

RESEARCH ARTICLE:

Perspectives on Public Administration Liability for the Limits of the Public Service

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ABSTRACT

The object of the hereby paper is to analyze several aspects related to the liability of the administration for the limits of the public service – a topic which is particularly present, complex and difficult, especially through the controversies it creates and the amount of solutions that it generates in various legislative systems. In this context, we intend to clarify the concept of public service and the one of liability of the administration for the limits of the public service, to establish the conditions for engaging this type of liability and to observe whether according to the current Romanian regulations, the mechanisms by which the administration becomes liable for the limits of the public service are clear. The

KEYWORDS: *judicial liability, administrative liability, public service limits*

1. Introduction

Judicial liability is defined in the Romanian literature as “a complex of rights and obligations which, according to the law, arise as a result of committing illegal acts and constitutes the framework for the achievement of the state constraint, by applying legal sanctions with the purpose of ensuring balance in social relations and for guiding the members of society in the spirit of observing the rule of law”¹. Judicial liability is a component of social liability and it is characterized by the fact that it occurs whenever a person violates a norm of law through an unlawful act that may consist of an action or inaction. Given its importance to society, judicial liability is traditionally a fundamental institution of law.

According to the doctrine, considering the two major components of the law perceived as the whole of judicial norms, namely private law and public law, there are two forms of judicial liability: judicial liability in private law and judicial liability in public law. Then, taking into account all branches of law that include the norms governing judicial liability, we distinguish between: civil liability, criminal liability, administrative liability, etc.

In the doctrine, the administrative-patrimonial liability was defined as representing the form of judicial liability consisting in forcing the state or, as the case may be, the administrative-territorial units to repair the damage caused to individuals through an illegal administrative act or by the unjustified refusal of the public administration to solve an application for a right recognized by law or a legitimate interest.

¹Bălan, E. 2008. *Administrative Institutions*, , Bucharest, Romania: C.H.BECK Publishing, p.194 - extract taken from Costin, M. 1974. *Legal Liability in RSR*, Cluj Napoca, Romania: Dacia Publishing House, pp. 31-32.

As we said before, the subject of the administration's liability for the limits of the public service is not chosen with the exigency to elucidate all the theoretical and practical problems that it can raise, the possible loopholes that remain unclear, to be treated in the following, during the elaboration of the PhD thesis entitled “Administrative-Patrimonial Liability for the Public Power Act and the Rule of Law”.

2. The judicial nature of the administration's liability for the limits of the public service

Administration appears as a component of public space, understood as the space of manifestation of general interests and of specific mechanisms of their assurance. Similar to all others, public administration can be wrong as well². And, again, similar to all others, it can and must be held liable for its mistakes. The authors of administrative law argue that administrative liability is a form of judicial liability that is trained whenever the rules of administrative law are violated, by committing an illicit act, generally called administrative misconduct. Considering the administrative illicit, the doctrine distinguishes three forms of administrative liability, as follows: the administrative illicit itself, contravention illicit and the illicit that causes material and moral damages.³

Committal of the administrative illicit itself, also called disciplinary administrative deviation, has as result the engagement of the administrative-

²Bălan, E.; Troantă Rebeles, D. T. , *General Principles of the Administrative Procedure. The Romanian Perspective. Transylvanian Review of Administrative Sciences*, [S.l.], p. 13-29, Jun. 2007. ISSN 1842-2845. Available at: <<http://www.rtsa.ro/tras/index.php/tras/article/view/362>>.

³Ștefan, E.E. 2012. *PhD thesis*, Prof.coord. N. Popa, Bucharestp. 16.

disciplinary liability; committal of the contravention illicit (contravention) will lead to administrative-contravention liability, and the committal of illicit that leads to material and moral damages, will lead to administrative-patrimonial liability. This latter type of liability is known in the literature in four forms:

- 1) Exclusive patrimonial liability of the state for damages caused by judicial errors that do not exclude the magistrates' liability;
- 2) The patrimonial liability of the administration for the limits of the public service;
- 3) Joint liability of the officer and the public authorities for damages caused by typical or assimilated administrative acts; and
- 4) The liability of the public authority for damages caused by administrative contracts.

The liability of the public administration must be divided into two categories, from the beginning, in two big categories⁴: on one side its liability for the administrative acts that it issues (here we are referring to the administrative contracts) and, on the other hand, the liability for the malfunction of the public service (sometimes found in the literature as the liability for its illicit acts or for the limits of the public service)⁵. If the first one has been extensively analyzed in our doctrine, the issue being discussed practically in almost every work of general administrative law, the latter is often not even mentioned or, at best, treated expeditiously. We believe that we are in

this situation, on one hand, because liability for the malfunctioning of public service is often confused with civil liability and on the other hand because the jurisprudence in this matter is extremely poor. Unlike civil liability, which is a subjective liability, in the case of the liability for public authority it is difficult to answer with certainty whether it has an objective or subjective character due to its complex character. Based on the "service risk" theory and the "bad operation service" theory, we can distinguish between "objective" liability and "fault-based" liability of the administration for damages caused to third parties through public authority acts. In the category of objective liability, in general, it is included state liability for damages created by judicial errors, as well as that of the public administration authorities for the limits of the public service. Regarding the latter type of liability, we mention that it occurs when a public service, through the faulty way in which it is organized, causes certain damage to individuals. This form of liability is not expressly established in our country, but we believe that it can be deduced from the following constitutional principles:

- "The principle of equality of all before the law and the public authorities" together with the fact that "no one is above the law" - art. 16 of the Romanian Constitution, par. 1 and 2;

- "Guaranteeing the right to life, as well as to physical and mental integrity, which may be harmed by the limits of a public service" - art. 22 of the Romanian Constitution.

