

Cătălin-Silviu Săraru

## **Administrative law in Romania**



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# **Administrative Law in Romania**

## **Cătălin-Silviu Săraru**

### **Activity**

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"Anibal Teodorescu" Prize awarded by the Union of Jurists of Romania in 2014 for the work „Cartea de contracte administrative – modele, comentarii, explicații” („The Book of administrative contracts - models, comments, explanations”), C.H. Beck Publishing House, Bucharest, 2013.

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## Chapter I

### Administrative Law Science

#### 1. The emergence of the science of administrative law

Administrative law as a science has emerged in France since the beginning of the 19<sup>th</sup> century. The founders of the science of French administrative law are<sup>1</sup> Joseph Marie Gérando, Baron de Rathsamhausen (who published *Institutes du droit administratif français, ou Éléments du code administratif, réunis et mis en ordre*, 6 vol., 1829-1836), Louis-Marie de La Haye, Vicomte de Cormenin (he publishes in 1822 *Questions de droit administratif* and in 1840 publishes the book *Droit administratif*) and Louis-Antoine Macarel (he publishes in 1818 *Éléments de Jurisprudence administrative* and in 1828 the book *Tribunaux administratifs*, also between 1844-1846 publishes *Cours de droit administratif*, in 4 volumes).

Gradually, the study of administrative law science was extended to law schools in other countries.

A particular case opposed to the French model is the United Kingdom. In 1885, the work written by A.V. Dicey entitled "*Introduction to the Study of the Law of the Constitution*", in which the author denies the existence of an administrative law in England, appears in England, considering that public administration was subject to the common law and administrative litigations were resolved England by common law courts and not by specialized courts of administrative litigation, as is the case in France<sup>2</sup>. The theory of denying the existence of an administrative law in the United Kingdom has dominated much of the 20<sup>th</sup> century.

From the second half of the twentieth century it will be seen in the United Kingdom: a) an extension of the sphere of public administration and at the same time, it recognizes the special powers enjoyed by the administration in order to achieve the public interests of the society; b) development of special administrative jurisdictions (currently there are over 2000 administrative jurisdictions, especially in the field of the social security and the labor law<sup>3</sup>). This has led to the establishment of administrative law theories together with constitutional law theories united in the "Constitutional and Administrative Law" discipline currently taught at law schools in the United Kingdom, a concept illustrated in numerous papers and university courses<sup>4</sup>. Therefore, in the last time there is an

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<sup>1</sup> See Gilles J. Guglielmi, *Vu par ses pères fondateurs, le droit administratif*, in *Le droit administratif en mutation*, PUF, 1993, p. 42.

<sup>2</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan and Co., Londra, 1885, p. 180.

<sup>3</sup> See Ioan Alexandru, *Drept administrativ comparat*, Lumina Lex, Bucharest, 2000, p. 102.

<sup>4</sup> See O. H. Phillips, P. Jackson, *Constitutional and Administrative Law*, 6<sup>th</sup> ed., Sweet-Maxwell, Londra, 1978; A. W. Bradley, R. D. Ewing, *Constitutional and Administrative Law*, 12<sup>th</sup> ed., Londra, 1998.

attenuation of the classical theory of non-existence of an administrative law in the United Kingdom supported by A. V. Dicey.

## **2. The emergence and evolution of the science of administrative law in Romania**

In the Romanian Principalities, elements of administrative law were taught for the first time in a discipline entitled "Public Law" („Drept public”) which also included elements of constitutional law at the Mihailean Academy in Iasi starting with the academic year 1858-1859 (a course taught by Simion Bărnuțiu).

Later, with the establishment of the University of Bucharest in 1864, Faculty of Law was established discipline "Public Law" which contained elements of constitutional law and administrative law.

In the United Principalities of Moldova and Wallachia, the first administrative law book entitled "*Romanian Administrative Law*" („*Drept administrativ român*") was written by Giorgie C. Alexandrescu-Urechea and appeared in Iasi in 1875.

A valuable scientific work titled *Curs de drept public român (Romanian Public Law Course)* in three volumes was published by Constantin G. Dissescu between 1890-1891. The first two volumes deal with the principles and institutions of constitutional law, and the third volume deals with the matter of administrative law. Through this work, Constantin G. Dissescu can be considered the creator of the constitutional law and administrative law branches in Romania.

During the period of the Kingdom of Romania, European personalities in the field of administrative law will be distinguished: Paul Negulescu (which wrote in 1904 the book „*Tratat de drept administrativ*" - "*Treatise of Administrative Law*" in two volumes, reprinted four times until 1934), Anibal Teodorescu (his reference book is „*Tratat de drept administrativ*" - "*Treatise of Administrative Law*" in 2 volumes: vol. 1 - 1929, vol. 2 - 1935) and Constantin Rarincescu (founder of Romanian school in administrative litigations matters. His reference book is „*Contenciosul administrativ român*" - "*Romanian administrative contentious*" published in 1936).

During the communist period (1948-1989), we note the reference works of the authors: Romulus Ionescu („*Curs de drept administrativ al R.P.R.*" - "*Administrative Law Course of R.P.R.*", Didactic and Pedagogical Publishing House, Bucharest, 1960), Mircea Anghene („*Elemente de drept administrativ*" - "*Administrative Law Elements*", Scientific Publishing House, Bucharest, 1958), Ilie Iovăneș („*Drept administrativ și elemente ale științei administrației*" - "*Administrative Law and Elements of Administration Science*", Didactic and Pedagogical Publishing House, Bucharest, 1977).

After 1989, have been highlighted as international researchers and law school creators: Antonie Iorgovan (his fundamental work is *Tratatul de drept administrativ - Treatise of Administrative Law*, the last edition - fourth edition - was published in two volumes at the C.H. Beck Publishing House in 2005) and Ioan Alexandru (author of a unique work in the contemporary Romanian administrative doctrine entitled „*Tratat de administrație publică*” - "*Treatise of Public Administration*", Universul Juridic Publishing House, Bucharest, 2008).

## **Chapter II**

### **Introductory notions of Romanian administrative law**

#### **1. Definition of administrative law**

**Administrative law** is the branch of law that encompasses the legal norms governing social relations regarding the organization, activity, control and liability of the public administration, based on and in the enforcement of the law<sup>1</sup>.

Public administration due to its complexity is currently governed by legal norms belonging to several branches of law<sup>2</sup>. Thus, some patrimonial relations within the public administration are governed by civil law, financial relations are subject to regulation of the rules of financial law, labor and wage relations are regulated by labor law, etc.

#### **2. The object of regulation of the Romanian administrative law**

The rules of administrative law regulate:

- the organization and functioning of public administration authorities;
- the relations between the public administration authorities, on the one hand, and between them and the natural and legal persons, on the other;
- the rights and obligations of civil servants regulated mainly by the Civil Servants' Statute;
- the legal regime of public property;
- the liability of public administration authorities;
- the contraventional liability of natural and legal persons;
- the exercising of administrative control;
- the administrative contentious consisting of all disputes of an administrative nature, arising in relations between the administration and other persons, which are given to the jurisdiction of the courts;
- the principles and procedure according to which the activity of public administration authorities takes place.

#### **3. The features of administrative law**

Romanian law is part of the Roman-German legal system, a dualist system based on the classical division as a public law - private law.

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<sup>1</sup> See Rodica Narcisa Petrescu, *Drept administrativ*, Hamangiu, Bucharest, 2009, p. 27.

<sup>2</sup> See Alexandru Negoită, *Drept administrativ*, Sylvi, Bucharest, 1996, p. 34; Rodica Narcisa Petrescu, *op. cit.*, 2009, p. 28.



Administrative law is a branch of public law. As early as antiquity, the Roman jurist Ulpianus stated that "public law is the one that concerns the organization of the Roman State; private law concerns particular interests" („*Publicum jus est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem pertinet*” – Ulpianus, D., 1.1.2).

Administrative law will present the general features of public law as well as its own features.

The main features of public law are<sup>1</sup>:

- traditionally, the rules of public law protect the public interest, which justifies the special protection granted;
- one of the subjects of the public law relationship (the social relationship governed by the rules of public law) is a public authority;
- the parts of the legal relationship of public law are in a position of juridical inequality, the state (public authorities) having an superordinated position and the other part a subordination position;
- the legal norms constituting the public right are in principle imperative rules, from which it can not be derogated by the will of the parties – „*Jus publicum privatorum pactis mutari non potest*” – D., 2.14.38 ("Public law can not be modified by conventions between individuals");
- the rules of public law are defended by the public authorities *ex officio*.

Administrative law embraces all these features of public law. Additionally, the administrative law has specific features, which derive from its object of activity.

**Administrative law implies an administrative legal regime for regulated social relations** justified by the specific nature of the realization of the *public interest*, the administration of the *assets subject to the public property* and the provision under the continuity and permanence of *public services*.

**The administrative legal regime** is a set of rules specific to the public administration activities established by norms of administrative law in order to achieve the public interest, distinct from those regulating the relation between the individuals. Thus, for example, the adoption of unilateral administrative acts is done in accordance with specific previous, concomitant and forward-looking procedures. Also, the bilateral legal acts (administrative contracts) are subject to a legal regime that differs from the legal regime applicable to private law contracts. The administrative contracts are signed, usually, after a prior procedure by which the public authority selects its private partner (public tender), part of the contract

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<sup>1</sup> See Mircea Djuvara, *Teoria generală a dreptului. Drept rațional, izvoare și drept pozitiv*, All Beck, Bucharest, 1999, p. 68-78; Giorgio del Vecchio, *Lecții de filozofie juridică*, Europa Nova, Bucharest, 1994, p. 215-217; Henri Lévy-Bruhl, *Sociologie du droit*, Presses Universitaires de France, Paris, 1964, p. 7,8; Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *Teoria generală a dreptului*, 2<sup>nd</sup> ed., C.H. Beck, Bucharest, 2008, p. 253-257; Nicolae Popa, *Teoria generală a dreptului*, 5<sup>th</sup> ed., C.H. Beck, Bucharest, 2014, p. 71-75; Ion Corbeanu, Maria Corbeanu, *Teoria generală a dreptului*, Lumina Lex, Bucharest, 2008, p. 188-191.

clauses are regulatory clauses unilaterally set by the public administration, the administration has the possibility to unilaterally terminate the contract when the public interest demands it, etc.

In administrative law, **public interest has priority over private interest**. Unlike the private individuals who pursue their personal interests by signing different legal acts from a position of juridical equality, the administrative authorities, when acting as agents of general interests of society, will be able to impose unilaterally their will from a position of juridical inequality, regulating social conduct, establishing rules for the organization and functioning of public services and affecting the assets of public utilities.

**Administrative law sets the limits on how the public administration can act by virtue of public power prerogatives (the principle of legality).** The **public power** can be defined as a right derived from the law that the public authorities have to impose with legally binding decisions on other legal subjects (natural and legal persons). In a democratic state, the public power is always exercised within the limits of law. The public administration authorities carry out their activity **on the basis of law and in accordance with the law**, aiming at the organization of the execution and the concrete execution of the law. Applying the principle of legality implies that the activity of any public authority is carried out in accordance with the provisions of the normative acts and administrative acts of the superior hierarchical authorities, as well as taking into account its own regulations adopted in accordance with the normative and administrative regulations with higher juridical force.

**Administrative law sets the conditions under which it is undertaken the legal liability of the public administration.** In a state governed by law, the public authorities and civil servants liable for damaging the rights and legitimate interests of natural and legal persons. In Romania people injured by administrative acts have the right to address petitions to public authorities under the terms of art. 51 of the Constitution and Government Ordinance no. 27/2002 *regarding the regulation of the activity of solving petitions*, the right to address at the Advocate of the People (Ombudsman), as well as the right to address, under the conditions of Law no. 554/2004 *of the administrative contentious*, at the administrative contentious instance.

