whereby the parties derogate from the legal rules on judicial evidence, pursuant to Art. 256 of the Romanian Civil Procedure Code[38]).

### 5. Different legal interest protected in the two lawsuits

The different legal nature of civil (*lato sensu*) and criminal actions also gives rise to fundamental differences in the legal interest protected in civil (*lato sensu*) proceedings on the one hand and criminal proceedings on the other. In this respect, for example, an action for annulment of an administrative act classifying an event as an accident at work would seek to protect the employer's specific legal interest in having his responsibilities in the field of health and safety at work correctly established, on the one hand, as opposed to criminal proceedings, which would have a much broader protected legal interest, taking into account the protection of all social relations concerning the protection of the worker and the employer's responsibility in the work process, including the worker's right to life, under the most severe legal sanction - criminal liability[39].

[35] Article 270 paragraph 1 of the Romanian Civil Procedure Code has the following content: "The authentic inscription gives full proof, to any person, until it is declared as false, regarding the findings made personally by the one who authenticated the inscription, under the law."
[36] Article 254 paragraph 1 of the Romanian Civil Procedure Code has the following content: "The evidence is proposed, under penalty of forfeiture, by the plaintiff through the summons request, and by the defendant through the response, unless the law provides otherwise. They can also be proposed orally, in the specific cases provided by law."
[37] Article 349 paragraph 2 of the Romanian Civil Procedure Code has the following content: "The judicial confession cannot be divided against the author except in the cases when it includes separate and unrelated facts."
[38] Article 256 of the Romanian Civil Procedure Code has the following content: "Conventions on the admissibility, object or burden of evidence are valid, with the exception of those that concern rights that the parties cannot dispose of, those that make it impossible or difficult to prove legal acts or facts or, as the case may be, go against public order or good morals."
[39] Vlad Neagoe and Ciprian Dominte, "Accidentul de muncă - dreptul angajatorului de a nu fi pedepsit de două ori pentru aceeaşi faptă - ne bis in idem" (2022) 8 „Dreptul", p. 117.

The different scope of application also results from the difference in the legally protected interest: "The criminal law, then, is a powerful and condemnatory response by the State. It is also a bluntly coercive system, directed at controlling the behavior of citizen. Criminalisation involves rules backed up by threats. In a sense, criminal law is the means by which the State bullies citizens into complying with its injunctions."[40] and "By contrast, civil judgments seem merely to pin the salient breach upon a defendant, without necessarily saying anything about her moral culpability."[41].

William Blackstone asserted that: "The distinction of public wrongs from private, of crimes and misdemesnors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemesnors, are a breach and violation of the public right and duties, due to the whole community, considered as a community, in its social aggregate capacity."[42]

It was also said that: "it is the function of the criminal law rather than of the civil law to act as a deterrent, for, apart from anything else, punishment can be made to fit the crime, whereas in the civil law of tort, the actual damage suffered, for which compensation may be payable, bears no relation whatever to the degree of culpability"[43].

The analysis of the administrative litigation court in the previously mentioned cases is also done without a reference to the degree of culpability and this is another reason why it cannot be imposed on the criminal court.

The distinction regarding the legal interest protected has also been taken into account in the case law of the Court of Justice in the *ne bis in idem* matter, in terms of the criterion of the complementary aims of the two procedures[44]. Moreover, the Court cannot fail to mention the proposal in the same matter of the concept of protected legal interest as an additional criterion, in addition to the identity of the perpetrator and the act, which was defined as follows: „It is the societal good or social value that the given legislative framework or part thereof is intended to protect and uphold. It is that good or value that the offence at issue harms, or with which it interferes." (see, even if they were not followed by the Court of Justice, the Conclusions of AG Michal Bobek of September 2, 2021, in case C-117/20, bpost SA v. Autorité belge de la concurrence, point 136).

