Novelty Elements of Administrative Liability Regulated by the Administrative Code

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ABSTRACT

By analyzing the evolution of administrative liability, we can observe that this institution has been difficult to contend in the Romanian doctrine, the opinions expressed in specialized literature varying from the argumentation of its existence to the denial of the identity of the administrative liability forms or of the applicable legal regime.

Starting from the idea that one of the most important effects of the public interest, which characterizes the binding relation that arises from an illicit administrative act which affects interests, is the inequality of the parties to this relation, because one of them does not act in its own interest, but in the interests of all, we consider that the proper functioning of the administration is the primary element which prevents damage and liability for it.

In our law there was no express regulation of the liability of the administration for its wrongful acts until the entry into force of the Administrative Code (July 2019) – it could conclude, up to that point, that such an act leaves the scope of administrative law and directs it to civil law, which will be resolved as if there were two individuals at issue. We consider that the entry into force of the Code and, by implication, the novelty of such legislative provisions represent a step forward in resolving the system's accountability for the unlawful acts, the correction and improvement of the work that civil servants and contractual staff submit every day in carrying out their tasks.

KEYWORDS: *Administrative Code, administrative liability, patrimonial liability, wrongful acts.*

1.Introduction

From the perspective of the law, things cannot be understood in the sense that it only intervenes in the case of the wrong that has already been done, at which point the penalty can be imposed. From the point of view of law, the cultural vision of the individual towards the law can be founded, which implies greater attention/care towards the importance and integrity of the values imposed by society.

If in the early period these rules were more of a moral nature, with the evolution of society, they gradually acquired multiple features.

Often a sign of equality is drawn between responsibility and liability – liability in the legal interpretation.

Advocates of legal responsibility agree upon the fact that the law is what stimulates the active role of a subject of law and, at the same time, has the role of helping the state to transpose itself into a society with self-control, based on legal norms, but especially on moral norms.

Liability is not only intended to remove violations of legal rules, it must be seen as a mechanism for legal education of citizens in order to help guarantee a model society.

It is not rarely that a sign of equality is drawn between responsibility and liability – liability in the legal interpretation.

Legal liability is defined in the Romanian literature as "*a complex of rights and obligations which, according to the law, arise as a result of the commission of unlawful acts and which constitute the framework for the state coercion, by means of applying legal sanctions in order to ensure the stability of social relations and to guide members of the society in the spirit of respect for the rule of law*"[1].

This type of liability is established in compliance with the provisions of the European Convention on Human Rights and with the Case-law of the European Court of Human Rights.

As a result, we also share the doctrinal view[2] that a unified implementation of European regulations will be a major challenge for the national order.

[1]Bălan, E., 2008, *Instituții administrative*, Bucharest: C.H. BECK Publishing House, p.194 – section taken from Costin, M., 1974, *Legal liability in RSR*, Cluj: Dacia Publishing House, pp. 31-32.
[2]Schwartze, J., 2006, *European administrative law*, Office for Official Publications of the European Communities, Sweet and Maxwell, p. 206.

Legal liability derives from moral liability, and at the same time from responsibility, being the consequence of the responsible performance of a legal act.

Legal liability is the consequence of the liability for an unlawful act, i.e. the violation of the rules of law, by conduct, usually, with intent.

This institution of law is found in the various systems of law, since all systems have legal, regulated rules and all of these rules also include the component of the sanction.

The main types of sanction are criminal, administrative or civil. As a result, we will be able to talk[3] about:

- Criminal liability;
- Administrative liability;
- Civil liability,

as these fall under the concept of legal liability.

The above-mentioned forms of liability may interact or compete with one another. By way of example, we would point out that for the same act contrary to legal rules, both administrative and criminal liability may be triggered.

In relation to these considerations, we can say that legal liability differs from other types of liability according to the penalty imposed on a person who disregards the mandatory legal provisions.

We must therefore take into account that beyond the specific common elements and features, the legal forms, each type of liability has its own physiognomy relative to the branches of law to which it belongs.

The types of liability are differentiated according to several criteria, the most important being the degree of social danger inherent in the wrongdoing. This rule exempts the civil and property types of liability, for which the remedial function in relation to the damage created is determined.

[3]Tiță-Nicolaescu, G., *Câteva delimitări necesare între răspunderea civilă delictuală și răspunderea contractuală în dreptul român*, in *Universul Juridic Magazine* λ no. 11, November 2016, pp. 29-37.

2.Criminal, administrative and civil liability

Criminal liability is, in its content, a legal relation of constraint, caused by the commission of a criminal act[4], relation that is established between the state and the offender.