## **Chapter III**

### **The sources of administrative law**

#### **1. The notion of source of law<sup>1</sup>**

The notion of source of law has two meanings:

a) *source of law in the material sense* - represents the material conditions of the company at a given time (the factors of configuration of the law) that were the basis of the legislator's will to regulate a certain social domain; it is those "gifts" of law and society that determine the legislator's action.

b) *source of law in the formal sense* - it represents the form of externalization of the will of the legislator and of the public authorities that enforce the law.

#### **2. The formal sources of administrative law**

##### **2.1. Constitution and constitutional laws**

The constitution in force of Romania was adopted by the Constituent Assembly on November 21, 1991 and was approved by the national referendum organized on December 8, 1991 (the date it entered into force).

The constitutional laws are, according to art. 73 paragraph (2) of the Constitution, those by which the Constitution is revised.

In 2003, the Constitution was subject to a revision process<sup>2</sup>, with the following changes:

- enhancing constitutional guarantees of fundamental rights and freedoms (new rights such as economic freedom, access to culture, the right to a healthy environment) have been introduced;

- the fulfillment of the constitutional conditions for Romania's integration into the European Union and for the accession to the North Atlantic Treaty (a new title was introduced entitled "Euro-Atlantic Integration" and the principles of EU integration were established, such as the right of Romanian citizens to choose and to be elected to the European Parliament),

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<sup>1</sup> On the sources of Romanian law see Nicolae Popa, *op.cit.*, p. 156-172; Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *op.cit.*, p. 119-196; Ion Corbeanu, Maria Corbeanu, *op. cit.*, p. 169-184; Mircea Djuvara, *op. cit.*, p. 306-342;

<sup>2</sup> The Law on the revision of the Constitution was adopted by the Parliament on September 18, 2003 and was approved by the referendum organized on October 18 and 19, 2003. Following the Law of revision, the Constitution of Romania was republished in the Official Gazette no. 767 of October 31, 2003, giving the texts a new numbering.

- solving some dysfunctions found within the decision-making process of the public authorities (differentiation of the powers of the two Houses of Parliament, extension of the presidential mandate to 5 years; restriction of parliamentary immunity, express mention of the principle of separation of powers in the state, entry into force of the laws within 3 days of at the time of publication, etc.).

There are sources of administrative law: the constitutional provisions regarding some prerogatives of the President of Romania (Chapter II of Title III), the structure and powers of the Government (Chapter III of Title III), the Parliament's relations with the Government (Chapter IV of Title III) and the public administration (Chapter V of Title III). Also, the Constitution includes the fundamental regulations regarding the conditions under which the expropriation of private property goods can be realized (art. 44 (3), the regulation of the right to petition (art. 51), the right of the person injured by a public authority (art. 52) and of public property law (art. 136).

## 2.2. Organic laws and ordinary laws

*Organic laws* - are adopted in areas of special importance for citizens' rights and freedoms, provided by art. 73 paragraph (3) of the Constitution (the electoral system; the organization of the Government and the Supreme Council of the Defense of the Country, the status of civil servants, the administrative litigation, the organization and functioning of the Public Ministry and the Court of Accounts, the general legal regime of the property; the organization of the local public administration, the territory, as well as the general regime regarding local autonomy, etc.), as well as other articles of the Constitution.

Organic laws are a source of administrative law only insofar as they contain rules of administrative law, which regulate administrative relations. Thus, it is a source of administrative law Law no. 554/2004 *of the administrative contentious*<sup>1</sup>.

*Ordinary laws* - are adopted in all other areas that do not fall under the laws of organic law. Ordinary laws are adopted with the vote of the majority of the members present in each House of Parliament [art. 76 (2) of the Constitution].

Ordinary laws are a source of administrative law only insofar as they contain rules of administrative law. Thus, it is a source of administrative law: Law no. 52/2003 *regarding the transparency of decision making in the public administration*<sup>2</sup>.

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<sup>1</sup> Published in the Official Gazette, Part I no. 1154 of December 7, 2004, as subsequently amended.

<sup>2</sup> Republished in the Official Gazette, Part I no. 749 of December 3, 2013.

### **2.3. Simple ordinances and emergency ordinances adopted by the Government**

*Government ordinances (simple)* are issued under a special enabling law adopted by Parliament, within the limits and under the conditions provided by it. The Government Ordinances have the same legal force as the ordinary laws where it follows that the Government cannot issue simple ordinances in the fields reserved to the organic and constitutional laws.

*Emergency ordinances* are adopted by the Government in extraordinary situations whose regulation cannot be postponed. They can be issued both in the field of ordinary and organic laws<sup>1</sup>. Emergency ordinances cannot be adopted in the field of constitutional laws, they cannot affect the regime of the fundamental institutions of the state, the rights, freedoms and duties provided by the Constitution, the electoral rights and they cannot target measures for forced passage of public property [art. 106 (6) of the Constitution].

There are sources of administrative law: Government Ordinance no. 27/2002 *regarding the regulation of the activity of solving the petitions*<sup>2</sup>; Government Emergency Ordinance no. 57/2019 *regarding the Administrative Code*<sup>3</sup>.

### **2.4. Administrative acts having normative character**

The administrative acts having normative character are issued for the organization of the execution of the primary regulations contained in laws and ordinances.

There are administrative acts:

- the decrees issued by the President of Romania,
- the Government decisions, instructions and orders of the ministers, acts of the specialized administrative authorities organized under the subordination of the Government or the ministries,
- administrative acts of the autonomous administrative authorities at central and local level,
- administrative acts issued by the prefect and by the decentralized public services of the ministries and other specialized central public administration bodies,
- the acts of the local public administration authorities.

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<sup>1</sup> The Constitutional Court has ruled by several decisions that by emergency ordinance the Government can regulate also in the field of organic law - see Decision no. 83/1998 (published in the Official Gazette no. 211 of May 19, 1998), Decision no. 134/1998 (published in the Official Gazette no. 88 of February 25, 1998).

<sup>2</sup> Published in the Official Gazette, Part I no. 84 of February 1, 2002, approved with amendments by Law no. 233/2002.

<sup>3</sup> Published in the Official Gazette, Part I, no. 555 of July 5, 2019, as amended.

Under certain conditions, administrative acts may also be adopted by legal persons under private law who, according to the law, have obtained the status of public utility or are authorized to provide a public service, under a regime of public power.

The public authorities can issue both administrative acts of normative character and administrative acts of individual character. The *normative administrative acts* **are sources of law** given that they contain legal norms, that is to say obligatory, general and impersonal rules of conduct, which take into account a generality of social relations and are addressed to an indefinite number of persons. In contrast, the *individual administrative acts* **are not sources of law** because they contain rules of conduct for a particular person or for a group determined by natural or legal persons (examples - building authorizations, contravenational sanction minutes, a decision of Government for appointing a person to a certain position), thus depriving them of the characters of impersonality and generality.

## 2.5. Legal uses

According to the provisions of art. 1 Civil code in cases not provided for by law, the customs are applied, and in their absence, the legal provisions regarding similar situations, and when there are no such provisions, the general principles of law.

In matters regulated by law, customs are only applicable insofar as the law expressly refers to them. Only usages according to public order and good manners are recognized as sources of law.

The role of custom as a source of administrative law is very limited because administrative law usually governs by imperative rules that must be applied uniformly throughout the country.

In the doctrine it was emphasized that as the evolution of the local autonomy may appear some administrative practices imposed by the geographical conditions, the degree of dispersion of the inhabitants, their occupation, the holidays and religious customs<sup>1</sup>, etc. Thus, for example, it is the custom that in many city halls the mayor and the local officials work and on Sundays when people come to the fair, to the church, etc.

## 2.6. Jurisprudence

The jurisprudence represents the totality of the court decisions. In the system of Romanian-German law (of which the Romanian law is a part), **court decisions do not constitute a source of law**, because the judicial precedents do

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<sup>1</sup> See Antonie Iorgovan, *Tratat de drept administrativ*, vol. I, 4<sup>th</sup> ed., All Beck, Bucharest, 2005, p. 139 ; Rodica, Narcisa Petrescu, *op. cit.*, 2009, p. 33 ; Verginia Vedinaş, *Drept administrativ*, 9<sup>th</sup> ed., Universul Juridic, Bucharest, 2015, p. 50, 51.

not have a generally binding legal value, the judge not being obliged to pronounce the same solutions in other cases. **Exceptions are:**

- *the decisions of the High Court of Justice and Cassation in the case of the appeal in the interest of the law* (art. 514-518 Code of Civil Procedure) promoted by the General Prosecutor, the Governing Board of the High Court of Cassation and Justice, the governing bodies of the courts of appeal or by the People's Advocate when it is found that in the practice of the courts a certain regulation is applied differently. The decisions of the High Court of Cassation and Justice in this case have the role of realizing the unitary application of the law throughout the territory of the country, being obligatory for the lower courts;

- *the decisions of the High Court of Justice and Cassation in the case of a preliminary ruling for the disclosure of certain legal issues*. According to art. 519 Code of Civil Procedure if, during the trial, a full court of the High Court of Cassation and Justice, of the court of appeal or of the court, vested with the solution of the case in the last instance, finding that a question of law, whose clarity depends the settlement on fund of the respective case, is new and on it the High Court of Cassation and Justice has not ruled and is not the subject of an appeal in the interest of the law being resolved, will be able to request the High Court of Cassation and Justice to make a decision by which to in principle, the question of law with which it was referred was resolved. According to art. 521 (3) Code of Civil Procedure the delegation given to the questions of law is obligatory for the court that requested the release from the date of the decision's decision, and for the other courts, from the date of publication of the decision in the Official Gazette of Romania, Part I.

- *the decisions of the Constitutional Court* are generally binding from the date of their publication in the Official Gazette and have power only for the future [Article 147(4) of the Constitution]. The decisions judging the exceptions of unconstitutionality are compulsory *erga omnes* (for all), not only for the parties to the dispute. According to art. 147 (1) of the Constitution, the provisions of the laws and ordinances in force, as well as those of the Parliament's regulations, found to be unconstitutional, cease their legal effects 45 days after the publication of the decision of the Constitutional Court if, within this period, the Parliament or the Government, as the case may be, do not agree with the provisions unconstitutional with the provisions of the Constitution. During this term, the provisions found to be unconstitutional are suspended by law.

- *court decisions annulling normative administrative acts*. The definitive and irrevocable court decisions by which the administrative act of a normative character has been annulled in whole or in part are generally binding and have power only for the future according to art. 23 of Law no. 554/2004 *of the administrative contentious*. They shall be published compulsorily after motivation, at the request of the courts, in the Official Monitor of Romania, Part I, or, as the case may be, in the official monitors of the counties or of the municipality of Bucharest, being exempted from the payment of publication fees.

## 2.7. Legal doctrine

The legal doctrine represents the legal literature (articles, monographs, courses, treaties). In the system of Romanian-German and Anglo-Saxon law, the opinions expressed by the authors in the doctrine do not have a binding legal force and therefore **do not constitute a source of law**.

Above all, however, both the legislator and the judge to substantiate a point of view regarding the creation or application of legal norms study the legal doctrine.

## 2.8. International treaties

The international treaty is a bilateral or multilateral legal act by which rights and obligations are created, modified or extinguished between the subjects of international law (states, international organizations)<sup>1</sup>. The international legal framework governing international treaties concluded between states is provided by the *1969 Vienna Convention on the Law of Treaties*. The conclusion of treaties between international organizations or between them and states is governed by the *Vienna Convention of 1986*.

According to art. 11 (2) of the Romanian Constitution, the treaties ratified by the Parliament, according to the law, are part of the national law. Examples: Law no. 129/1997 *for ratifying the Treaty on good neighborly relations and co-operation between Romania and Ukraine*, signed in Constanta on June 2, 1997<sup>2</sup>; Law no. 74/1992 *for the ratification of the Treaty of Friendship, Cooperation and Good Neighborhood between Romania and the Republic of Bulgaria*<sup>3</sup>.

In order for an international treaty to be a source of administrative law, it must fulfill the following conditions<sup>4</sup>: a) it must be of direct, direct application; b) be ratified according to the provisions of the Constitution; c) to include regulations of the social relations that are the subject of the administrative law.

