RESEARCH ARTICLE:

The analysis of the administrative liability as a type of legal liability. The delimitation between administrative-patrimonial liability and civil-tort liability

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ABSTRACT

In order for the social relations to take place in optimal conditions, the human society is organized in different forms. Throughout the complexity of social life, administration is one of the most important human activities. The liability of the public administration must be divided even from the beginning into two broad categories[1]: on the one hand, its liability for the administrative acts issued (we also refer here to the administrative contracts) and on the other hand, the liability for the malfunctioning of the public service (sometimes found in the specialty literature as the liability for its unlawful acts or for the limits of the public service)[2]. Committing an unlawful act causing material and moral damages will engage the administrative-patrimonial liability. The principle of civil tort law can be seen from two sides: either from the perspective of the obligation to repair the damage, imposed by law to the individual who caused it by the unlawful act, or from the perspective of the right of the individual who suffered a damage by an unlawful act to be compensated properly.

KEYWORDS: *administrative liability, administrative-patrimonial liability, civil-tort liability*

[1]For a similar division, see Teodoresco, A. 1935. *Le fondementjuridique de la responsabilité dans le droit administrative*" in *Mélanges Paul Negulesco*, Bucharest, Romania: ImprimeriaNaţională Publishing House, pp. 755-756.

[2]It would therefore operate a separation of the administrative liability similar to that of civil liability, also divided into a liability based on a legal act (contractual civil liability) and one based on a legal fact (civil tort liability).

1.Introduction

1.1.Legal Liability

The legal liability is defined in the Romanian specialty literature as "a complex of rights and obligations that, according to the law, arise as a result of committing illegal acts and constitute the framework for achieving state coercion, by applying legal sanctions in order to ensure the stability of social relations and guidance for the members of society in the spirit of respect for the rule of law"[3].This type of liability is established in accordance with the provisions of the European Convention on Human Rights and the ECHR Case-law. Therefore, we also share the doctrinal opinion[4]that a uniform implementation of the European norms will represent a huge challenge, both for the European legal orders, but especially for the different national orders of each member state. The liability derives from responsibility, the legal liability is the consequence of responsible committing a legal action, being held legally liable is the consequence of committing with liability an unlawful act, that is a violation of a current legal provision by a concrete, knowingly actional behaviour.

The followers of the legal responsibility rely on the fact that the law has the role of stimulating the active position of the subject of law and contributes to the fact that the state will eventually become a self-controlled society, based on moral regulations. Liability represents a mechanism not only to annihilate the violation of legal norms, but also to stimulate the positive active behaviour of the subject, a legal education mechanism that would be based on internal moral regulators as guarantors of an exemplary society.

The legal responsibility does not come from nowhere. It must be governed by the legal norm, determined by it. For this reason, nor does the legal liability exist without an obligation prescribed by law. The existence of concrete obligations stipulated by the legal norm represents the static of the legal responsibility, while their realization represents its dynamics. The legal behaviour and the legal relationship cannot arise without the model of behaviour prescribed by the law. In its evolution, the responsibility goes through several stages: the incorporation of the rule in the legal norm, the existence of appropriate obligations, the determination of the legal status; acknowledging the obligations by taking a mental attitude towards them and finding the motivation for the behaviour; the legal behaviour.

The legal liability and responsibility are two distinct categories, which have however many common features, interacting and mutually determining each other, since there can only be liability between responsible individuals who are free to choose a particular type of legally compliant or non-compliant behaviour.

Liability and responsibility do not coincide, because they are based on different external factors, as diverse as the objectives to which they relate. The notions do not even coincide in terms of their nature: liability has a more normative character, while responsibility, preponderant and direct, has a more value character.

The legal liability must be studied in close connection with the social one, adding to the latter the legal specificity, since many scholars, philosophers, sociologists, defining social liability, reveal only the characters specific to the moral, political and other liability, without emphasizing in particular the signs of legal liability.

[3]Bălan, E. 2008. *Administrative institutions*, Bucharest, Romania: C.H. BECK Publishing House, p.194- fragment taken from Costin, M. 1974. *Legal responsibility in RRS*, Cluj Napoca, Romania: Dacia Publishing House, pp. 31-32.
[4]Schwartze, J. 2006. *European administrative law*, Office for Official Publications of the European Communities, Sweet and Maxwell, p.206.

From the perspective of legal experts, the legal liability is the most serious form of social liability.