In recent times, even after the decision of the Constitutional Court of Romania, it has been pointed out that the identity of the matter in dispute is not

[40] A.P. Simester and others, *Criminal Law. Theory and Doctrine*, Oxford and Portland: Hart Publishing, 2010, p. 5.
[41] Ibid, p. 5.
[42] William Blackstone, *Commentaries on the Laws of England*, Oxford: Oxford University Press, 2016, Vol. 4, p. 3.
[43] Dennis Lloyd, *The Idea of Law*, Harmondsworth: Penguin Books, 1981, p. 265.
[44] Decision of the Court, Grand Chamber, of 20 March 2018, Case C 524/15, *Luca Menci*.

the same as the identity of the subject matter and/or the cause of action, but that: "the notion of «matter in dispute» helps us to understand why third parties cannot be bound by the negative effect of res judicata, while the invocation of new arguments or evidence «neutralizes» the positive effect of res judicata, the court subsequently seized is faced with a new litigious issue, which it can resolve without being in any way linked to the solution of the initial judicial procedure"[45].

### 6. Application of the *fraus omnia corrumpit* principle

In order to prevent such situations that might prevent the truth from being established and the fair resolution of a criminal case in which a civil court (*lato sensu*) has previously ruled on a preliminary question of a decisive nature in the criminal process, the possibility of invoking the principle that *fraud corrupts everything* (*fraus omnia corrumpit*) could also be considered.

As stated in the literature, the concept of fraud refers to "situations in which a person attempts to obtain rights granted by a legal regulation on the basis of deceit, bad faith or dishonesty" in which context "the *fraus omnia corrumpit* principle operates as a corrective mechanism to the absolute and unlimited application of a legal provision by invoking fundamental moral standards such as good faith, fairness or justice"[46]. It would not be too much to say that the fraud of the law is a "complete perversion of the law", respectively "The law has been used to destroy its own objective: it has been applied to annihilating the justice that it was supposed to maintain; to limiting and destroying rights which its real purpose was to respect"[47].

According to the settled case-law of the Court of Justice, "the principle of the prohibition of fraud and abuse of rights, as expressed in that case-law, constitutes a general principle of Union law, observance of which is binding on individuals"[48].

As regards the components of fraud, the Court of Justice has pointed out that "in particular, a finding of fraud is based on a consistent set of indicators establishing the presence of an objective element and a subjective element"[49].

As has been pointed out in doctrine, in the European legal order, the principle of *fraus omnia corrumpit*, as a general principle of law, has a function of filling the gaps in the European rule by correcting its strict application, based on fundamental, unwritten principles such as good faith, equity and justice, in order

[45] Alin Speriusi-Vlad, "Autoritatea de lucru judecat a hotărârii civile în procesul penal" in *V. Pașca, Liber Amicorum*, Bucharest: Universul Juridic, 2021, p. 550 and 556.
[46] Annekatrien Lenaerts, "The Role of the Principle Fraus Omnia Corrumpit in the European Union: A Possible Evolution Towards a General Principle of Law?" (2013) 1 *Yearbook of European Law* 32, p. 460.
[47] C. Frederic Bastiat, *The Law*, London: The Institute of Economic Affairs, 1998, p. 24.
[48] See in this regard, decision of 6 February 2018, Grand Chamber, Case C-359/16, paragraph 49 and the case-law cited therein.
[49] Case C-359/16, paragraphs 50-52.

to avoid undermining the objectives of the Union. The principle has a far-reaching corrective function: it will invalidate the legal act in its entirety or exclude the application of the rule of law in order to avoid fraud resulting in any legal effects. As is clear from the case-law of the Court of Justice, the principle of *fraus omnia corrumpit* is both absolute, preventing the party concerned from obtaining any benefit from fraudulent evasion of the law, and overriding the legal rules in force or other principles of law[50].

We consider that the principle of *fraus omnia corrumpit* can be applied in this case in two ways, one procedural (formal) and the other substantive. Moreover, in a classic work on fraud, the author points out that in the old French law 11 species of fraud were established, but, following a methodical classification, these are reduced to three categories: Fraud committed by one party to the detriment of the other contracting party (fraud *de re ad rem*); fraud concerted by the parties to deceive third parties alien to the act (fraud *de persona ad personam*); fraud consisting in concealment in the form of an act concluded by the parties with the aim of evading an obligation imposed by law (frauda *de contract in contractum* or *fraus legi*)[51].