Often, on the basis of a treaty concluded between two states, which includes regulations of a principled nature in all areas of interest to them, agreements are subsequently concluded that develop collaboration in a limited area<sup>5</sup>. Thus, the cross-border cooperation between Romania and Ukraine is regulated by the Treaty on good neighborly relations and cooperation between the two

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<sup>1</sup> See Florian Coman, *Drept internațional public*, vol. II, Sylvi, Bucharest, 1999, p. 22-39.

<sup>2</sup> Published in the Official Gazette, Part I no. 157 of July 16, 1997.

<sup>3</sup> Published in the Official Gazette, Part I no. 174 of July 23, 1992.

<sup>4</sup> See Antonie Iorgovan, *op. cit.* (*Tratat de drept administrativ*), vol. I, 2005, p. 135; Rodica Narcisa Petrescu, *op. cit.*, 2009, p. 31.

<sup>5</sup> See Cătălin-Silviu Săraru, *Considérations sur les accords de coopération transfrontalières entre les unités administratives-territoriales limitrophes des zones frontalières de la Roumanie et les structures similaires dans les pays voisins*, „Curentul Juridic” no. 2 (45)/2011, p. 89.



states, signed in Constanta on June 2, 1997, ratified by Romania by Law no. 129/1997. Based on the Good Neighborhood Treaty, cooperation agreements have been concluded in various fields with an impact on cross-border cooperation, including in the field of administrative law, such as the Agreement between the Government of Romania and the Government of Ukraine on cooperation in the field of border water management, signed in Galați on September 30, 1997, ratified by Romania by Law no. 16/1999<sup>1</sup>.

## **2.9. The legal order of the European Union**

### **✓ Romania and the European Union**

Romania was the first country in Central and Eastern Europe to have official relations with the European Community. In January 1974, an agreement included Romania in the Generalized System of Community Preferences, after which it signed a series of agreements with the European Economic Community (EEC) to facilitate trade. In 1980, Romania proceeded to the de facto recognition of the European Economic Community, by signing the Agreement on the creation of the Romania - EEC Joint Commission, concurrently, the Agreement on Industrial Products being signed.

On 1 February 1993, the European Agreement is concluded in Brussels establishing an association between Romania, on the one hand, and the European Communities and their Member States, on the other.

In October 1999 the European Commission recommended the start of the accession negotiations with Romania. Following the decision of the Helsinki European Council in December 1999, accession negotiations with Romania began on February 15, 2000.

Romania has concluded the accession negotiations at the EU winter summit in Brussels on December 17, 2004. The accession treaty was signed on April 25, 2005 in Luxembourg. On January 1, 2007 Romania becomes a member of the European Union, together with Bulgaria.

### **✓ The acquis of the European Union**

The legal norms of the European Union form an organized and structured assembly having its own sources, endowed with organs and procedures able to issue these norms, to integrate them, as well as to find and to sanction, if necessary, the violations. The legal order of the Union can be found within the concept of acquis of the European Union.

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<sup>1</sup> Published in the Official Gazette no. 13 of January 19, 1999.

The notion of **acquis of the European Union (initially the *acquis communautaire*)** introduced by the Treaty of Maastricht on the European Union (Articles 2, 3 and 43) consists of: the content, principles and political objectives contained in the Treaties originating in the European Communities and in the subsequent ones (Single European Act, Treaty of Maastricht, Treaty of Amsterdam, etc.); the legislation adopted by the EU institutions for the implementation of the Treaty provisions (regulations, directives, decisions, opinions and recommendations); the case law of the Court of Justice of the European Union; statements and resolutions adopted within the European Union; common actions, common positions, signed conventions, resolutions, declarations and other acts adopted in the framework of the Common Foreign and Security Policy (CFSP) and cooperation in the field of Justice and Home Affairs (JHA); international agreements to which the EU is a party, as well as those concluded between EU Member States with regard to its activity.

### ✓ **Characteristics of European Union law**

European Union law is characterized by:

- The immediate applicability of European Union law. Union law rules automatically acquire positive legal status in the internal legal order of the Member States.
- Direct applicability of European Union law. Union law rules are likely to create by themselves rights and obligations for individuals.
- Priority of European Union law. Union rules take precedence over any national rule. In Romania this is enshrined in art. 148 paragraph (2) of the revised Constitution: *"as a result of accession, the provisions of the constitutive treaties of the European Union, as well as the other mandatory Community regulations, have priority over the contrary provisions of the internal laws, in compliance with the provisions of the Act of Accession"*.

## **2.10. The need to codify the rules of administrative law**

Romania adopted the Administrative Code through the Government Emergency Ordinance no. 57/2019<sup>1</sup>, which entered into force on July 5, 2019. Romania thus joins the countries that have an administrative codification.

In Romania, until the adoption of the Administrative Code, the legal norms that formed the branch of administrative law, unlike other branches of law that were codified<sup>2</sup>, were found in disparate normative acts and not in a unitary

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<sup>1</sup> Published in the Official Gazette, Part I no. 555 of July 5, 2019.

<sup>2</sup> Thus the norms of the civil law are systematized within the Civil Code, the norms of the civil procedural law within the Code of civil procedure, the norms of the criminal law within the Criminal Code, the norms of the criminal procedural law in the Code of criminal procedure, the norms of the labor law in the Labor Code.

code that would ensure unity and cohesion based on common principles, the unity of the regulatory method, the precision and clarity of the rules.

The codification of the norms that regulate the action of the public administration presents an undeniable advantage for the citizen who will find in a single normative act regulated all the rights and obligations that fall within the content of the legal relation of administrative law.

The administrative codification, as expressed in the literature, must ensure in a unitary conception: the rational organization of the entire specialized apparatus of the public administration in order to increase its efficiency; precise establishment of the rights and obligations of civil servants, of their responsibility for the acts of service; citizens' knowledge of their rights and obligations as subjects of legal relationships with the public administration<sup>1</sup>.

The doctrine also highlights the difficulties raised by the codification of administrative law<sup>2</sup>:

- diversity and heterogeneous nature of the matters that constitute the object of regulation of administrative law;
- the large number of competent public authorities to publish administrative rules;
- the multitude of normative texts that regulate the activity of the public administration;
- the specific of the public administration, the main object of regulation of the administrative law, which is in a continuous change, transformation, in order to be able to face the new challenges of the social reality.

After 1990 the concerns for administrative codification determined the elaboration between 2000-2003 by specialists in the field of public administration within the Regional Training Center for Continuing Public Administration in Sibiu, in collaboration with the Academy of Civil Servants in Germany of two draft codes: *the Administrative Code*<sup>3</sup> which regulate matters of substantive law and the *Code of Administrative Procedure*<sup>4</sup> which contains aspects of contentious and non-contentious procedure. These projects were subsequently analyzed within

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<sup>1</sup> Iulian M. Nedelcu, *Considerații privind necesitatea adoptării unui Cod de procedură administrativă cu trimiteri la instituții juridice civile*, „Revista de Științe Juridice” no. 2/2006, p. 116; Mircea Anghene, *Necesitatea codificării normelor de procedură administrativă*, „Revista Română de Drept” no. 11/1973, p. 62 et seq.; Liliana Vișan, *Necesitatea codificării normelor de procedură administrativă*, „Revista de Drept Public” no. 2/2005, p. 71.

<sup>2</sup> See Verginia Vedinaș, *op. cit. (Drept administrativ)*, 2015, p. 79.

<sup>3</sup> See the Regional Training Center for Local Public Administration Sibiu, *Codul administrativ al României – proiect*, Global Media, Sibiu, 2002.

<sup>4</sup> *Codul de procedură administrativă al României*, project published in „Revista de Drept Public” no. 4/2004.

the Institute of Administrative Sciences "Paul Negulescu"<sup>1</sup> and then within working groups set up over time by the relevant ministry<sup>2</sup>. In 2008 the Government approved *the preliminary theses of the draft Administrative Procedure Code* through the Government Decision no. 1360/2008<sup>3</sup> and recently *the preliminary theses of the draft Administrative Code* were approved by Government Decision no. 196/2016<sup>4</sup>. Unfortunately, we find that these codes have not been adopted so far, although they are required by theorists and practitioners of administrative law.

The administrative code adopted for the first time in Romania in 2019 regulates the general framework for the organization and functioning of public administration authorities and institutions, staff status within them, administrative responsibility, public services, as well as some specific rules regarding public and private property of the state and of the administrative-territorial units.

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<sup>1</sup> The Institute of Administrative Sciences "Paul Negulescu", re-established in Sibiu in 1995, is the continuator of the Institute of Administrative Sciences founded in 1925 at the initiative of Professor Paul Negulescu. It has the status of public utility association and is the Romanian national section of the International Institute of Administrative Sciences (I.I.S.A. Brussels). By Law no. 246/2007 (published in the Official Gazette, Part I no. 485 of July 19, 2007, as amended) was established the Institute of Public Law and Administrative Sciences of Romania, continuation of the Institute of Administrative Sciences "Paul Negulescu".

<sup>2</sup> See the Special Collective for the finalization of the Draft of the Administrative Procedure Code of Romania constituted by the Order of the Minister of Interior and Administrative Reform no. 289/2007; The working group for the elaboration of the draft Administrative Code constituted by the Order of the Minister of Administration and Interior no. 84/2010; The working group for the finalization of the draft of the Administrative Code and the elaboration of the draft of the Administrative Procedure Code constituted by the Order of the Minister of Regional Development and Public Administration no. 2394/2013.

<sup>3</sup> Published in the Official Gazette, Part I no. 734 of October 30, 2008.

<sup>4</sup> Published in the Official Gazette, Part I no. 237 of March 31, 2016.

## Chapter IV

### Norms and relations of administrative law

#### 1. The norms of administrative law

The logico-legal structure of the norm of administrative law has several particularities.

**The hypothesis of the norm of administrative law.** Due to the need for these norms to be as clear as possible, most of the times the hypothesis is broader, with the aim of specifying as accurately as possible the parameters within which the norm acts in concrete cases. The hypothesis of the norm of administrative law refers to: the situations in which the legal norm applies, the categories of subjects to which the norm applies, definitions, principles, the purpose of a public authority or a certain activity, etc.

**Provision of the rule of administrative law.** The provision of the rule of administrative law is presented in most cases in imperative form, because the institutions and authorities of the administration act in the realization of the public power. The imperative provisions are those that command a conduct or require the withdrawal of a conduct.

The imperative provisions can be:

a) *onerative*, by which a certain action is required. An example of an onerative disposition is found in art. 225 (1) of the Administrative Code which shows that the local councilors are obliged, in the fulfillment of the mandate, to organize regular meetings with the citizens and to grant hearings.

b) *prohibitive*, by which a certain action is prohibited. An example of a prohibitive provision is found in art. 413 (2) of the Administrative Code which provides that any discrimination against a civil servant, defined in accordance with the provisions of the specific legislation regarding the prevention and sanctioning of all forms of discrimination, is prohibited.

Less often, administrative rules can be met with permissive provisions in administrative law. The permissive provisions provide for a certain conduct, leaving to the subject of the law whether or not to exercise this conduct. Most of the time these provisions are evoked by the verb "to be able", introduced in the expressions like "administrative authority can", "citizen can"<sup>1</sup>. An example of a permissive provision is found in art. 129 (13) of the Administrative Code which shows that the local council can confer to the Romanian or foreign natural persons with special merits the title of honorary citizen of the commune, city or municipality, on the basis of its own regulation.

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<sup>1</sup> See Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, vol. I, 2005, p. 144.

The sanction of the rule of administrative law. In administrative law we find<sup>1</sup>:

- a) Administrative-disciplinary sanctions (demotion from the civil service, dismissal from the civil service, etc.);
- b) Administrative-contraventional sanctions (warning, fine, etc.);
- c) Administrative-patrimonial sanctions (granting compensation to the injured person established by the court as a result of the state's responsibility for a judicial error);
- d) Technical-administrative measures of constraint (retention of driving license, obligation to medical treatment, etc.);
- e) Measures of enforced execution (demolition of constructions, setting up of bank accounts, etc.);
- f) Sanctions regarding legal acts (cancellations, suspensions, etc.).