1.2.Types of Legal Liability

The legal liability is a broad and universal notion in our law system, as otherwise in any other law system, because as a principle a legal norm also contains, as it is known from the general law theory, a component called sanction. Therefore, if a legal rule, by hypothesis, imperative, either imposes a certain conduct (an onerous legal norm) or, on the contrary, prohibits a certain conduct (prohibitive legal norm), it is within a legal logic to impose a legal sanction for the violation of the imperative rule. This sanction may be criminal, contravention or may also be of a civil nature, therefore we can speak of a criminal, contravention or civil liability[5], these belonging, in generic terms, to the concept of legal liability. Of course these forms of liability can interfere, meaning, as we will further present, that they can be in competition (for example, the same unlawful act can incur a criminal liability, but also a civil liability). Regarding these first considerations, we can say that the legal liability represents the sanction imposed on an individual who disregards the imperative legal provisions.

Beyond the common ground of the legal liability types, we must retain the content and the appearance of each type determined by the specific areas of law. Of course, the specialty literature raised the question of the criteria according to which the types of legal liability can be divided. A first criterion is the degree of social danger of the unlawful act that engages the legal liability (however with the exception of the civil and the patrimonial or the material liability for which the reparative function of the material damage is decisive and specific).

It is undeniable that a certain degree of social danger draws the boundary line between the criminal liability and the contravention one, or between the disciplinary offense and the criminal offense, but on its own the mentioned criterion is not sufficient for individualizing the types of liability.

There is a legal liability that can be achieved in the interest of the entire society (criminal liability) as there is a liability that protects group or individual interests (patrimonial, material, disciplinary, contractual, tort liability).

Criminal liability is in its content a legal relationship of constraint generated by committing a crime[6], relationship that is established between the state and the offender and gives the state the right to hold the offender liable, to apply him the sanction provided by the criminal law and to coerce him to execute it. Of course, correlated with this right, the offender has the obligation to be liable for his act and to obey to the sanction applied. The sanction of the offender takes place in order to re-establish the rule of law and to restore the authority of the law. Specific to the criminal law is that no act is punished unless it is incriminated by the criminal law. It therefore governs the lawfulness of the incrimination principle expressed in the Latin phrase "nullum crimen sine lege" (there is no offense without being prescribed by law) and "nulla poena sine crimen" (there is no punishment without an unlawful act). And as a sanctioning regime, the criminal punishment – the most serious of legal sanctions – is specific for the offense.

In the area of *administrative law*, three forms of legal liability are distinguished:
1)administrative-disciplinary liability;
2)administrative-contravention liability;
3)administrative-patrimonial liability.

[5]Tita-Nicolaescu, G., November 2016. Universul Juridic Magazine, no. 11, pp. 29-37.

[6]Puscas, N. 2003. *Civil law. General theory of obligations*, Constanta, Romania: Europolis Publishing House, pp.138-139.

In the *civil law* there are two forms of liability: *contractual* and *tort*.

Both types are based on the idea of repairing a patrimonial (or moral) damage caused by non-fulfilment of the contractual obligations or by committing an unlawful act.

In the labour law until the adoption of the current Labour Code coexisted: *disciplinary liability* and *material liability*.

2.Administrative Liability

2.1.Administrative Liability in Romania

In order for the social relations to take place in optimal conditions, the human society is organized in different forms. Throughout the complexity of social life, administration is one of the most important human activities. "The public administration is inextricably linked to the state"[7]. Over time, the notion of public administration had various meanings, and one we consider to be appropriate in the context of this paper is that of Prof. Andre de Laubadere according to which the administration is defined as "the totality of authorities, agents and bodies, in charge of ensuring multiple interventions of the modern state, under the impetus of the political power"[8].

According to the doctrine, depending on the two major components of the law perceived as the totality of legal norms, namely the private law and the public law, there are two types of legal liability: the legal liability in private law and the legal liability in public law. Then, considering all the legal areas that contain the norms governing the legal liability, we distinguish between: civil liability, criminal liability, administrative liability etc.

The administrative liability as an institution of the administrative law, as opposed to civil and criminal liability, recognized in some forms since antiquity, is relatively young[9]. The administrative liability has about two centuries since it was instituted following the bourgeois revolution in France, as a liability of the administration for damages to particulars through unlawful activity. For a long time, the liability specific for the administrative law was traditionally interpreted by reference to concepts and institutions specific to the civil law, or, by case, to the criminal law.

Like everyone, the public administration can also be wrong[10]*. And again, like everybody, it can and it must be held liable for its mistakes.* The authors of administrative law argue that the administrative liability is a type of legal liability that is involved whenever the rules of the administrative law are violated by committing an unlawful act, generally called administrative deviation.