This report allows the state to hold liable the person who commits the act and, at the same time, to apply the sanction provided for by the law. Moreover, on the basis of this legal relation, the person who commits the act may be bound to serve the sentence by the state's coercive force.

The role of criminal liability and the sanctioning of the offender is to restore the rule of law and the authority of the law. In this context, we can say that criminal law is extremely specific, having its peculiarities. One of its main peculiarities is that the acts are punishable by the application of criminal sanctions, only if they are provided for by the criminal law.

The sphere of public law also includes administrative liability- an institution which is analyzed by the present paper, in accordance with the law and doctrine, with its three forms:

1) administrative-disciplinary liability;

2) administrative-contravention liability;

3) administrative-patrimonial liability.

In accordance with the constitutional provisions, but also with organic laws, public power is the authority of the public administration defending the public interest, with the following prerogatives:

- ✓ Public law is the basis for its legal capacity;
- ✓ The public administration issues authoritative acts which are executed ex officio and directly applies, when applicable, administrative coercion of a preventive, sentencing or enforcing character;
- ✓ It enforces criminal sanctions imposed by courts through definitive and irrevocable decisions;

[4]Pușcaș, N., 2003, *Drept civil. Teoria generala a obligațiilor*, Constanța: Europolis Publishing House, pp. 138-139.

- ✓ It issues normative acts, which have legal force that is inferior to the law, but which rank according to the position and competence of the authority applying them;
- ✓ Any individual act or any material operation carried out by these authorities is a concrete execution of the law (fulfilment of the law).

In order to continue with the analysis of administrative responsibility in general, and then with its succinct analysis, from the perspective of the Administrative Code, recently entered into force, we specify, in advance, that the Administration has become the characteristic element of modern society and the key notion of administrative sciences. There is more and more talk of an 'administrative era' and, together with the scientific and technical revolution, of an administrative revolution, which differentiates modern societies from traditional ones.

It is necessary for the Romanian public administration to meet major requirements, by scientific organization and permanently improving its own activity and administrative system, by using all the mechanisms at its disposal, effectively, to achieve maximum results, with minimal effort.

It is the science of administration that gives the science of administrative law its basic principles and allows the individualization of the peculiarities of this branch of law. At the same time, the strictly legal research of administrative activity cannot be carried out in isolation from the social, economic, political environment in which it takes place, without understanding how to express itself at any given time.

With regard to liability in the sciences of administration, we believe that this overlaps with liability under administrative law.

In the Romanian administrative law, the physiognomy of the administration's liability for its wrongful acts is far from clear. What we can say, however, from the outset, is that, unlike tort liability, in the case of administrative liability, the courts have limited power to decide, which involves only for cases of intent (intent to cause damage to the state) or gross negligence, therefore, a public employee who causes a loss of state revenue (e.g. damage to the state cabinet), but who does so with minimal negligence is not liable. In the case of expenditure unlawfully incurred in the purchase of goods and services by local authorities, negotiation is the direct link between the

director or official who enabled the supply and the private counterpart. The administrator or official shall be liable with personal property so that the institution remains independent from the unlawfully incurred into expenditure[5].

In our law there was no express regulation of the liability of the administration for its wrongful acts until the entry into force of the Administrative Code (July 2019) – it could conclude, up to that point, that such an act leaves the scope of administrative law and directs it to civil law, which will be resolved as if there were two individuals at issue. In other words, the wrongful act "undresses" the administration from its public power-which gives it the privilege of jurisdiction embodied in the existence of administrative litigation-and reduces it to the status of a simple private person. Therefore, according to that concept, the legal person governed by public law guilty for its own act or for the act of its employees, will be sued before the common law court, like any private legal person, and the rules under which such a legal person under common law is liable shall apply to it by analogy.

The expert doctrine has extensively analysed the issues related to the problem of the administrative act, which seems natural to us in relation to the fact that the administrative act is the essential way in which the entire activity of the public administration materializes.

There are, however, manifestations of the will of the public administration[6] which do not result in administrative acts, but in administrative facts, sometimes lacking the very manifestation of explicit will, since the administration is not held responsible for those acts.

In this context, we do not understand why, in so far as the liability of the administration for its unlawful acts was regarded by our doctrine as an autonomous liability, distinct from tortious civil liability, on the basis that, on one hand, administrative law is an autonomous law branch and, on the other hand, because that liability has specific[7] features, we could not extend that conclusion to the liability of the administration for its unlawful acts, on the basis of the same considerations.