## **2. The relations of administrative law**

### **2.1. Definition**

Administrative law relations<sup>2</sup> are those social relationships that are born, modified or extinguished under the rules of administrative law in which at least one of the topics is a public authority/institution or public service, regarding the organization of the execution or the concrete execution of the provisions of the law<sup>3</sup>.

### **2.2. Features of administrative law relations**

Administrative law relations have the following features:

- a) One of the subjects of the relation is a public authority/institution or a public service. For the purposes of Law no. 554/2004 *of the administrative contentious* are assimilated to the public authorities, the legal persons of private law who, according to the law, have obtained the status of public utility or are authorized to provide a public service, under a regime of public power [art. 2(1) letter b) of Law no. 554/2004].

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<sup>1</sup> *Idem*, p. 145.

<sup>2</sup> On the definition of administrative law relations see Ion Corbeanu, *Drept administrativ*, 2<sup>nd</sup> ed., Lumina Lex, Bucharest, 2010, p.57 ; Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 43; Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, vol. I, 2005, p. 149,150; Verginia Vedinaş, *op. cit. (Drept administrativ)*, 2015, p. 83; Alexandru Negoită, *op. cit. (Drept administrativ)*, 1996, p. 40, 41; Ioan Alexandru, *Tratat de administrație publică*, Universul Juridic, Bucharest, 2008, p. 125; Dumitru Brezoianu, *Drept administrativ român*, Lucreţius, Bucharest, 1997, p. 27.

<sup>3</sup> The term "law" is used here in the general sense (*lato sensu*), encompassing all regulatory acts, issued, following a unilateral decision, from a public authority.

b) The relations of administrative law appear in the process of organizing the execution and the execution of the provisions of the law.

c) There are relations of authority or power. The administrative structure invested with the prerogatives of public power has the possibility of unilaterally imposing a certain conduct on the other subject.

d) There are usually constituted relations on the inequality of legal position of the parties.

### **2.3. The subjects of the relation of administrative law**

An administrative law relation can be established between<sup>1</sup>:

a) two public administration authorities

b) an authority of the public administration and another public authority (for example the relations between the Ministry of Justice and the courts). Such relationships may have a dual legal nature, such as, for example, the relations between Parliament and Government regulated by Chapter IV of Title III of the Constitution, which are both constitutional and administrative law.

c) an authority of public administration and non-governmental organizations without patrimonial purpose (associations, foundations, unions, employers' associations). Under the law, the associations and foundations that carry out activities in the general interest or of some communities can be recognized by the Government as being of public utility (establishments of public utility).

d) an authority of the public administration and legal persons with patrimonial purpose (autonomous management, national company or commercial company)

e) an authority of the public administration and a natural person.

### **2.4. Classification of administrative law relations**

Depending on the topics involved, administrative law relations can be classified into two categories<sup>2</sup>:

a) Administrative law relations in which both subjects are public administration authorities.

b) Administrative law relations in which a subject belongs to the public administration, and the second subject is a natural or legal person from outside the public administration.

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<sup>1</sup> See Ioan Alexandru, *op. cit. (Tratat de administrație publică)*, 2008, p. 125.

<sup>2</sup> See Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 45; Ioan Alexandru, Mihaela Cărașan, Ion Popescu, Dragoș Dincă, *Drept administrativ*, Economica, Bucharest, 2002, p. 65, 66; Alexandru Negoită, *op. cit. (Drept administrativ)*, 1996, p. 44,45.

### **2.4.1. Administrative law relations in which both subjects are public administration authorities**

Within them we can distinguish:

**a) hierarchical subordination relations.** Such are, for example, the relations between the Government and the ministries, the relations between the ministries and their central subordinate specialized authorities (the relations between the Ministry of Public Finance and the National Agency for Fiscal Administration). These are authority relationships that are established between public administration structures in an administrative hierarchy. The subjects are in a position of legal inequality, the superordinate subject (bearer of the public authority) having by his unilateral will regarding the conduct of the other subject (subordinate). The superordinate subject named and active subject has the right to lead, guide and control the activity of the subordinate subject named and passive subject<sup>1</sup>.

**a) collaboration relations.** There are collaborative relations between the President and the Government, the relations between the ministries (for example, the Ministry of Culture can collaborate with the other ministries in order to carry out joint actions in the country and abroad, etc.). These relationships are made between subjects that do not have hierarchical subordination. The subjects are in a position of legal equality. Therefore, the birth, modification or termination of these relations will be determined, in principle, by the will of both subjects.

**b) administrative tutelage relations.** These have as legal basis the assurance of legality in the activity of authorities of the public administration. The prefect and the National Agency of Civil Servants are, according to the provisions of art. 3 of Law no. 554/2004 *of the administrative contentious*, administrative tutelage authorities exercising a legality control over the acts of some public administration authorities. Thus, the Prefect can directly attack the acts issued by the local public administration authorities (county council, local council, mayor) directly before the administrative litigation court, if they consider them illegal. Also, the National Agency of Civil Servants can attack before the administrative contentious court the acts of the central and local public authorities that violate the law on the civil service.

**c) coordination relations.** By virtue of some legal provisions an authority of the public administration may acquire the competence to coordinate the activity of another authority of the public administration. In contrast to the hierarchical subordination relation, in this case the subject under the coordination of the other enjoys a large functional and decision-making autonomy. Thus, accord-

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<sup>1</sup> See Ioan Alexandru, Mihaela Căraușan, Ion Popescu, Dragoș Dincă, *op. cit. (Drept administrativ)*, 2002, p. 65.



ing to the provisions of art. 170 (1) of the Administrative Code, the County Council has the role of coordinating the activity of communal, city and municipal councils, in order to carry out public services of county interest.

**2.4.2. Administrative law relations in which a subject belongs to the public administration, and the second subject is a natural or legal person from outside the public administration**

Within them we can distinguish:

**a) Subordination relations.** There are legal relationships in which the authorities of the public administration, based on the legal competence, can unilaterally establish rights and obligations for natural and legal persons outside the system of public administration (for example, the relations of administrative contraventional law between the offender and the bodies entitled to ascertain and apply the sanction).

**b) Legal relations for the collaboration and participation** of some natural and legal persons in carrying out the tasks of the public administration (for example the relations between the Ministry of Culture and different associations and foundations in order to carry out common cultural activities).

**c) Legal relations for the use of public services** (for example the use of public transport means). The public administration authorities have the legal right and obligation to provide public services to meet needs of general interest. Citizens have the right to use public services under the conditions provided by the regulations regarding their organization and activity and to demand their functioning in good conditions.

## Chapter V

### The administrative act

#### 1. Definition

The administrative act is the unilateral legal act emanating from a public authority or from private persons authorized by them, on the basis of public power, on the basis and in view of the execution of the law<sup>1</sup>.

Administrative acts are the main legal form of the activity of public administration authorities.

#### 2. The features of the administrative act

The administrative act presents the following features:

**a) The administrative act is a legal act.** The legal act represents a manifestation of will made with the intention of producing legal effects, that is to give birth, to modify or to extinguish rights and obligations. Therefore, the administrative act is, like any legal act, a manifestation of will intended to produce a change in the existing legal reality<sup>2</sup>. The administrative act differs from such **administrative operations** (notices, agreements, minutes of establishment, etc. necessary for issuing the administrative act). We note that while administrative acts directly produce legal effects on those to whom they are addressed, effects that the public authority issuing the act envisages, administrative operations do not produce legal effects by virtue of the will of the perpetrator, but these effects they occur because the law provides (by law - *ope legis*)<sup>3</sup>. For example, a building permit is an individual administrative act that produces the legal effects envisaged by the issuing public authority with regard to the conditions that the respective construction must fulfill. In order to issue the building permit, a series of notices provided by Law no. 50/1991 *regarding the authorization of the execution of the construction works*<sup>4</sup>. These opinions are administrative operations. In order to

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<sup>1</sup> For different definitions of the administrative act see Ion Corbeanu, *op. cit. (Drept administrativ)*, 2010, p. 76; Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 307; Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, vol. II, 2005, p. 25; Verginia Vedinaş, *op. cit. (Drept administrativ)*, 2015, p. 95, 96; Alexandru Negoită, *op. cit. (Drept administrativ)*, 1996, p. 137; Ioan Alexandru, *op. cit. (Tratat de administrație publică)*, 2008, p. 548; Anton Trăilescu, *Drept administrativ*, ediția 4, Editura C.H. Beck, București, 2010, p. 191; Dumitru Brezoianu, *op.cit. (Drept administrativ român)*, 1997, p. 137; Ilie Iovănaş, *Dreptul administrativ și elemente ale științei administrației*, Didactic and Pedagogical Publishing House, Bucharest, 1977, p. 219.

<sup>2</sup> Jean Rivero, Jean Waline, *Droit administratif*, 15<sup>e</sup> édition, Dalloz, Paris, 1994, p. 79.

<sup>3</sup> Dumitru Brezoianu, *op.cit. (Drept administrativ român)*, 1997, p. 125; Alexandru Negoită, *op. cit. (Drept administrativ)*, 1996, p. 133; Ioan Alexandru, Mihaela Cărăușan, Ion Popescu, Dragoș Dincă, *op. cit. (Drept administrativ)*, 2002, p. 255, 256.

<sup>4</sup> Republished in the Official Gazette, Part I no. 933 of October 13, 2004, as subsequently amended.

obtain the building permit, the opinions provided by the law must be favorable. The effect produced by these opinions is that the authorization depends on them, an effect provided by law and which does not depend on the will of the administrative structure that gives the opinion<sup>1</sup>.

**b) The administrative act is a unilateral manifestation of legal will** because it releases a single legal will, which comes from a public authority. For the validity of an administrative act, it is not necessary the consent of the person to whom it is addressed. Therefore, the character of the administrative act of being a unilateral manifestation of legal will distinguishes it from the contracts (bilateral legal acts) of public law (administrative contracts) or private law (civil law, labor law contracts, etc.). For example, for the issuance of a report on the application of a contravention sanction against the person who committed the contravention, it is not necessary to consent to the application of the sanction<sup>2</sup>.

Also the unilateral manifestation of will represented by the administrative act is carried out under public law, which distinguishes it from the unilateral act of private law (will, donation, etc.).

**c) The administrative act is adopted by a public authority.** Law of the administrative contentious no. 554/2004 defines in art. 2 (1) letter b) the issuing public authority as any state body or of the administrative-territorial units that act, in regime of public power, for the satisfaction of a public interest.

Mainly administrative acts are adopted by public administration authorities. But administrative acts can also adopt structures within the Parliament, as well as the organs of the judiciary in their organizational activity or in concrete execution of the law. Thus, for example, the order by which the Secretary General of the Senate sanctions a parliamentary civil servant or the order by which the president of the High Court of Cassation and Justice appoints or dismisses the economic manager are administrative acts issued by public authorities within the legislative or judicial power<sup>3</sup>.

Law of the administrative contentious no. 554/2004 provides in art. 2 (1) letter b) the second thesis, the fact that, within the meaning of this law, the legal persons of private law who have obtained the status of public utility or are authorized to provide a public service, under public power, are assimilated to the public authorities. Thus, for example, the General Association of Sport Hunters and Fishermen (AGVPS) is a non-governmental association of public utility having an exclusive competence, delegated by the state through normative acts, in the field of hunting and sport fishing. In this capacity AGVPS can issue administrative acts.

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<sup>1</sup> See Dumitru Brezoianu, *op.cit.* (*Drept administrativ român*), 1997, p. 125, 126; Ioan Alexandru, Mihaela Cărbăușan, Ion Popescu, Dragoș Dincă, *op. cit.* (*Drept administrativ*), 2002, p. 256.

<sup>2</sup> See Ioan Alexandru, Mihaela Cărbăușan, Ion Popescu, Dragoș Dincă, *op. cit.* (*Drept administrativ*), 2002, p. 258.