Considering the unlawful administrative act, the doctrine distinguishes three types of administrative liability, as follows: the proper unlawful administrative act, the contravention unlawful act and the unlawful act causing material and moral damages[11]. Committing the proper unlawful administrative act, also called disciplinary administrative deviation, engages the administrative-disciplinary liability; committing the contravention unlawful act (contravention)

[7]Brezoianu, D., Oprican, M. 2008. *Public administration in Romania,* Bucharest, Romania: C.H. Beck Publishing House, p.3.

[8]de Laubadere, A. 1973. *Traite de Droit Administratif*, 6th edition, vol I, Paris, L.G.D.J, p.11.

[9] Prisăcaru, V. I. 1996. *Romanian administrative law treaty* – general part – IInd edition, revised and added, Bucharest, Romania, ALL Beck Publishing House, p. 601.

[10]Bălan, E., Troanta Rebeles, D., *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>. Access date: 27th of May, 2017.

[11]Stefan, E.E. 2012. *Theses*, prof. coord. Nicolae Popa, Bucharest (fragment extracted from the summary of the PhD thesis), p. 16.

will engage the administrative-contravention liability, while committing an unlawful act causing material and moral damages will engage the administrative-patrimonial liability. This latter type of liability contains four types mentioned in the specialty literature:

1.the exclusive patrimonial liability of the state for damages caused by judicial errors that do not exclude the magistrates' liability;

2.the patrimonial responsibility of the administration for the limits of the public service;

3.the solidary liability of the civil servants 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.

2.2.Administrative Liability in France

The French administrative law originates in the absolutist and centralized period of the French state where the king was the leader of the executive system that he ruled and controlled. The French Revolution of 1789 and the Declaration of the Rights of Man and of the Citizen mark the transition from the undemocratic despotic state to a constitutional state, based on rules of law which form, through the public (administrative) law and the separation of powers principle, a modern public administration governed by the rule of law. The strict application of this principle excluded from the very beginning the judicial intervention of the court over the executive, including the administrative courts, even returning to the administration itself to settle the litigation regarding the executive actions, and later the State Council (created in 1799), a consultative body of the government, formulated mandatory opinions for the executive activity, latter acquiring (1872) judicial powers, through its special section dedicated to the contentious administrative, which became an independent administrative Court. The French judicial practice in litigation had an essential contribution to establishing some basic concepts, starting from the distinction between the responsibility of the public authorities based not on the principles of the Civil Code, which refer to the relations between individuals, but on the rules of the special public law which concern joining the state's rights with the private rights, in the more general context of promoting the public interest. In this respect, distinctions have been drawn between “public domain” and “private domain”, “administrative contract” and “private contract”, “public management” and “private management”, “public services” and “private services”, “public agent” and “private employee”, “public interest” and “private interest”, etc.

In the Romanian administrative law, the appearance of the administration's liability for its unlawful acts is far from clear. Therefore, not being able to refer to the Romanian doctrine or case-law, we will have a look at the French ones. The similarity of the two systems of administrative law can only encourage this approach.

If until the XIXth century there was a quasi-total irresponsibility of the state because the specifics of its mission made it difficult to transpose the provisions of the civil law, it was gradually imposed the principle of applying derogatory rules from the Civil Code. This happened in 1873 when the Conflict Tribunal judged a famous case, known as the Blanco affair. The fact was the following: a child was injured by a wagon belonging to a tobacco factory operated by the state. His father came in front of the common law courts through an action of civil tort liability, but an exception of incompetence appeared there. The Conflict Tribunal solved the exception in favour of the administrative case-law. Through a famous wording, this

court ordered that "the responsibility which may be borne by the State for the damages caused to particulars by the act of its employees from the civil service cannot be guided by the principles laid down in the civil code for the relationships between particulars. This responsibility (of the state-n.n., I.P.) it is neither general, nor absolute; it has its own rules that vary according to the needs of the public service and the need to reconcile the rights of the state with the private rights"[12].

By establishing for the first time the competence of an administrative law court, the French case-law thus referred to the specific nature of the administrative liability. As an important inter-war doctrinal observes, "in general, the rules of civil law apply only to the relationships between individuals, considered as particulars. From the moment when we move towards public law relationship, more precisely those relationships that link the individual with the public authority, the whole situation changes, because the latter does not present himself or operate as a simple particular, but is invested most often with that imperium that characterizes it and distinguishes it from the individual"[13].