Under the first approach of procedural nature, we consider that a procedural conduct of the parties cannot be excluded, by which a procedural situation favorable to them is pre-established, without a genuine support in the factual or legal reality. If the criminal court were to find such an element of fraud, the civil court's solution could be set aside as a remedy for such unfair procedural conduct against the good faith exercise of procedural rights, based on the principle that *fraud corrupts everything* (*fraus omnia corrumpit*).

With regard to the second approach, which can be seen in its substantive law aspect, we refer to the object of criminal proceedings always consisting in criminal liability for an *offence*, which constitutes in itself a *fraud against the law (fraus legi)*. In order to have full jurisdiction in this matter to protect the general interest and the procedural and substantive rights of the parties, the criminal court should be able to consider and rule on any point of law or fact decisive for the criminal case. In this context, if one of these aspects was previously the subject of a civil trial (*lato sensu*), the criminal court should be bound by the civil court's decision, in line with the decision of our constitutional court, but unless it considers that the civil court's decision prevents the truth from being established and the criminal case from being fairly resolved, in view of the very object of the criminal proceedings, which always consists of a crime, itself a fraud which corrupts everything (*fraus omnia corrumpit*), including the right of the interested

[50] Annekatrien Lenaerts, "The Role of the Principle Fraus Omnia Corrumpit in the European Union: A Possible Evolution Towards a General Principle of Law?", *Yearbook of European Law* 1 (2013):32, p. 463, 468, 484 and 485, and the works cited there.

[51] J. Bédarride, *Traité du dol et de la fraude en matière civile et commerciale*, Aix, Aubin, Libraire-Éditeur, Paris, 1851, quoted in Romanian doctrine in Di. Gherasim, *Buna-credință în raporturile civile*, Bucharest: Editura Academiei Republicii Socialiste România, 1981, p. 91.

party to invoke in the criminal proceedings the civil judgment which is favorable to him. Moreover, from an evidentiary point of view, it is unanimously accepted that fraud against the law can be proved by any means of evidence, which is why the difference in the evidentiary regime in criminal proceedings compared to civil proceedings (*lato sensu*) is also justified. Moreover, the principle of *fraus omnia corrumpit* is traditionally the basis for actions for revocation (Paulian) in national law, when the authority of res judicata concerns unsecured creditors who are allegedly harmed by the acts or deeds of their debtor, established by a final civil judgment, which may be set aside to the extent that it proves fraud, according to Art. 1562 of the Romanian Civil Code[52]. Such particular applications of the same principle can also be found in the national law of other Member States, which provide for actions for revocation (*actio pauliana*), such as Belgium, France or the Netherlands[53].

In criminal cases, fraud against the law should be represented by the crime itself, both from the objective aspect, relating to the act or inaction that entails the criminal liability of the accused, and from the subjective aspect, corresponding to the subjective side of the specific crime. In this respect, reference may also be made to the case-law of the Court of Justice, which has made a similar assessment in the case of *fraudulent obtaining of a specific certificate* (E 101 certificate, within the meaning of Article 11 of Regulation No. 574/72 concerning formalities for the posting of workers), in which it held that both the objective element consisting in the fact that the conditions for obtaining or invoking the certificate were not met and the subjective element corresponding to the intention of the persons concerned to avoid or evade the conditions for the issue of the certificate in order to obtain the benefit attaching to it were met, with the consequence that the court was able to remove such a certificate[54].

The importance of the issue at stake must be stressed, given that the interpretation of the constitutional court's decision as attributing absolute authority of res judicata to the civil court's ruling on the preliminary issue in criminal proceedings could lead to the blocking of criminal investigations and denial of justice to the parties concerned, as there is already judicial practice that can be interpreted in this sense. Thus, *e.g.*, in a recent case concerning the commission of service and corruption offences as well as offences against the financial interests of the European Union, the prosecutor ordered, by order dated 11 August 2021 of the Prosecutor's Office of the High Court of Cassation and Justice - National Anticorruption Directorate - Anti-Corruption Section, to close the case because

[52] Gabriel Boroi and Mirela Stancu, *Drept procesual civil*, Bucharest: Hamangiu, 2020, p. 91. Article 1562 paragraph 1 of the Romanian Civil Code has the following content: "If he proves a prejudice, the creditor can request that the legal acts concluded by the debtor in fraud of his rights, such as those by which the debtor creates or increases his insolvency, be declared unenforceable against him.".