<sup>3</sup> See Emanuel Albu, *Dreptul contenciosului administrativ*, Universul Juridic, Bucharest, 2008, p. 39.

**d) The manifestation of will takes place under and for the realization of public power.** Due to this fact, the administrative act is compulsory and enforceable *ex officio*. The issuing authority of the act may unilaterally impose its will against the person to whom that act is addressed, establishing its conduct to be followed. The obligatory nature of the administrative acts implies that the administrative act is obligatory both for all the subjects of law to which they are addressed (legal persons of public or private law and natural persons) and for the issuing body as long as it has not been repealed, revoked or annulled<sup>1</sup>.

The obligation of the administrative act is a consequence of the presumption of legality enjoyed by all the administrative acts being issued on the basis and in order to execute the law<sup>2</sup>.

**e) The administrative act is issued for the purpose of organizing the execution of the law or its concrete execution.** The very reason for being the public administration is to organize and execute in concrete the law, understood in its broad acceptance, not only by act of the Parliament. The normative acts and the administrative acts are classified in a hierarchy according to their legal force.

### 3. Classification of administrative acts

The administrative acts are classified into several categories, as follows:

**1) According to the criterion of the extent of the legal effects produced:**

*a) Normative administrative acts* - they include regulations of general and impersonal character, that is, legal norms. Normative administrative acts often include imperative (operative and prohibitive) norms. Less often, administrative rules can be met with permissive provisions in administrative law.

*b) Individual administrative acts* - creates, modifies or extinguishes rights and obligations for the benefit or task of one or more determined persons.

**The individual administrative acts are classified in:**

- *Acts establishing determined rights and obligations for the subjects to which they are addressed.* Example: the building permit which gives the owner a set of rights and obligations related to the realization of a certain building.

- *Acts conferring a personal status on the beneficiaries.* Example: university diploma that assigns to the beneficiary a complex of rights and obligations and not a certain right or obligation.

- *Administrative acts by which the administrative constraint is applied.* Example: the report by which the contravention is recorded and the sanction provided by law is applied.

<sup>1</sup> See Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 309.

<sup>2</sup> See Emanuel Albu, *op. cit. (Dreptul contenciosului administrativ)*, 2008, p. 39; Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 309.

- *Administrative-jurisdictional acts*. According to the provisions art. 2 paragraph (1) letter d) of Law no. 554/2004 *of the administrative contentious* by administrative-jurisdictional act is understood the act issued by an administrative authority, invested by organic law with attributions of special administrative jurisdiction. The special administrative jurisdiction represents, according to art. 2 paragraph (1) letter e) of Law no. 554/2004, the activity carried out by an administrative authority that has, according to the special organic law in this matter, the competence to resolve a conflict regarding an administrative act, following a procedure based on the principles of contradictory, assuring the right to defense and independence of the administrative-jurisdictional activity<sup>1</sup>.

**1) According to the criterion of the organ from which it emanates:**

- a) Acts emanating from the public administration authorities
- b) Acts emanating from public authorities other than administrative ones
- c) Administrative acts by delegation that are issued, on the basis of an express empowerment given by law or by public administration bodies under the law, by certain private persons (associations and foundations of public utility, legal persons of private law authorized to provide a public service, under public power);

**2) After the material competence of the organ from which it emanates:**

a) *Acts of general administration* by which the execution is organized and concretely the provisions of the law are executed in any field of social relations. This is, for example, the Government's decisions.

b) *Acts of special administration* by which the execution is organized and concretely the provisions of the law are executed only in a certain field of social relations. This is, for example, the order of a minister implementing the provisions of the law in the relevant field of that ministry.

## **4. The legal regime of administrative acts**

### **4.1. Legality of administrative acts**

The **legality of administrative acts** means the obligation to comply with the provisions contained in the Constitution and in the laws adopted by Parliament, as well as with the other normative and administrative acts with a legal force superior to the adopted act<sup>2</sup>.

<sup>1</sup> For definitions of the administrative-jurisdictional act in the doctrine see Dumitru Brezoianu, *Contenciosul administrativ*, Metropol, Bucharest, 1995, p. 57, 58.

<sup>2</sup> On the sources of legality of the administrative act see Rozalia-Ana Lazăr, *Legalitatea actului administrativ. Drept românesc și drept comparat*, All Beck, Bucharest, 2004, p. 53-59.

An individual administrative act cannot derogate from the provisions of a normative administrative act adopted by the competent authority<sup>1</sup>.

## 4.2. Competence of public administration authorities

The administrative acts are adopted on the basis and within the limits of the competences established by normative and administrative acts for the issuing public authorities.

The competence of the public authorities expresses the content of the activity carried out, through the dignitaries, the civil servants and the contract staff (employees), by the public structures, with or without legal personality, from a material, territorial and temporal point of view.

The competence of the public administration authorities has the following characteristics:

- competence is determined by law.
- competence is aimed at satisfying the public interest.
- competence is mandatory.

In the doctrine the competence is examined in relation to the sphere and nature of the social relations entered in the activity field of an authority (*ratione materiae*) or with the spatial or geographical limits in which the material competence of a public body is manifested (*ratione loci*)<sup>2</sup>.

Therefore, we will distinguish the following **types of competence**:

**1. The material competence** (*ratione materiae*) of the issuing public authority represents the extent of its attributions provided by the law or the scope of the attributions of a public authority fixed by law.

The material competence can be:

- *general* when the exercising authority has the right to decide in all areas of social reality, under the conditions of the law (the competence of the Government to adopt Government decisions in all areas of social reality)
- *special* when the exercising authority has the right to decide only in a certain area of social reality (the competence of a minister to adopt orders and instructions only in a certain area of social reality: work, education, public finances, etc.).

**2. Territorial competence** (*ratione loci*) represents the territorial framework (geographical boundaries) in which a public authority exercises its powers.

The territorial competence may be:

- *national* if the public authority exercises its powers throughout the state (Government decisions apply throughout the country).

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<sup>1</sup> See Prosper Weil, *Le droit administratif*, 15<sup>e</sup> édition, Presses Universitaires de France, Paris, 1992, p. 88.

<sup>2</sup> See Rozalia-Ana Lazăr, *op. cit. (Legalitatea actului administrativ...)*, 2004, p. 107; Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, vol. I, (2005), p. 280, 281.

- *local* if the public authority exercises its attributions on a certain territory within the state, such as the territory of an administrative-territorial unit (the decisions of a local Council of a city apply only in the territorial area of that city).

#### **4.3. Competence related and the discretionary power (opportunity) of public administration**

The **competence related** to the public administration is manifested when, in the presence of a given situation, the administrative authority does not benefit from any margin of freedom, being forced to act in a manner determined strictly by law<sup>1</sup>.

Sometimes the law can allow the public authorities a wider or narrower margin of appreciation on a particular situation. Thus, the law may allow public authorities to have the opportunity to choose the decision they will make (for example, after examining the ability to drive a car on public roads, the police has the opportunity to decide whether or not to give the car), to choose the means that will be used to achieve the result provided by law (for example in the field of taking police measures in the event of public disturbances) or to choose the moment when an administrative act. We are in this case in the presence of a **discretionary power** exercised within the limits allowed by law by the public authorities. Therefore, the discretionary power is nothing more than the margin of freedom available to the public authority, within the limits of the law<sup>2</sup>, which allows it to assess how it will serve the general interests of the society.

For example, for the issuance of a traffic permit the law provides for a number of conditions. Based on the legal provisions, some of these conditions such as the age limit, the payment of the tax will be established directly by the competent public administration authority to issue the act, being in this case the **exercise of the related competence**. Other conditions, such as the ability to drive a vehicle on public roads will be left to the discretion of the police, being in this case the **exercise of discretionary power**.

#### **4.4. Form of the administrative act**

The form of the legal act designates the way of externalizing the manifestation of will made with the intention of creating, modifying or extinguishing a legal relations<sup>3</sup>.

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<sup>1</sup> See Dana Apostol Tofan, *Puterea discreționară și excesul de putere al autorităților publice*, All Beck, Bucharest, 1999, p. 65.

<sup>2</sup> See Prosper Weil, *op. cit.* (*Le droit administratif*), 1992, p. 89.

<sup>3</sup> See on the definition of the form of the civil legal act Mircea N. Costin, Călin M. Costin, *Dicționar de drept civil de la A la Z*, 2<sup>nd</sup> ed., Hamangiu, Bucharest, 2007, p. 470.

Administrative acts are usually issued/adopted in **written form**, which is a necessary condition for the validity of the act itself (requirement *ad validitatem*). The written form is a guarantee of respect for legality.

Normative administrative acts will always take the written form, because the law stipulates the obligation to publish them.

Exceptionally, certain *individual administrative acts* may also take the oral form. For example, according to the provisions of art. 5 (2) of the Government Ordinance no. 2/2001 *regarding the legal regime of contraventions* stipulates the warning as the main contravention sanction, together with the contraventional fine and the provision of an activity for the benefit of the community. According to art. 7 (1) of the Government Ordinance no. 2/2001 the warning consists in the **verbal** or written warning of the offender on the social danger of the committed crime, accompanied by the recommendation to comply with the legal provisions. The warning applies if the deed is of minor severity. The warning is addressed orally when the offender is present at the finding of the contravention and the sanction is applied by the certifying agent [art. 38 (1) of the Government Ordinance no. 2/2001].

#### 4.5. Procedure for issuing/adopting administrative acts

There are three categories of procedural forms necessary for issuing/adopting an administrative act: previous procedural forms, concomitant and subsequent to the issuance/adoption of the administrative act.

##### 4.5.1. Previous procedural forms (prior) to the issuance or adoption of the administrative act

Procedural forms prior to the issuance/adoption of the administrative act most commonly encountered in practice are opinions and agreements.

**The opinions** are the opinions that one body of the public administration requests from another body of the public administration in a problem or in several problems, to inform and to decide knowingly the cause<sup>1</sup>.

The agreement represents the acceptance, the consent that one public body gives to another public body, in order to issue by the latter an administrative act. Thus, for example, according to art. 35 (2) of the Government Emergency Ordinance no. 111/2011 *regarding the electronic communications*<sup>2</sup> the license to use the radio frequencies can be transferred in its entirety, only with the **prior agreement** of ANCOM [National Authority for Administration and Regulation

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<sup>1</sup> See Tudor Drăganu, *Actele de drept administrativ*, Scientific Publishing House, Bucharest, 1959, p. 121.

<sup>2</sup> Published in the Official Gazette, Part I no. 925 of December 27, 2011, approved with amendments by the Law no. 140/2012, as subsequently amended.



in Communications], with the assumption of all the obligations arising from it, and with the compliance with the conditions provided. in the license regarding its surrender. Any agreement with the object of assigning the license, concluded without obtaining the prior agreement, is null and void.

In the category of the preliminary procedural forms, **the drafting of the administrative act** by specialized departments within a public authority/institution competent to issue or adopt an administrative act will also enter<sup>1</sup>.

**Participation of citizens and associations legally constituted in the process of elaboration of normative administrative acts.** Within the procedures of elaboration of the draft normative acts, the authority of the public administration has the obligation, according to the provisions of art. 7 (1) of Law no. 52/2003 *regarding the decision-making transparency in the public administration*<sup>2</sup>, to publish an announcement regarding this action in its own site, to display it at its headquarters, in a space accessible to the public, and to transmit it to the central media or local, as appropriate. The public administration authority will send the draft normative acts to all the persons who have submitted a request for receiving this information.

#### **Other procedural forms prior to the adoption of administrative acts.**

In administrative practice, various procedural forms can be encountered prior to the adoption of the administrative acts provided by law, such as: proposals [for example, according to art. 275 (10) of the Administrative Code the prefect can propose to the ministries and other bodies of the central public administration measures to improve the activity of the decentralized public services, organized at the level of the administrative-territorial units], certified (for example the urbanism certificate issued under the conditions provided by Law no. 50/1991 *regarding the authorization of the execution of the construction works*. According to Article 6 of Law no. 50/1991, the urban planning certificate is only an information act prior to the issuance of the administrative act called building authorization), reports, social surveys, etc.