The evolution of the administrative liability in France was based on two major directions, on the one hand the law, which created the possibility to indemnify the victims independently of the fault, and on the other hand the judge who accepted the responsibility. Regarding the compensation scheme, the conclusion of the doctrine was that it is a combination between the insurance system, which establishes solidarity in relation to the risk determined for the policyholders, and the guarantee offered by the state in the name of the national solidarity which occurs besides this.

[12]Civil Court 8 févr. 1873, BLANCO, M. Long, P. Weil, G. Braibant, P. Dévolvé, B. Genevois. 2001. *Les grands arrets de la jurisprudence administrative*, Paris, France: Dalloz Publishing House, p. 1.
[13]Teodoresco, A. *op. cit*., pg. 759.

2.3.Administrative- Patrimonial Liability– Type of Administrative Liability

As we have seen before, committing an unlawful act causing material and moral damages will engage the administrative-patrimonial liability. This latter type of liability is known in the specialty literature in four forms:

1.the exclusive patrimonial liability of the state for damages caused by judicial errors that do not exclude the magistrates' liability;

2.the patrimonial responsibility of the administration for the limits of the public service;

3.the solidary liability of the civil servants 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 even from the beginning into two broad categories[14]: on the one hand, its liability for the administrative acts issued (we also refer here to the administrative contracts) and on the other hand, the liability for the malfunctioning of the public service (sometimes found in the specialty literature as the liability for its unlawful acts or for the limits of the public service)[15].

If the first one has been extensively analyzed in our doctrine, the problem being discussed practically in almost every paper of general administrative law, the second one is often not even mentioned at all or, at best, treated expeditiously. We believe that

[14]For a similar division, see Teodoresco A.: *Le fondementjuridique de la responsabilité dans le droit administrative*, in *Mélanges Paul Negulesco*, ImprimeriaNațională Publishing House, Bucharest, 1935, pp. 755-756.
[15]It would therefore operate a separation of the administrative liability similar to that of civil liability, also divided into a liability based on a legal act (contractual civil liability) and one based on a legal fact (civil tort liability).

we are in such a situation, on the one hand because the liability for the malfunctioning of the civil service is often confused with the civil tort liability, and on the other hand because the case-law in this matter is extremely poor.

The legal regime of the right established in art. 52 paragraph (1) and (2) is developed by the Law 554/2004, including in terms of the administrative-patrimonial liability incumbent on the public authority, being determined by the unlawful acts that come from it and cause different prejudices to the particulars.

The analyze of the provisions from this law results in several elements regarding the legal regime of the administrative-patrimonial liability of the public authorities for damages caused by their unlawful acts.

1.It is recognized the possibility of covering both material and moral damages (those that cannot be evaluated in money).

2.The liability is linked with the unlawful administrative acts, which can equally be unilateral administrative acts (typical or assimilated), as well as administrative contracts.

2.4.Administrative-Patrimonial Liability in National and European Context

Unlike civil and criminal liability, established in some forms since ancient times, the administrative liability is relatively young, having a little more than two centuries since it was first instituted in France following the Great French Revolution. As Professor Iorgovan memorably said, "(...) The administrative law had, has and will have (as long as the areas of law will exist) its own liability (of the state administration bodies, non-state bodies, civil servants and citizens respectively) for breaching the obligations from the administrative relationship"[16]. According to the provisions of art. 52 of the Constitution, "the injured individual regarding a right of his own or a legitimate interest, by a public authority, by an administrative act or by failure to resolve a request within the legal timeframe, is entitled to obtain recognition of the claimed right or the legitimate interest, cancellation of the act and repairing the damage (...)". This represents, in fact, the constitutional basis of the public authorities' liability for injuries caused to citizens by violating their legitimate rights or interests, corroborated with art. 21 of the Constitution on free access to justice. The administrative liability is explained by some theoreticians of public law starting from the concept of constraint, but the notion of constraints not identical with liability. If the administrative constraint aims to self-regulate the social system, the liability aims to restore the violated normative order, as well as to condemn the negative act and its author. The administrative liability, in the opinion of Antonie Iorgovan, also occurs "beyond" the administrative constraint. The phenomenon of liability therefore manifests itself on the "field of the evil already done", it is determined directly by violating a social norm. We rallied to the opinion of Antonie Iorgovan who states that, by broad law, three major categories of administrative unlawful acts can be identified: the proper unlawful administrative act, the contraventional unlawful act and the unlawful act causing material and moral damages, and in our opinion what distinguishes them is the unlawful act, which in fact qualifies the violation of the law as an offense, a civil offense or a crime, and from here we continued to analyze the guilt as a component of the liability.