[53] Annekatrien Lenaerts, *op. cit.* (2013), p. 465.

[54] Decision of 6 February 2018, Grand Chamber, Case C-359/16, cited above, paragraph 53.

the criminal act referred to does not exist and the preliminary chamber judge rejected as unfounded the complaint lodged by the petitioner SC A SRL against this closure order, on the occasion of which he held that 'the judgment of the administrative and fiscal court confirming the legality of the procurement procedure which is the subject of the criminal complaint, constitutes a preliminary issue, within the meaning of the provisions of Article 52 paragraph 3 of the Romanian Criminal Procedure Code, on which the criminal nature of the facts depends, leading to the conclusion that the matters referred to the public prosecutor by the complaint do not meet the conditions of the typical nature of the offences complained of[55].

## 7. Conclusions

Given the fundamental differences between criminal proceedings and civil proceedings (*lato sensu*), we consider that a different resolution of the same contentious issue, not arbitrarily, but justified by valid, substantial and compelling reasons (as required by ECHR case law), could not prejudice the principle of legal certainty which is the basis of res judicata and the foreseeability of legal relationships for the party concerned. In accordance with the case-law of the CJEU, account must be taken of the need to strike a fair balance between the principle of res judicata and the principle of legality, and it is therefore necessary to respect the rights of the defense and the adversarial nature of the proceedings for parties who did not take part in the first proceedings. Thus, the Court of Justice of the European Union has stressed that: "the principle of legal certainty, however important, cannot be applied in an absolute manner, but its application must be combined with that of the principle of legality; the question which of these principles must prevail in each particular case depends on a comparison of the public interest with the private interests at stake"[56].

It should also be added that the principle of the legality of criminalization is not an absolute one, being described as "the principle of *maximum* certainty, not *absolute* certainty"[57].

By giving limited effect to the decision of the administrative court before the criminal court, the interested party could not have a legitimate expectation in this respect, given that it has always been aware of the fundamental differences in the legal nature of the two actions, the absence of opposing parties and the failure to defend the public interest through the only competent judicial body

[55] I.C.C.J., Criminal Division, Decision No 27 of 27 January 2022 of the Judge of Preliminary Chamber, available at: https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=187646#highlight=##%20dna.

[56] Decision of the Court of 22 March 1961, Société nouvelle des usines de Pontlieue - Aciéries du Temple (S.N.U.P.A.T.) v. High Authority of the European Coal and Steel Community, Cases C-42/59 and 49/59 SNUPAT v. High Authority [1961] ECR 53, 87.

[57] Jeremy Horder, *Ashworth's Principles of Criminal Law*, Oxford: Oxford University Press, 2016, p. 87.

represented by the public prosecutor.

Nor could it be argued that the criminal court would correct the alleged errors of the civil court or that it would place the onus on the individual to remedy any shortcomings of the judicial authorities (within the meaning of ECHR practice), but only to exploit the differences between civil and criminal proceedings in order to respect the rights of the parties concerned and safeguard the public interest reflected in the criminal process. In this regard, the ECtHR has ruled that it is not, in principle, its function to compare different decisions of national courts, even if they are rendered in apparently similar proceedings; it must respect the independence of those courts (*Nejdet Şahin and Perihan Şahin v. Turkey*, Grand Chamber, 2011, p. 50). The European Court found in this case that the circumstances and consequences of the same event - a plane crash - were interpreted differently by the domestic courts, namely the Supreme Administrative Court and the Supreme Military Administrative Court of Turkey (para. 67).

In conclusion, we consider that the restriction before the criminal court of the authority of res judicata of a civil judgment on a preliminary issue in criminal proceedings would not prejudice the principle of legal certainty, as the basis of res judicata, given that, from an objective point of view, the criminal court, with its specific procedural means and special procedural guarantees, can review the decision of the civil court in order to restore legality and not to abolish the legal relationships established on the basis of the civil judgment, and, from a subjective point of view, the person concerned has no legitimate expectation of opposing the criminal action against the right he has won in the civil court, since the fundamental differences between criminal proceedings and civil proceedings (*lato sensu*) are well known.

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