#### **4.5.2. Procedural forms concomitant with the issuance or adoption of the administrative act**

For the adoption of an administrative act by a collegiate body, the conditions stipulated by the law regarding quorum and majority must be fulfilled. Also, administrative acts, whether adopted by a collegiate body or issued by a single person body, must be motivated, and signed (sometimes countersigned) under the conditions of the law.

**The quorum** represents the number of members, relative to the total members of a collegiate body, which must be present in order for its deliberations

<sup>1</sup> See Verginia Vedinaş, *op. cit. (Drept administrativ)*, 2015, p. 113; Iordan Nicola, *Drept administrativ*, "Lucian Blaga" University Publishing House, Sibiu, 2007, p. 411.

<sup>2</sup> Republished in the Official Gazette, Part I no. 749 of December 3, 2013.

to be valid. Thus, for example, art. 137 (1) of the Administrative Code provides that the meetings of the local council shall be held legally in the presence of the majority of the local councilors in office.

**The majority required for the adoption of the act** represents the number of votes cast in favor of the draft administrative act necessary, according to the law, for it to be adopted.

Most can be:

a) *simple* - consisting of half plus one of the number of those present. For example, the sitting President of the Local Council is elected by an open majority vote, according to art. 123 (1) of the Administrative Code.

b) *absolute* - consisting of half plus one of the total number of members of the collegiate body. For example, the decisions of the Local Council regarding the local budget, as well as those establishing local taxes and fees, are adopted with the absolute majority of local councilors in office, according to art. 139 (3) of the Administrative Code.

c) *qualified* - it is indicated by the law, as it is usually the vote of two thirds or three fourths of the number of members that make up the collegiate body. For example, the decisions regarding the acquisition or alienation of the property right in the case of immovable property are adopted by the local council with the qualified majority of two thirds of the number of local councilors in office, according to art. 139 (2) of the Administrative Code.

**Signing and countersigning of the administrative acts.** Under the conditions provided by the law, the administrative acts are signed by the head of the issuing public authority. The law also sometimes stipulates the obligation of countersignature by the persons who have the obligation to fulfill or have responsibilities in the field of regulation of the administrative act in question. Thus, for example, under the conditions provided by the Constitution the President of Romania issues:

a) Decrees signed only by the President. For example, according to art. 94 lit. c) of the Constitution the President issues decrees appointing him in public positions, under the conditions provided by law

b) Decrees signed by the President and countersigned by the Prime Minister. Thus, for example the decree of the President granting the individual clemency must be countersigned by the Prime Minister according to the provisions of art. 100 (2) of the Constitution.

**The motivation of the administrative acts** is a guarantee of the observance of the law and the protection of citizens' rights. Generalizing the principle of motivating administrative acts has the effect of guaranteeing the effective realization of the right to a good administration<sup>1</sup>.

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<sup>1</sup> Emanuel Albu, *Motivarea actelor administrative – garanție a dreptului la o bună administrație (administrare)*, „Revista de Drept Public” no. 4/2010, p. 66

An important element for openness and transparency in public administration is the obligation of public authorities to make known the reasons for their decisions<sup>1</sup>.

**Participation of citizens and associations legally constituted in the decision-making process.** According to the provisions of art. 8 (1) of Law no. 52/2003 *regarding the transparency of decision-making in the public administration* to the interested persons can participate, in the conditions of the law, in the works of the public meetings of the authorities of the public administration.

#### **4.5.3. Procedural forms subsequent to the issuance or adoption of the administrative act**

The procedural forms subsequent to the issuance or adoption of the administrative act are: communication, publication, approval, confirmation.

**The communication** is the operation by which the issuing public authority notifies the interested party of an *individual administrative act*, either by direct delivery to it, or by displaying at his domicile, or by other means.

**The publication** represents the public awareness of *the normative administrative acts* by printing in the Official Monitor, in the case of the normative administrative acts adopted at central level, in the county official monitors, in the media or by displaying at the issuer's headquarters and on the own site for the adopted acts, locally.

**The approval** is the manifestation of a will of a higher administrative body by which it is declared in agreement with an act issued by a lower body, an act which, without this manifestation of his subsequent will would not produce, according to the law, legal effects<sup>2</sup>. For example, the approval of an act issued by a public administration body on the basis of a delegation of competence.

**Tacit approval.** The seat of the matter can be found in the Government Emergency Ordinance no. 27/2003 *regarding the tacit approval procedure*<sup>3</sup>.

The silence of the administration to the requests by which it is requested to issue or renew an authorization necessary to carry out a certain activity, to provide a service or to exercise a profession signifies the approval of the request, under the conditions provided by the Government Emergency Ordinance no. 27/2003.

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<sup>1</sup> See Cătălin-Silviu Săraru, *Considerații cu privire la principiile Spațiului administrativ european și la necesitatea includerii lor în proiectul Codului administrativ român*, „Caietul Științific” ISAR no. 7/2005, Section for Legal and Administrative Sciences, p. 35.

<sup>2</sup> See Tudor Drăganu, *op. cit.* (*Actele de drept administrativ*), 1959, p. 137

<sup>3</sup> Published in the Official Gazette, Part I no. 291 of April 25, 2003, approved with amendments by Law no. 486/2003, as subsequently amended.

Thus, for example, urbanism certificates, notices, agreements, permits and authorizations regarding the expropriation for a cause of public utility, necessary to achieve objectives of national, county and local interest regulated by Law no. 255/2010<sup>1</sup> is considered granted, except for the environmental agreement, if they have not been transmitted to the expropriator within the terms provided by law [art. 24 (5) of Law no. 255/2010].

The tacit approval procedure **does not apply**:

- the authorizations issued in the field of nuclear activities, those regarding the regime of firearms, ammunition and explosives, the regime of drugs and precursors, the field of national security [art. 2 (1) of the Government Emergency Ordinance no. 27/2003].

- the building permits, the urban planning certificates and the urban planning documentation provided in art. 6 paragraph (1) and art. 7 paragraph (1) of Law no. 50/1991 *regarding the authorization of the execution of the construction works*, and in art. 29 and 44 of Law no. 350/2001 *on spatial planning and urbanism* (Decision no. 13/2013 of the High Court of Cassation and Justice regarding the examination of an appeal in the interest of the law<sup>2</sup>).

- in other areas established by laws and ordinances [for example, according to the provisions of art. 24(5) of Law no. 255/2010 the environmental agreement regarding the expropriation for a cause of public utility, necessary to achieve objectives of national, county and local interest is exempted from the application of the tacit approval procedure regulated by GEO no. 27/2003] or by Government decision [according to article 2(2) of the Government Emergency Ordinance no. 27/2003, the Government can establish, by decision, the motivated proposal of each authority of the public administration concerned, and other exceptions from the application of the tacit approval procedure].

#### 4.6. The legal force of administrative acts

At the basis of the legal effects produced by the administrative acts is the presumption that they were issued in compliance with all the conditions imposed by the law, a presumption that has three dimensions:

a) **Presumption of legality** - in the sense that the administrative act was issued in accordance with the provisions of the Constitution, the laws and the administrative acts adopted by the higher hierarchical bodies.

b) **Presumption of authenticity** - in the sense that the act was issued by the public authority shown in its content by specific forms: header, stamp, signatures, etc.

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<sup>1</sup> Law no. 255/2010 *regarding the expropriation for a cause of public utility, necessary to achieve objectives of national, county and local interest*, published in the Official Gazette, Part I no. 853 of December 20, 2010, as subsequently amended.

<sup>2</sup> Published in the Official Gazette, Part I no. 674 of November 1, 2013.

c) **The presumption of truthfulness** - in the sense that the administrative act is supposed to correspond, in essence, to the truth.

These are relative presumptions, *iuris tantum*, which can be overturned if the administrative act is challenged before the administrative litigation courts and it cancels it, finding its illegality.

A particularity of the legal force enjoyed by the administrative acts is given by **the rule of their execution ex officio** (*executio ex officio*). The administrative act constitutes itself an enforceable title. Therefore, when the administrative act is not voluntarily executed by those to whom it is addressed, the issuing public authority can proceed directly to the forced execution of the administrative act, without having to obtain a court decision which will then be enforced by through a judicial executor, as in the case of civil acts.

#### 4.7. The legal effects of administrative acts

The administrative act, being a legal act, is a manifestation of will made with the intention of producing legal effects, that is, to give birth, to modify or to extinguish rights and obligations. The manifestation of will takes place on the basis of the achievement of public power.

##### 4.7.1. The moment from which the administrative act produces legal effects

The moment from which the administrative act produces legal effects differs depending on how we consider the issuing body of the act or other subjects of law.

Thus, for the issuing body the administrative act produces effects from the moment of its issuance. These effects consist of<sup>1</sup>:

- a) the obligation to make it known, by publication or communication;
- b) the obligation not to modify or repeal it except by following the procedure provided by law.

For the other subjects of law, the normative administrative acts produce legal effects from the date of their publication, and the individual administrative acts, as a rule, from the date of their communication. However, as we have seen, there are also individual administrative acts for which the Constitution establishes the obligation to publish them, under the sanction of their non-existence. Thus the decisions of the Government and the decrees of the President of Romania are published in the Official Gazette regardless of whether they are normative or individual [art. 100 (1) and art. 108 (4) of the Constitution].

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<sup>1</sup> *Idem*, p. 119.

#### 4.7.2. Suspension of the execution of administrative acts

Suspension represents the interruption, temporary cessation of legal effects by an administrative act<sup>1</sup>.

**The reasons for the suspension** of the administrative acts are related to the existence of doubts (doubts) regarding the legality or the opportunity of an administrative act. Thus, for example, on the grounds of opportunity within the limits permitted by law, an authorization to demolish a building is suspended until the tenant moves to another home<sup>2</sup>.

**The bodies that can order the suspension** are:

- a) the issuing body of the act
- b) the hierarchical organ superior to the one who issued the act
- c) the administrative litigation court under the conditions provided by the

Law no. 554/2004 *of the administrative contentious*. At the request of the injured person made either with the introduction of the preliminary administrative complaint (art. 14 of the Law no. 554/2004), or with the main action or by a separate action, until the settlement of the action in the fund (art. 15 of the Law no. 554/2004), the court may order the suspension of the execution of the administrative act in well justified cases and for the prevention of an imminent damage.

Suspension may also operate lawfully, when the conditions provided by law are fulfilled.

Therefore, the suspension can be of two **types (categories)**:

a) *suspension of law* that intervenes on the basis of a text of law (*ope legis*). Thus, according to art. 123 (5) of the Constitution “The prefect may attack, before the administrative contentious court, an act of the county council, of the local council or of the mayor, if he considers the act illegal. The contested act is suspended by law”.

b) *the suspension ordered by certain public authorities*: the administrative court, the authority that issued the act or the authority hierarchically superior to the one that issued the act.

The legal effects of the suspension of the administrative act consist in the temporary cessation of the effects of the act envisaged by the issuer, following that, after the cessation of the causes that have caused the suspension, either the repeal of the act will take place, or it will be put out of force by the modalities provided by law<sup>3</sup>.

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<sup>1</sup> See Antonie Iorgovan, *op. cit.*(*Tratat de drept administrativ*), 2005, vol. II, p. 94 ; Verginia Vedinaş, *op. cit.* (*Drept administrativ*), 2015, p. 122 ; Rodica Narcisa Petrescu, *op. cit.* (*Drept administrativ*), 2009, p. 354 ; Ilie Iovănaş, *op. cit.* (*Dreptul administrativ şi elemente ale ştiinţei administraţiei*), 1977, p. 251.

<sup>2</sup> See Rodica Narcisa Petrescu, *op. cit.* (*Drept administrativ*), 2009, p. 355.

<sup>3</sup> See Verginia Vedinaş, *op. cit.* (*Drept administrativ*), 2015, p. 122, 123.