Regarding the administrative liability in the European law, especially the contentious administrative part, Recommendation Rec. (2001) (passed on

[16]Stefan, E. 2012. *Theses*, prof. coord. Nicolae Popa, Bucharest (fragment extracted from the summary of the PhD thesis), p. 11.

05.09.2001) from the Committee of Ministers of the Council of European alternatives to litigation between administrative authorities and private parties, states that "in principle, the appeal in front of the administration must be accessible to the subject of any act and may relate to the opportunity and/or the legality of an act".

Another problem identified refers most frequently to the issue of state liability and the explanation we gave to the Romanian state's conviction in ECHR is that the non-unitary practice is perhaps the most important cause of this phenomenon. We asked ourselves, naturally: what are the causes of the non-unitary practice? We found the answer in the weaknesses of the judicial independence principle, so it is necessary to strengthen the legislation on this issue, in order for the magistrates to be truly independent, as we will explain in the thesis. We cannot leave the burden of treating private disputes on the shoulders of the judge, even in the absence of the law, because the progress made by science often exceeds the right, rather than giving it guarantees of independence and immutability. "The ideal system would be that helping the magistracy to entrust those who give guarantees of honesty and independence, of intelligence and legal knowledge".

Also in the science of law[17] the distinction between liability and responsibility is outlined, distinction that originates in the philosophical theses regarding the delimitation of the social liability and the social responsibility. This delimitation is highlighted in terms of administrative law in several aspects. First of all, the administrative law analyzes the responsibility and the liability of the public administration authorities. Second of all, the administrative law analyzes these phenomena in relation to the civil servants. Third of all, the administrative law is concerned about investigating citizens' responsibility for the legal rules and their liability in the event of breaching them. The legal liability "arises on the field of the evil already done", more precisely following a deviation. Specific for the deviations committed by civil servants is the fact that they may occur during the exercise of their function, in connection with its exercise or simply by deviating from certain norms which have no direct link with the function, but which question the status of the civil servant. The legal status of the civil service also includes the issue of its liability, whose purpose is to repress the mistakes committed by public clerks, and this is only one of the purposes of the liability. Through liability, both the preventive and the sanctioning purposes are achieved, to which the educative purpose should also be added according to the current doctrine. The legal system allows in all EU states the removal of a civil servant, under certain conditions. Thus, in each country there is a system of disciplinary sanctions applicable in case of deviations committed by civil servants, the most serious being the dismissal (sometimes even with the suppression of the pension right, like in the case of a very serious unlawful act, in France). In most countries, the disciplinary procedure is distinctly regulated in the case of civil service, also involving the participation of representatives from the administrative staff. In general this refers to a consultative opinion that the chief of staff, with duties in the disciplinary field, is not formally bound to follow. But in such a case, it is undeniable that a certain pressure is being exercised on him. In certain expressly provided situations, this even refers to genuine disciplinary courts that will pronounce the sanction. On the other hand, the law of the civil service provides everywhere the possibility of dismissal in

[17] Apostol Tofan, D. 2008. "*Administrative institutions*", Course notes, Bucharest, http://www.umk.ro/images/documente/master/institutii_administrative_europene.pdf (source verified on 01.02.2018).

case of professional failure. Such dismissals may take place in practice because of some physical or intellectual disabilities, as shown by the case-law in countries where the civil service contentious is more developed. No less true is that the trade union pressure and the phenomena specific to large organizations make the dismissals from civil service to be extremely rare, however apparently with the exception of Denmark.

3.The delimitation between Civil-Criminal Liability and Administrative-Patrimonial Liability

The purpose of civil liability is, in principle, to compensate damage, this obligation of compensation also pursuing that the act susceptible of causing the prejudice is not committed anymore. The preventive-educative function of the civil liability, no matter what type we discuss about, brings into focus some aspects that are strictly personal to the offender, his mental state, psychological elements that have led the offender to commit the act, these being necessary for the subjective grounding of the liability. The culpability of the offender's conduct is an essential condition because we will not be able to discuss about the presence and the applicability of the civil liability where there is no guilt[18].

Thus, an analysis of the guilt is important, because only an attitude that is qualified as a negative one, reproved by the law, could engage a civil liability, whether tort or contractual[19].