This type of liability also intervenes regardless of the guilt of the public authority called upon to be liable. In practice, it has been found that this creates an optional state of the state power body to act in a regress, especially since it does not attract any sanction for the relevant minister or public servant concerned, in the conditions of non-exercising the action in

⁴For a similar division, see Teodoresco, A. *Le fondement juridique de la responsabilité dans le droit administratif*, in *Mélanges Paul Negulesco*, 1935. Bucharest, Romania: National Printing House Publishing, pp. 755-756.

⁵It would therefore operate a separation of administrative liability similar to the one which operates in civil liability, also divided into a liability based on a judicial act (contractual civil liability) and one based on a judicial fact (civil liability tort).

regression. The person who suffered the damage is not bound to prove a fault of the administration or the servant, but must convince the court that the damage is due to an inherent fault, a limit of the structure of the public service.

3. “Public service” indissolubly linked to “public interest”

The law offers discretionary powers on the authorities of public administration to carry out their own tasks.⁶ On the citizens, these powers are not exercised only with the provision and the enforcement of the law, but also through the public services they provide, through the granting of permits and authorizations.⁷ The public service term is extremely important, as the administrative law, according to the literature, has two dimensions. On one side, we talk about the judicial person under public law - the organic dimension, and on the other side we talk about the public service - the material dimension⁸. The state and the administrative-territorial units, as organizational forms of life and activity of the members that make them, are meant to ensure the inhabitants the necessary conditions for cohabitation continuously and permanently, organizing for this purpose a multitude of organizational structures, frequently called in the normative acts, but also in the specialized judicial doctrine of public services, which they provide for their proper functioning with: material means and money, specialists, etc. Some of these public services are organized only by the state; others may also be organized by local authorities recognized by the state. In the first case, we talk about public services of

the state, in the second case of public services of the commune, city or county, as the case may be. The importance of public service is all the greater as the state and its other units are “indispensable tools meant to provide its citizens with the sum of welfare that they cannot otherwise find”⁹. Thus, the concept of public service is indissolubly linked to the one of public interest and can be defined as “the activity organized or, where appropriate, authorized by a public authority for the purpose of satisfying a legitimate public interest, carried out by an administrative authority (administrative body) or public agent (state/private) to satisfy a general interest”¹⁰. When the civil service elected for the citizen presents certain limits – certain organizational and operational impediments that endanger certain material or human values, we can speak of the involvement of the public administration’s patrimonial liability for the limits of the public service. In France, the notion of public service has evolved with the evolution of public administration, characterized by two phenomena: the proliferation of public services having an economic subject, namely industrial public services and commercial; the development of the participation of individuals in the tasks of general interest (the management of public services of private persons is best illustrated by the concession of public services)¹¹. French literature has defined the public service as the totality of the activities of a public collectivity aimed to satisfy needs of general interest (national defense, rail transport, etc.). The various public authorities (state, local collectivities) provide public services: France’s external relations are, for example, a public service

⁶Bălan, E. 2005. *Administrative Procedure*, Bucharest, Romania: University Publishing, p. 28.

⁷*Ibidem*, p. 29.

⁸Manda, C. 2007. *Administrative Law. Elementary Treatise*. Bucharest, Romania: Ed. IV, Lumina Lex Publishing, p. 291.

⁹*Ibidem*, p. 292.

¹⁰Bălan, E., 2008. *Administrative Institutions*, Bucharest, Romania: C. H. Beck Publishing, p. 129.

¹¹See André de Laubadère, Jean Claude-Venezia, Yves Gaudament, 1999. *Traité de droit administratif*, Volume 1, General Administration, 15th edition, L.G.D.F., p. 43.

of the state and national, a transport service in a city is a municipal public service. Within the French doctrine, the notion of public service was recognized in two ways: *organic or formal and a material one*. Organically or formally, the civil service was characterized as an organization, a corporation guided by administration, and in the material way, the public service was considered as any activity that aimed to satisfy a general interest (irrespective of the nature of the organization exercising it)¹². Often, the material and formal definition coincided, so that in the French classic law, an activity of general interest, guaranteed by administration, was always considered a public service.

Regarding the conditions that constitute the basis of the commitment of the public administration authorities for the limits of the public service in our country, we appreciate that these are represented by¹³:

- The existence of a public service that contains some organizational and functional shortcomings and which contradicts certain material or human values;
- Existence of material or moral injury caused by the limits of the respective public service;
- Causal relationship between public service limits and injury;
- Developing claims by the injured party.