[5]Decision no. 11969 from November 25th, 1998 Court of cassation, Civil Section 3, Published in Official Gazette No. 143 of March 5th, 2003.

[6]Catană, E. L., 2017, *Contenciosul actelor administrative asimilate*, Bucharest: C.H. Beck Publishing House, , p.27.
[7]Iovănaș, I., *op. cit.*, pp. 178-180; Lepădătescu, M., *Natura juridică a răspunderii patrimoniale a organelor administrației de stat pentru pagubele pricinuite prin actele lor ilegale*, in *Annals of the University of Bucharest*, 1968, pp. 9-14.

Even though, as I have previously pointed out, the tradition of Romanian law has identified administrative and civil liability, there have been a number of rulings of the High Court of Cassation and Justice which have decided to hold the State liable even when it could not be held liable, the damage being caused in the pursuit of a normal and lawful activity.

Elements on such matters have been analysed by the author of this paper in some previous expert articles, and it is now important to consider whether the Administrative Code has come to clarify the institution of administrative liability, so that for legal theorists and practitioners, things are sufficiently clear, from the perspective of the new legal rules.

The opportunity and necessity of organizing all normative acts applicable in the field of administrative liability in an Administrative Code has proved to be appropriate.

In this respect, we show that the Government's priority for drafting the code, for the purposes of simplifying legislation, is reiterated in the Strategy for the Strengthening of Public Administration 2014-2020, approved by Government Decision no. 909/2014, and in the Better Regulation Strategy 2014-2020, approved by Government Decision no. 1076/2014.

For Romania, 1930 is the year of the first work entitled Annotated Administrative Code, a work authored by Paul Negulescu, George Alexianu and Romul Boila[8]. It is not in itself an analysis of a new normative act that has emerged, but a collection of normative acts of the time commented upon by the authors. Moreover, during this period such collections of normative acts with the name of handbook, reference book of the officials, guide, repertoire, etc. constantly appear.

The idea was subsequently abandoned, but in 2011, a first draft of the Administrative Code was written.

Until 2019, the draft of the Administrative Code was annotated, in Article 571 – Forms of legal liability in public administration, with express mentions of the provision of administrative liability in the event of wrongdoing by public administration staff.

In 2019, on July 7th, the Administrative Code entered into force.

In it, administrative liability is governed by Part VII, Title I.

[8]See Iftene, C., *Teze și antiteze ale Codului administrativ,* in *Journal of Public Law*, No.. 4/2019, Bucharest: Universul Juridic Publishing House, 2019.

Prior to the entry into force of the Administrative Code, administrative liability did not have a legal definition.

Today, the doctrinal definition has been transposed by the Administrative Code into a legal definition. The Code defines administrative liability in Article 5, (ii), as "that form of legal liability which consists of all rights and obligations of an administrative nature which, according to the law, arise as a result of the commission of an unlawful act infringing, as a rule, the rules of administrative law'.

According to the principle of legality of liability, administrative liability can operate only under the conditions or in cases stipulated by the law, within the limits set by it, according to a certain procedure carried out by the authorities invested for this purpose.

The principle of fairness or proportionality of liability implies the correlation of the sanction applied with the degree of social danger of the wrongful act committed and with the extent of the damage, in the event of damage, with the form of guilt found, by a correct individualization. The principle of expedience establishes that the time of application of the sanction must be as close as possible to that of the manifestation of the unlawful act, without unnecessary delays or delays, in order that the social resonance of the sanction applied is maximum by increasing its preventive effect.

Regarding disciplinary liability, as a novelty, the Administrative Code[9] offers a general approach, defining, in Article 569, the notion of disciplinary misconduct in administrative law: *"disciplinary misconduct is the act committed with guilt by civil servants, dignitaries and those with assimilated positions, which consists of an action or inaction in which they violate their obligations under the work report, respectively from the exercise of or in connection with it and which affects their socio-professional and moral status"*.

This definition represents a particular application, by reference to administrative law, of the definition offered by Article 247 of the Labour Code ('work-related act and consisting of an

[9]Preduț, M. C. *(coord.)*, *Raspunderea administrativa in Codul Administrativ (VII)*, EuroAvocatura.ro, Published on October 24th, 2019.

action or inaction committed with guilt by the employee, by which he has violated the legal norms, the internal regulation, the individual employment contract or the applicable collective labour contract, the orders and legal provisions of the hierarchical leaders").

The active subject of administrative-disciplinary liability is the authority of the public administration, or any entity assimilated to it against which the consequences of disciplinary misconduct are overcome, and in whose competence falls the liability of the perpetrator.