Appreciation of guilt with which an offender makes a damaging act is a difficult obstacle, given the rather complex psychic process that constitutes the structure of guilt, more precisely the volitional and intellectual factors. It is the duty of the court to issue a value judgment on the unlawful act and the damage that has been produced, these being elements of an objective nature. Starting from these, the court must establish both the existence or the non-existence and also the type of guilt. Given that the legislator did not intervene to provide criteria in order to establish guilt, this operation was left to doctrine and case-law and theories on this subject were developed. We consider that it is necessary to discuss about the parallel between the subjective and the objective liability, the former being characterized by the existence of guilt, being necessary for this to be identified and mandatory for the damaging act to be culpable within a subjective liability.

In order for the civil liability of the individual who caused the damage to be committed, it is not enough that there was an unlawful act in causal relationship with the damage that was produced, but this act has to be attributable to its author, being necessary for the author to have a blame when he committed it, acting with guilt[20].

In general, the subjective side of the unlawful act, seen as an element of the legal liability, is expressed differently in the areas of law, with some distinctions being imposed between the civil liability and the other types of liability, but these differences can not eliminate the unity of the concept in which it is expressed the subjective attitude of the author of the unlawful act, towards this and its consequences[21].

The principle of civil tort law can be seen from two sides: either from the

[18] Boilă, L.R. 2009. *Subjective Trial Civil Liability*, Bucharest, Romania: C.H. Beck Publishing House, p. 40.

[19] Mangu, F.I. 2014. *Civil liability. Conviction of civil liability*, Bucharest, Romania: Universul Juridic Publishing House, p. 222.

[20] Mangu, F.I. *About guilt - an essential condition of civil tort liability for own deed, according to the new Civil Code*, Annals of the West University of Timisoara, Law series, no. 2, 2011, p. 102.

[21] Adam, I. 2004. *Civil law. General theory of obligations*, Bucharest, Romania: ALL BECK Publishing House, p. 298.

perspective of the obligation to repair the damage, imposed by law to the individual who caused it by the unlawful act, or from the perspective of the right of the individual who suffered damage by an unlawful act to be compensated properly. According to art. 1349 NCC, any individual has the duty to comply with the rules of conduct which the law or the local custom imposes and not to prejudice by his actions or inactions the rights or the legitimate interests of other individuals and the individual who breaches this duty is liable for all the damage caused, being forced to repair them completely; the prerequisite and essential condition for the liability to be engaged is that the individual to have discernment at the time of committing the unlawful act[22].

Unlike the civil liability, which is a purely subjective liability, from the perspective of many civilian authors, in the case of the liability of the public authorities 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 theory of "bad service functioning", we can distinguish between the "objective" liability and the "guilt-based" liability of the administration for damages caused to third parties by public power acts. In the category of objective liability, in general, it is included the liability of the state for the damages created by judicial errors, as well as that of the public administration authorities for the limits of the public service.

Regarding the administrative-patrimonial liability, in the objective liability category, in general, it is included the liability of the state for damages created by judicial errors, as well as that of the public administration authorities for the limits of the public service. Referring to the latter type of liability, we mention that it occurs when a public service, through the faulty way in which it is organized, produces certain prejudices to particulars. This form of liability is not expressly established in our country, but we believe that it can be deducted from the following constitutional principles:

-"the principle of equality of all before the law and the public authorities" corroborated with "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, right 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 respond. In practice, it has been found that this creates an optional state of the state power body to take action in regress, especially since it does not attract any sanction for the minister responsible or for the civil servant concerned, under the conditions of non-exercising the action in regress. The person who suffered the damage is not bound to prove the fault of the administration or of the civil servant, but must convince the court that the damage is due to an inherent fault, a structure limitation of the public service. In the Romanian case-law, in the judgments decided for repairing the damages caused by judicial errors, reference was made to the provisions of art. 998-999 Civil Code. Recently[23] however, the supreme court considered that these references are wrong, because the liability of the state engages under special laws, respectively art. 504-507 Criminal Procedure Code and art. 96 from Law no.

[22]We also talked about discernment on another occasion (in this regard, Tița-Nicolescu, G. 2016. *Civil law. General Theory of Contractual Obligations*, Bucharest, Romania: Universul Juridic Publishing House. However, we will also consider the issues regarding the discernment in the civil tort liability, since we are basically talking about a sine qua non condition for the existence of any form of civil liability.

[23]Revista de Drept Român / rrdp.ro (Source verified on 12/01/2018).