### 4.7.3. Revocation and retraction of administrative acts

The revocation represents the legal operation by which the issuing body or the higher hierarchical body abolishes (removes) the administrative act in question, *ex officio* or at the request of the interested subjects of law<sup>1</sup>. The revocation made by the issuing body is called withdrawal.

Revocation can only take place in the case of individual administrative acts. Normative administrative acts are removed from force by repeal.

**Reasons for revocation of administrative acts.** The revocation of an administrative act may intervene for reasons of its illegality or inopportunity.

The cause of revocation may be prior, concurrent or subsequent to the issuance of the administrative act<sup>2</sup>.

**The bodies that can revoke the administrative act.** The body that unilaterally issued the illegal or inopportune administrative act is naturally entitled to revoke it (retract) also unilaterally. The issuing body which revokes the act may modify it by virtue of the principle *qui potest plus, potest minus* (who can more, maybe even less).

The hierarchical body superior to the one who issued the act will be able to revoke it by virtue of its right to ensure that the issuance and application of the acts of the hierarchically inferior bodies comply with the legal provisions and be timely for the optimal conditions of the society.

**The effects of the revocation of the administrative act.** The revocation has the effect of extinguishing the legal relationships that were born on the basis of the revoked act. When the revocation of an administrative act is carried out due to illegality (previous or concomitant with the issuance of the act), the revocation will usually produce retroactive effects (*ex tunc*) from the date of issuance of the revoked act, the legal reports that were born on its basis being totally abolished as if the act did not exist<sup>3</sup>.

If the revocation of an administrative act is done for reasons of inopportunity, the revocation will, as a rule, take effect from the date when its inability is stated by the revocation act (*ex nunc*), the legal effects produced by the revoked act until the revocation date remaining valid<sup>4</sup>.

#### **Exceptions from the principle of revocability of administrative acts:**

a) *Administrative acts with jurisdictional character.* They, as well as the court decisions, benefit from a judged working authority and can only be abolished by following the legal remedies.

<sup>1</sup> On the institution of revocation in administrative law see Ion Brad, *Revocarea actelor administrative*, Universul Juridic, Bucharest, 2009.

<sup>2</sup> See Ilie Iovănaș, *op. cit. (Dreptul administrativ și elemente ale științei administrației)*, 1977, p. 252.

<sup>3</sup> *Ibid.*; Anton Trăilescu, *op. cit. (Drept administrativ)*, 2010, p. 212; Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 348.

<sup>4</sup> Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 348; Anton Trăilescu, *op. cit. (Drept administrativ)*, 2010, p. 212.

b) *Administrative acts materially executed*. The justification for which such acts are irrevocable lies in the fact that by revoking them the previous material situation cannot be restored<sup>1</sup>. Only the administrative acts that are materially realized by one or more determined actions are irrevocable, because in these cases, by the will's manifestation of the issuing body, the consumed factual situation can no longer be changed<sup>2</sup>. Thus, for example, a demolition permit will no longer be revoked once the building has been demolished. The person injured by the demolition authorization will of course be able to request the legality of the demolition authorization to be checked and, eventually, to request payment of damages to the administrative litigation court.

c) *The administrative acts of sanctioning contraventional* can no longer be revoked neither by the issuing body nor by the superior body, but they can be canceled only by judicial means<sup>3</sup>.

d) *Administrative acts that gave rise to subjective rights guaranteed by the law in terms of their stability*<sup>4</sup>. This is for example the property titles issued by the county commissions for applying the Land Fund Law no. 18/1991 by which the right of private property was constituted or reconstituted as a fundamental right guaranteed by art. 44 of the Constitution. It would be unfair and contrary to the rules of the rule of law that the titles of property thus issued be revoked.

e) *Administrative acts that entered the civil circuit and produced legal effects*. Based on the issuance of an administrative act, various acts of private law (civil, commercial, labor contracts, etc.) can be concluded through which rights and obligations are born, modified or extinguished. Thus, based on a building permit, the permit applicant builds a building and then decides to transfer the ownership right through a sale-purchase contract. The building permit becomes irrevocable from the moment the contractual relation is born. The justification lies in the fact that the contract always arises through the agreement of the will of the parties, and will terminate also through the agreement of the parties, or in case of disagreement through a court decision. If the administrative act that entered the civil circuit and produced legal effects could be revoked, then the principle of the security of the civil circuit and the stability of the legal relations would be undermined by creating uncertainty about the existence and extent of the patrimonial rights and obligations of the contracting parties.

According to the provisions of art. 1(6) of Law no. 554/2004 of the administrative contentious, in case the illegal administrative act can *no longer be revoked* as it entered the civil circuit and has produced legal effects the issuing

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<sup>1</sup> A se vedea Ioan Santai, *Căi procedurale de desființare a actelor de drept administrativ stabile*, „Revista română de drept” no. 3/1985, p. 14, 15.

<sup>2</sup> See Ilie Iovănaș, *op. cit.* (*Dreptul administrativ și elemente ale științei administrației*), 1977, p. 256.

<sup>3</sup> See Anton Trăilescu, *op. cit.* (*Drept administrativ*), 2010, p. 213.

<sup>4</sup> See Ioan Santai, *op.cit.* (*Căi procedurale de desființare a actelor...*), 1985, p. 15.



public authority can request the court *to annul* it by an action that can be brought within one year from the date of issue of the act. In the case of admitting the action, the court will decide, if it has been notified by the request for legal action, and on the validity of the legal acts concluded on the basis of the illegal administrative act, as well as on the legal effects produced by them.

#### 4.7.4. Annulment of administrative acts

The cancellation of an administrative act is the legal operation by which the cancellation of this act is ordered, when the act is hit by defects of legality.

**Grounds for annulment of administrative acts.** Cancellation of an administrative act can intervene for reasons of its illegality.

The cause of cancellation may be earlier or concomitant with the issuance of the administrative act. In the doctrine it is emphasized that it is not conceivable that an administrative act should be legal at the time of its issue and become illegal thereafter<sup>1</sup>.

The vices of legality affecting an administrative act may concern the issuance or adoption of the act in violation of the substantive, form or procedural conditions established by the law for its validity.

**Bodies that may order the administrative act to be annulled.** The annulment of the act can be ordered by the court through a court decision, under the conditions provided by art. 52 of the Constitution and of Law no. 554/2004 of the administrative contentious. Thus, according to the provisions of art. 52 (1) of the Constitution "*the person injured in his right or in a legitimate interest, by a public authority, by an administrative act or by not resolving within the legal term of an application, is entitled to obtain the recognition of the claimed right or of the legitimate interest, annulment of the act and reparation of the damage*".

By judicial decision both individual administrative acts and normative administrative acts can be annulled.

The presumption of legality enjoyed by an administrative act will act until the moment of its illegality being established by the judicial decision of annulment.

**The effects of annulment of the administrative act.** The cancellation of the individual administrative act has retroactive effects until the moment of its issuance (*ex tunc*).

The annulment of the normative administrative act produces effects only for the future (*ex nunc*). Thus, according to the provisions of art. 23 of Law no. 554/2004 of the administrative contentious "*the definitive court decisions by which the administrative act of a normative character has been annulled in whole or in part are generally obligatory and have power only for the future. They shall be published compulsorily after motivation, at the request of the courts, in the*

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<sup>1</sup> See Ilie Iovănaș, *op. cit.* (Dreptul administrativ și elemente ale științei administrației), 1977, p. 257.

*Official Monitor of Romania, Part I, or, as the case may be, in the official monitors of the counties or of the municipality of Bucharest, being exempted from the payment of publication fees".*

The cancellation of the administrative act has the effect of canceling all legal acts conditioned, in terms of legality, by the existence of the canceled administrative act.

#### **4.7.5. Non-existence of administrative act**

The non-existence of the administrative act intervenes as a sanction in the cases when the violation of the conditions of validity is so serious and obvious that no one can attribute the value of a legal act. The non-existent administrative act lacks one of the constitutive elements necessary and essential for its formation<sup>1</sup>.

**There are cases of nonexistence:** the administrative act was issued on the basis of a repealed law; the act bears the signature of a manifestly incompetent person, when the administrative act resolves a litigation of the jurisdiction of the courts.

The lack of administrative acts is enshrined in constitutional provisions. Thus according to the provisions of art. 100 (1) of the Constitution the non-publication of the decrees of the President of Romania in the Official Gazette draws their nonexistence. Also, according to art. 108 (4) of the Constitution, the failure to publish the Government decisions and ordinances in the Official Gazette draws their nonexistence. In the case of military decisions, the Constitution establishes an exception from the publication rule, showing that they are communicated only to the interested institutions.

**The effects of the non-existence of the administrative act<sup>2</sup>.** The non-existent administrative acts do not enjoy the presumption of legality. The non-existent act is devoid of enforceable force and therefore there is no obligation for the legal subjects to whom the administrative act is addressed to respect and execute it.

#### **4.7.6. Rectification of administrative acts**

The rectification of the administrative act consists in the correction operation of some material errors existing in the content of the act. Thus, for example, a building permit in which the name of the owner or the address at which the

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<sup>1</sup> Constantin G. Rarincescu, *Contenciosul administrativ român*, 2<sup>nd</sup> ed., „Universala” Alcalay & Co., Bucharest, 1936, p. 340;

<sup>2</sup> On the effects of the non-existence of the administrative act see Ana Rozalia Lazăr, *Din nou despre inexistența actului administrativ*, „Revista de Drept Public” no. 4/2007, p. 62-72.

building will be built is incorrectly written can be rectified in order to correct the mistakes.

Rectification is an operation subsequent to the issuance or adoption of the administrative act.

The rectification is usually performed by the issuing body of the administrative act, following the legal procedure provided for the issuance of the administrative act.

## Chapter VI

### Administrative contracts

#### 1. The notion of administrative contract

The administrative contract represents the will agreement between a public authority or a power of attorney and one or more natural or legal persons, under private or public law, which seeks to achieve a public interest and to which a special regime is applied, of administrative law<sup>1</sup>.

The administrative contract is an act of **public management**<sup>2</sup>. Public authorities may conclude, in the cases and under the conditions provided by law and **private management** acts such as employment contracts, civil contracts (for example a donation contract in which the public authority has the status of donor), commercial contracts, etc.

#### 2. The features of administrative contracts

Administrative contracts have the following features:

a) *The parties of the contract.* In administrative contracts one of the parties must be a public institution acting in the realization of public power or another subject of law authorized by a public institution. The parties are in a position of legal inequality, the contracting public authority having a position of superiority over the subjects of private law with which they contract.

b) *Purpose of the contract.* The aim pursued by the conclusion of the administrative contract is the achievement of a public interest. Thus, for example, the concession contract for a public service will follow the better implementation of that public service, so as to meet the needs of the community in which it is provided.

c) *The object of the contract.* Administrative is the contract whose object concerns the provision of public services, the execution of public works, the realization of public procurement, the valuation of public goods/activities/services, public loans, etc.

d) *The clauses of the contract.* The administrative contract has two parts:

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<sup>1</sup> On administrative contracts see Cătălin-Silviu Săraru, *Contractele administrative. Reglementare. Doctrină. Jurisprudență*, C.H. Beck, Bucharest, 2009; Cătălin-Silviu Săraru, *Cartea de contracte administrative. Modele. Comentarii. Explicații*, C.H. Beck, Bucharest, 2013.

<sup>2</sup> On the management acts of the public authorities see Rodica-Narcisa Petrescu, *Criterii de distingere între actele administrative de autoritate și actele de gestiune ale statului – implicații pe planul contenciosului administrativ*, „Dreptul” no. 10/1992, p. 39-45; Cătălin-Silviu Săraru, *op.cit.* (*Contractele administrative...*), 2009, p. 22-47.

- a regulatory part consisting of clauses established by law or administrative acts (called in doctrine derogatory clauses from the common law or exorbitant clauses). The regulatory part includes clauses imposed unilaterally by the contracting public authority and which devote increased powers in favor of this authority on the basis of the protection of the public interest (for example clauses regarding the right to control the public authority, clauses regarding the continuous organization and functioning of public services, the clause which establishes in favor of the contracting public authority the right to terminate the contract when the public interest requests it, etc.). Hence the legal inequality of the parties consisting of the position of legal superiority of the contracting public authority.