In support of this view, we recall the Law of Administrative Litigation which in Article 1 stipulates that:

“Any person who considers himself or herself to be prejudiced in his/hers right or in a legitimate interest, by a public authority, by an administrative act or by

not solving an application within the judicial term may appeal to the competent administrative court for the annulment of the act, the recognition of the claimed right or legitimate interest and the repair of the damage caused to him/her. Legitimate interest may be both private and public”.

4. Issues raised by the administrative liability for public service limits

Regarding the above-mentioned issues, we ask ourselves whether whenever the operation of a public service will cause damage to the administration, we will speak of administrative liability. In order to answer this question, we have to make a classic distinction between administrative public services and industrial and commercial public services. The difference between these two types of public services depends on the extent to which they are influenced by public law: there is a maximum influence on administrative public services and a minimum for industrial and commercial ones¹⁴. We believe that the involvement of administrative liability must be linked precisely to this intervention of public law in the operation of various services. Thus, it is understandable that in the case of administrative public services, the regime of administrative liability will apply. But this does not automatically mean that the rest of the public, industrial and commercial services must be submitted, without any distinction, to a regime of private law liability.

Another issue that liability for the limits of the public service raises is that of the competent court for hiring it. There are basically two possibilities: the liability of the administration is of the civil departments jurisdiction, as courts of common law competence in matters of civil liability, or the competence belongs to

¹²Vedea, G. in Rodica Narcisa Petrescu., 2001. *Administrative Law*, Cluj-Napoca, Romania: Cordial Lex Publishing, p. 11.

¹³Botomei, V. 2013. *Administrative Liability, Practical-Scientific Aspects in Comparative Plan*, Bacău, Romania: Vicovia Publishing, p.205.

¹⁴Morand-Deville, J. 2001. *Cours de droit administratif*, Paris, France: Montchrestien Publishing, p. 459.

the administrative litigation courts, as specialized courts for solving disputes between the administration and individuals. It would seem that the current Constitution, like Law no. 554/2004 of the administrative litigation, establishes the settlement of disputes arising from the illicit acts of the administration by the courts: special sections of administrative litigation and fiscal within the tribunals, the Courts of Appeal and the High Court of Cassation and Justice. The administrative litigation judge is the one who can pronounce on both the legality of the act and its opportunity. However, neither the Romanian Constitution, nor Law no. 554/2004, which represents the common law in the matter of the trial of administrative contentious proceedings and up to different special normative acts regulating the organization and functioning of public services¹⁵, we shall not find any provisions that will confer the administrative law courts the competence to judge the litigations that concern unlawful acts of the administration that caused personal injury. Moreover, both the Constitution and Law no. 554/2004 refers to damage caused by an administrative act or by an unjustified refusal to solve a claim. In addition, art. 2, lit. F of Law no. 554/2004 of administrative litigation informs that *“the activity of settlement by the competent administrative litigation court according to the organic law of disputes in which at least one of the parties is a public authority and the conflict was born either by the issuance or the conclusion, as the case may be, of an administrative act, within the meaning of this law, either by failing to solve the matter in the judicial term or by refusing to*

resolve an application for a right or a legitimate interest”. While it seems that we are again struggling with the limitations mentioned above - which reduce administrative litigation to litigations arising from acts rather than deeds - we believe that this article may, however, receive extensive interpretation.

¹⁵This is the case, for example, of Law no. 218/2002 on the organization and functioning of the Romanian Police (published in the *Official Gazette* no 305/2002), of Law no. 129/1996 on the Romanian railways transportation (published in the *Official Gazette* no. 268/1996).

5. Conclusions

At the basis of the organization and functioning of the public administration, and therefore at the basis of any fact that may cause damage to individuals, there is a number of administrative acts. Consequently - indirectly - it can be argued that a litigation in order to compensate for a damage caused by an act of the administration was born out of the issuance of an administrative act. We would thus find ourselves in the judicial definition of administrative litigation. Even though there is no general regulation in Romanian law¹⁶ to deal with the administration's liability for its malfunctioning, there is at least one special regulation that makes it clear that this liability is one that guides the rules of public law: the Law no. 83/1996 of postal services¹⁷. Referring to damage goods to shippers through loss, misappropriation, misdelivery, partial failure or damage to postal parcels, these facts are genuine unlawful acts resulting from the malfunction of the public service and give rise to compensation for the injured party.

We believe that to the extent that the responsibility of the administration for its unlawful acts was considered by our doctrine to be an autonomous liability distinct from civil liability, considering that, on one side, administrative law is an autonomous branch of law and, on the other side, that this liability has specific features, we can extend this conclusion to the liability of the administration for the limits of the public service (its illicit facts), on the same grounds.

¹⁶See in French law, the *Blanco* Decision, from 1873 by the Conflict Tribunal.

¹⁷Published in the *Official Gazette* no. 156/1996.

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