303/2004, being a liability of the public law, not of the civil tort liability. In this regard, by decision no. 422/17.01.2006 the supreme court decided that "the provisions of art. 998-999 Civil Code on civil tort liability cannot be a basis for engaging the liability of the state for the judicial errors". Recently, in another decision, the court decided that "the direct state liability can be engaged, in accordance with the provisions art.52 par. 3 of the Constitution, text which establishes a liability with an exclusively objective character for making judicial errors lato sensu [...]". Regarding the provisions of the common law on civil liability, the court found that the State is the legal person in relationships in which it directly participates, in its own name, as it appears from art. 25 of the Decree no.31/1954. Therefore, no civil liability of the state can be engaged as a distinct subject matter - a subjective liability, based on fault, under the conditions of art. 998-999 Civil Code for actions of public authorities (for the purpose referred to in III[rd] Title of the Romanian Constitution)[24].

Not without acknowledging the force of the above-mentioned arguments, which place the responsibility of the administration within the competence of the common law courts, we will still dare to argue otherwise.

We will briefly draw attention to the distinction to be made between the work carried out by the public services for the satisfaction of a general interest purpose and the activity pursuing exclusively private interests. If initially this was a reason to justify a more limited liability of the state, today - when the administration can be held responsible for almost all of the damages caused to particulars - the same distinction serves, however, to establish the general regime of the two liabilities.

Moreover, in the last century we can speak, within the liability of the administration, about "overcoming the notion of fault"[25], repairing the damage, referring more and more to the principle of equality of citizens in front of public tasks: a damage suffered by a certain particular, due to the action of the administration - and even if that action is not objectified in an unlawful act, it leads to a breach of that equality, which must be restored by paying the damages[26].

We also do not understand why, to the extent that the liability of the administration for its unlawful acts was considered by our doctrine to be an autonomous liability, distinct from the civil tort liability, considering that, on the one hand, the administrative law is an autonomous area of law and, on the other hand, that this liability presents specific features, we could not extend that conclusion to the administration's liability for its unlawful acts, on the basis of the same considerations.

Even if, as we have seen before, the tradition of Romanian law identified the administrative liability with the civil liability, there were some judgments of the Court of Cassation which decided to hold the state liable even if it could not be accused of fault, the damage being caused in the exercise of normal and legal activities. A great doctrinal observes in this respect that "the Court of Cassation shows an instinctive understanding of the fact that the state's responsibility for the damages caused by the operation of public services must not be judged by the exclusive principles of the civil law, being a special

[24]www.jurisprudenta.com (source verified on18/02/2016), Decision no. 142A/04.02.2010- Inadmissibility of the action in civil tort liability of the state, according to art.6 from CEDO).

[25]Dupuis, G., Guédon, M.J., Chrétien, P. 2007. *Droit administratif*, Paris, France: Dalloz-Sirey Publishing House, p. 567.

[26]Broadly, about this subject, see René Chapus. 1999. *Droit administratif general*, Paris, France: Montchrestien Publishing House, Paris, vol. I, pp. 130-132.

matter to be solved [...] according to its own and special rules and needs"[27].

In the same way, relatively recent, a decision of the Cluj Court of Appeal seems to approve us. In the present case, the applicants have brought an action for damages for the malfunctioning of public services against the Romanian state, on the ground that the public judicial service of the state does not function properly because, although they are the owners of three apartments in Cluj-Napoca, they cannot use them because they are occupied by some strangers and the state through its bodies fails to take action against these individuals in order to ensure respect for the claimants' property rights. Although the action was rejected due to an exception (considering that the state is not an administrative authority and cannot therefore be a defendant in a contentious administrative), nowhere in the text of the cited judgment is denied the fact that the court of contentious administrative would have competence in the matter. Moreover, the fact that this is a contentious administrative that has to be judged according to the provisions of Law no. 554/2004 is expressly recognized by the court, which establishes that the stamp fee is not payable according to the value of the buildings, because the contentious administrative expressly sets the amount with which the shares promoted on its basis are stamped, thus derogating from the common law. We consider that this decision, even if it rejects the demands of the claimants due to a controversial exception, it is a step forward in recognizing the competence of the contentious administrative court to hear the cases that call into question the administrative tort liability.

Somebody might object that this specificity of the administrative liability towards the civil tort liability we have attempted to emphasize comes in fact not from the difference between a public and a private individual, but from the difference existing between a natural person and a legal person, knowing that there may be certain difficulties when it comes to the application of the civil tort liability - tailored on the behaviour of a natural person - the facts of a legal person.