The passive subject of administrative-disciplinary liability is the person who has committed a disciplinary offence. Although it devoted an entire title to administrative responsibility, the legislature chose to separately regulate the liability of its various possible passive subjects.

Regarding administrative-patrimonial liability, this may be of most interest, since this establishes the general framework for the award of compensation. Compared to previous regulations, the provisions of the Administrative Code are more complex, the main novelty being brought by:

Article 574 Public authorities and institutions shall be liable exclusively for damage of a material or moral nature caused because of the organizational or functional deficiencies of public services subject to the following conditions:

(a) the existence of a public service which by its nature contains the risk of certain damage to the beneficiaries;

(b) the existence of material or moral damage, as the case may be, of a natural or legal person;

(c) the existence of a causal link between the use of a public service which by its nature contains the risk of certain damage and the damage caused to the natural person or, where appropriate, the legal person.

We consider that the entry into force of the Code and, by implication, the novelty of such legislative provisions represents a step forward in resolving the system's accountability for the unlawful acts, the correction and improvement of the work that civil servants and contractual staff perform every day in carrying out their tasks.

The Administrative Code provides that such liability will be incurred if a public service creates the risk of damage. At the same time, that risk should also materialize, and the damage thus

created should be caused by that risk. For example, public services that would create pollution can illustrate this.

In our view, the text proves to be insufficient and incomplete, with uncertainties as to its interpretation in Article 574 paragraph 1 letter (a)

On the one hand, in the title, the text of the law refers to the liability arising as a result of the organizational or functional deficiencies of public services, and on the other hand, one of the conditions which are required to be fulfilled cumulatively is that of the existence of a public service which by its nature contains the risk of certain damage to the beneficiaries. In this context we ask the following questions: What was the intention of the legislature? Should institutions and public authorities be held liable for damage caused by services which by their nature cause damage? Or should institutions and authorities be liable for damage caused by services which by the way they organize and operate cause damage? In the same way, we wonder what are those services that by their nature could cause damage?

From our point of view, the text of Article 574 paragraph 1 letter (a) excludes from the outset the assumption that public authorities and institutions are liable for damage caused by public services which not by their nature but by their functioning create damage and, based on the same reasoning, it follows, without any doubt, that if such a service were to exist, which by its mere nature could give rise to damage, the way in which it would be organized would be irrelevant.

For example, in the researcher's view, situations causing damage such as public service limits caused by the high workload and lack of employees remain unforeseen by the legislator. In such a context, although unfair, the diligent civil servant could be held liable for organizational circumstances which do not fall within the nature of a public service.

In the light of this view, we conclude that the provisions of Article 574 of the Administrative Code do not govern the assumption of the administration's liability for its unlawful acts.

3.Conclusions

If the relationships between individuals are based on legal equality, those between the administration and those who are administrated imply legal inequality.

In the name of public power, a set of prerogatives granted to the administration should be understood in order to enable it to prevail over the general interest when it is found in conflict with the private interest.

When the limits of public power are exceeded, there may be situations of attracting administrative-patrimonial liability, namely:

1. The exclusive patrimonial liability of the State for damages caused by judicial errors which do not exclude the responsibility of members of the judiciary;

2. The public authorities' patrimonial liability for public service limits;

3. The joint liability of the official and the public authorities for damages caused by typical or assimilated administrative acts; and

4. The liability of the public authority for damage caused by administrative acts and contracts.

With all the improvements that the long-awaited Administrative Code should be aware of, we conclude that the types of administrative liability are inextricably linked and relevant to their systematization in a single system of rules ensuring consistency, enforcement safety and, in particular, a uniform practice at the level of all areas of competence - that is because, on the one hand, it is difficult for the individual to study all the relevant rules in order to defend themselves from the illegal acts and acts of the administration, but, on the other hand, because the courts do not have uniform solutions to similar factual and legal situations, inferred from the ruling.

In our opinion, the entry into force of the Code and, by implication, the novelty of such legislative provisions represents a step forward in resolving the system's accountability for the unlawful acts, the correction and improvement of the work that civil servants and contractual staff perform every day in carrying out their tasks.

The public administration is required, by the members of the society, irrespective of the position they hold therein, to be successful, to carry out its tasks in full competence, without bias, with celerity.

In relation to all the aspects presented, for a good administration, all its elements must be considered, i.e. high-performance public management, efficiency and effectiveness in the activity of public administration, recruitment and training of quality personnel, responsibility and control, the right of every person to impartial and correct service, the citizen's rights of defence.

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