We believe that this objection would not be justified: if it is true that the administration acts exclusively by legal persons, their assimilation with private law moral individuals cannot be accepted. We are also struck here by the same difference that we previously mentioned and on which we base the argument that would demonstrate the specificity of the administrative liability compared to the civil one: the purpose that a legal person seeks to satisfy, which may be either a private interest or a public one, distinction made between the rules applicable to a legal person of private law and those applicable to a legal person of public law.

[27] *Ibidem.*

4.Conclusions

The aspects shown above remain valid not only in the context of tort liability for the own act, but also in the context of the liability for the servants' act. The conditions under which the administration is accountable to third parties for the acts of its civil servants are looser than those in which the private law consignee responds for the servants' act. Conversely, the conditions under which the administration may bring an action in regress against the accused civil servant are much stricter than those in which the servant may be required to compensate the consignee for the damage it repaired. And this because it was noted that "the civil servants being forced to a bigger diligence, they will be afraid to meet with celerity the necessities of the service," which would have a negative effect on the public interest. For this reason, and not without a certain amount of humour, it can be further said that "it cannot be asked from a civil servant an excessive diligence, all that can be asked is that he perform his job as a man with mediocre intelligence" and also that "many times the committed mistakes are part of the service tradition and cannot be imputed to a civil servant that he was faithful to the tradition"[28]. Starting from the rules and conditions of civil tort liability, the administrative liability was "customized" - it become a special responsibility, which applies to the damages arising from a certain category of unlawful acts and which is judged by the courts of contentious administrative. Contrary to these arguments, the authors of civil law consider that the civil tort liability is the joint responsibility for the liability of the state for damages, being a patrimonial liability of civil law[29].

However, we cannot conclude this advocacy on the specific nature of the administration's liability for its unlawful acts, without pointing out that, following this route, it should not fall into the other extreme and consider that whenever the administration or an employee produces damage to the particular it will be an administrative liability. And because it is known that the administration does not always act in its capacity as a legal person invested with public power, sometimes limiting itself to acting as a simple particular. In theory, this problem is resolved as simply as possible: whenever the administration acts as a public power holder, its administrative liability will engage and, on the contrary, whenever it acts as a simple particular, its liability will be a civil one. In practice, however, things are getting complicated, because between these two modes of action there is an indefinite number of shades of gray, in some cases being difficult to tell in which capacity actions the individual who produced the damage.

For this reason, we consider it is worthwhile to thoroughly stop over this issue, especially since it is particularly emphasized in the case of a central element of the administrative liability: the public service. So whenever the operation of public service causes damage to the administration, will we talk about administrative liability?

In order to answer this question, we have to make a classic distinction between the administrative public services and the industrial and commercial public services. As noted, the difference between these two types of public services depends on the extent to which they are influenced by the public law: there is a maximum influence in case of administrative public services and one for the commercial industrial ones. We believe that engaging the administrative liability must be precisely linked to this intervention of public law in

[28] *Ibidem*, p. 185.
[29] Iosof, R. 2013. *Theses*, prof.coord. LiviuPop, Cluj-Napoca, Romania (fragment extracted from the summary of the PhD Thesis), p.9.

the operation of different services. Thus, it can be clearly seen 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 subjected, without any distinction, to a regime of private law liability. The law offers discretionary powers to the authorities of public administration to carry out their own tasks[30]. On the citizens, these powers are not exercised only by the application and the enforcement of the law, but also by the public services they provide, by granting permissions and authorizations[31].

We have already shown that the involvement of public law in the operation of all public services is gradual, and that this results in the existence of industrial and commercial public services on which the rules of this right are still strong enough to justify the application of a regime of tort liability of administrative law. Of course, what are exactly these services ultimately remains a case-by-case assessment that will have to take into account elements such as the degree of state involvement in their functioning or the proportion between the lucrative purpose and the purpose of satisfying a public interest for which they were set up[32].

[30]Bălan, E. 2005. *Administrative procedure*, Bucharest, Romania: University Publishing House, p. 28.
[31]*Ibidem*, p. 29.
[32]Even within the same industrial and commercial public service provided by several legal persons, there may be differences of engaging the public law. In this respect, we can take the example of Romanian railways. Art. 3 of Law no. 129/1996 regarding the transport on Romanian railways (cited above) it establishes that this transport is organized and carried out mainly by the National Romanian Railways, which has the status of autonomous directorship of national interest. But art. 28 of the same law provides for the possibility that this transport may be executed by other legal entities.

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