- a conventional party, which is freely negotiated by the parties. Thus, for example art. 324 (4) of the Administrative Code stipulates: "*the concession contract will also include contractual clauses regarding the division of environmental responsibilities between the grantor and the concessionaire*".

e) *Litigation*. The disputes regarding the administrative contracts are the competence of the administrative litigation courts.

### 3. The main types of administrative contracts

#### 3.1. The concession contract

The concession contract is the contract by which a public authority, called a grantor, transmits for a fixed period to a person called a concessionaire, who acts on his risk and responsibility, the right and the obligation to exploit a good public property, to execute a work public, to provide and manage a public service or activity in exchange for payment, usually, of a royalty.

In the doctrine the difference is made between<sup>1</sup>: a) *the concession of public services* - it is the contract by which an administrative person entrusts a private person (or in some exceptional cases another administrative person) to take care of the functioning of a public service, partly on his risks and with the help of the agreed advantages; b) *the concession of public works* - is the contract by which an individual undertakes to build on his expenses and on his risks a public construction and to ensure the exploitation for a certain time; against the party, the administration gives them the right to levy user fees; c) *concession of goods* - the contract by which a public authority allows a private natural or legal person to own and use, in accordance with the law and the concession contract, a good belonging to the public domain of the state or of the administrative-territorial units; d) *concession of activities* - the contract by which a public authority confers on a private person the right to carry out a certain activity of national or local interest, in accordance with the law and the concession contract.

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<sup>1</sup> See, in this regard, Jean-Marie Auby, *Droit administratif*, Universite Bordeaux, Librairie Montaigne, 1975-1976, p. 173-174, Aladar Sebeni, *Noțiunea contractului de concesiune și încheierea acestuia*, „Dreptul” no. 8/1999, p.8 -13.

In the Romanian positive law are regulated by the Law no. 100/2016<sup>1</sup> the public works concession contract and the service concession contract and, respectively, by the Administrative Code the concession contract for public property goods. The concession of activities is not regulated by a framework law.

**Features that determine classification as administrative contracts:**

- one of the parties is a body governed by public law;
- there is a legal inequality between the parties in establishing the content of the contract, the decisive role being played by the legal person of public law;
- the main purpose of the contract is to serve in the best conditions the general interests of the community;
- contains derogatory (exorbitant) clauses from the common law found in the regulatory part that takes over the provisions of the specification. The grantor may unilaterally modify the regulatory part of the concession contract, with the prior notification of the concessionaire, for exceptional reasons related to the national or local interest, as the case may be. Also, another exorbitant clause shows that the termination of the concession contract can take place if the national or local interest imposes it, by unilaterally denouncing the grantor, with the payment of a fair and prior compensation for his charge. Then, also from the regulatory part are also the legal provisions stipulating the right of control of the grantor over the concessionaire regarding the execution of the contract<sup>2</sup>;
- the contract is concluded following the use of special procedures, such as the public auction;
- the non-observance of the obligations assumed by the contractor can attract, in addition to the contractual liability and the application of a form of specific liability to the administrative law - the contravention liability - with specific sanctions, respectively the contraventional fines, which are applicable in case of non-compliance with the specific legislation<sup>3</sup>;
- the jurisdiction of litigation regarding the conclusion and execution of concession contracts belongs to the administrative contentious court.

### 3.2. The public procurement contract

The public procurement contract is regulated by Law no. 98/2016 *on public procurement*<sup>4</sup> and Law no. 99/2016 *on sectoral acquisitions*<sup>5</sup>.

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<sup>1</sup> Law no. 100/2016 on works concessions and service concessions (published in the Official Gazette, Part I no. 392 of May 23, 2016).

<sup>2</sup> See Eugen Chelaru, *Administrarea domeniului public și a domeniului privat*, 2<sup>nd</sup> ed., C.H. Beck, Bucharest, 2008, p. 91.

<sup>3</sup> See Ion Dogaru (coord.), *Drept civil. Contractele speciale*, All Beck, Bucharest, 2004, p. 1030.

<sup>4</sup> Published in the Official Gazette, Part I no. 390 of May 23, 2016.

<sup>5</sup> Published in the Official Gazette, Part I no. 391 of May 23, 2016.

The public procurement contract is the contract with an onerous title, assimilated, according to the law, the administrative act, concluded in writing between one or more economic operators and one or more contracting authorities, whose purpose is the execution of works, the supply of products or the provision of services.

Public procurement contracts are:

- a) public works procurement contracts;
- b) public procurement contracts for products;
- c) public service contracts.

**The public procurement contract of works** is the public procurement contract that has as its object:

a) either exclusively the execution, or both the design and the execution of works in connection with one of the activities provided in annex no. 1 to the Law no. 98/2016;

b) either exclusively the execution, or both the design and the execution of a construction.

c) either the realization, by any means, of a construction that corresponds to the requirements established by the contracting authority that exerts a decisive influence on the type or design of the construction.

**The public procurement contract of products** is that public procurement contract that has as its object the purchase of products by purchase, including the payment in installments, renting, leasing with or without option to buy or by any other contractual means under which the contracting authority benefits from these products, whether or not they acquire ownership over them. The public procurement contract for products may include, as an accessory, works or installation and installation operations.

**The public procurement contract of services** is the public procurement contract that has as its object the provision of services, other than those which are the subject of a public works contract.

Law no. 99/2016 on sectoral procurement, transposing the provisions of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on the acquisitions made by the entities that operate in the water, energy, transport and postal services sectors and repealing the Directive 2004/17/EC<sup>1</sup>, regulates a kind of public procurement contracts, respectively sectoral contracts. The sectoral contract represents the public procurement contract with an onerous title, assimilated, according to the law, the administrative act, concluded in writing between one or more economic operators and one or more contracting entities, whose purpose is the execution of works, the supply of products or the provision of services for the purpose of carrying out their main activity in one of the fields defined by the Law no. 99/2016 as relevant: gas and thermal energy, electricity, water, transport services, ports and airports, postal services,

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<sup>1</sup> Published in the Official Journal of the European Union, series L, no. 94 of March 28, 2014.

oil and natural gas extraction, prospecting and extraction of coal or other solid fuels.

In the public procurement contract, unlike the public concession contract, the risk of exploitation is borne by the contracting authority. In the concession contract, the risk of exploitation is borne by the economic operator<sup>1</sup>. Thus, in the public procurement contract the economic operator supplies goods, provides services or performs works that will be further exploited by the contracting authority, the latter also bearing the risk of exploitation. Unlike public procurement, in the case of the concession contract, the economic operator not only provides goods, provides services or performs works, but also exploits these goods, services or works at his risk<sup>2</sup>. This is underlined by art. 8(2) of the Law no. 100/2016 regarding the concessions of works and the concessions of services which shows that if the contracting entity finds that a significant part of the operating risk will be transferred to the economic operator, the contract will be considered a concession contract.

**Features that determine classification as administrative contracts<sup>3</sup>:**

1. represents an agreement of will between a body set up to meet needs of general interest and another subject of law, public or private;

2. the general purpose of the public procurement system is dedicated to satisfying the public interest, namely the development and improvement of the community living environment;

3. it contains exorbitant clauses from the common law established by the contracting authority through the specifications and other prescriptions provided in the contract award documentation. Such clauses are those referring to the technical specifications provided in the specifications. The technical specifications are established by the award documentation and define the required characteristics regarding the work, service or products that are the subject of the purchase.

4. the contract is concluded following the use of special formalities that aim in principle to organize a public auction that can take the following forms, used under the conditions provided by law: a) the open auction; b) the restricted auction; c) competitive negotiation; d) competitive dialogue; e) the partnership for innovation; f) negotiation without prior publication; g) the competition of solutions; h) the award procedure applicable in the case of social services and other specific services provided by Law no. 98/2016; i) the simplified procedure.

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<sup>1</sup> The European Court of Justice has shown that in the absence of transfer of responsibilities to the economic operator, the contract will be for public procurement and not for concession, *Affair C-458/03, Parking Brixen* and Interpretative communication of 2006 of the European Commission on the applicable Community law for the award of contracts which are not in whole or in part subject to the provisions of the public procurement directives, published in OJ C 179 of 1 August 2006.

<sup>2</sup> See Mădălin Irinel Niculeasa, *Legislația achizițiilor publice. Comentarii și explicații*, C.H. Beck, Bucharest, 2007, p. 7-8.

<sup>3</sup> See Decision no. 3044/2000 pronounced by the Administrative Contentious Section of the Supreme Court of Justice.



5. The competence to judge the litigations regarding the conclusion and execution of the contract belongs to the administrative litigation court.

### **3.3. The contract to rent a good public property<sup>1</sup>**

The contract for renting a good public property is regulated by art. 136 (4) of the revised Constitution, by art. 861 of the Civil Code and by art. 332-348 of the Administrative Code.

In time, special regulations were adopted regarding the leasing of various public goods, such as, for example, Government Ordinance no. 19/2002 regarding some measures for the establishment and use of the residential fund of protocol and movable goods in the public domain of the state, under the administration of the Autonomous Administration "Administration of the State Protocol Patrimony". The regulations regarding the contract for the lease of a good public property are supplemented with the provisions regarding the lease of art. 1777-1835 Civil Code.

The contract for the lease of a public good property is that contract concluded in written form by which the holder of the right of public property or of administration on a good that belongs to the public domain of the state or to the administrative-territorial units, called lessor, is obliged to ensure the use of this good to a natural or legal person named tenant, for a fixed period of time, in exchange for a price, called rent. The lease is a species of the lease contract regulated by art. 1777-1850 Civil Code.

According to art. 333 (1) of the Administrative Code the renting of public property assets of the state or of the administrative-territorial units is approved, as the case may be, by decision of the Government, the county council, the General Council of the Municipality of Bucharest or the local council. Based on the decision to approve the lease, the lease agreement for the public property will be concluded. According to art. 332 of the Administrative Code the rental contract may be concluded, as the case may be, with any natural or legal person, Romanian or foreign, by the holder of the right of ownership or administration.

The purpose of the contract is to transmit, for a limited period of time, the right of use for free of charge on a movable or immovable good held in public property or in administration by the lessor, having the characteristics specified in the contract and in the specification.

The lessee has the right to use the good respecting the destination established by the contract in accordance with the nature of the good and with the legal provisions. The lease agreement will include clauses of a nature to ensure the exploitation of the rented property, according to its specificity.

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<sup>1</sup> See Cătălin-Silviu Săraru, *op. cit.* (*Cartea de contracte administrative...*), 2013, p. 225-235.

The owner will not be able to dispose of the property or to encumber it with tasks, the public property goods being inalienable, insensitive and imprecisable.

The resolution of the litigations arising in connection with the attribution, conclusion, execution, modification and termination of the lease of the public good property, as well as those regarding the granting of damages, is carried out according to the provisions of the Law of the administrative contentious.

### **3.4. The contract for the award of a good public property for free use<sup>1</sup>**

The right to use for free is regulated by art. 136 (4) of the revised Constitution, by art. 866, 874 and 875 of the Civil Code and of art. 349-353 C. adm.

The contract for awarding the use (free of charge) of a good public property is that contract concluded in written form by which the public authority exercising the general administration of the public property (Government, county council, local council) or, as the case may be, the institution public/autonomous management exercising the concrete administration of the good transmits, for a certain period of time, to a public utility institution the right of use over a good public property, free of charge, under the conditions established by the law and the instrument of incorporation.

The right of free use is constituted by a decision of the Government, of the county council or, as the case may be, of the local council. Based on the decision of incorporation, the contract for awarding the use of the public good property (free) will be concluded. Those who can attribute public domain goods for free use are:

- either the authority that performs the general administration of the public property goods, respectively the Government for the public state property goods, the county council for the public property assets of the county or the local council for the public property goods of the municipality, city or commune.
- either the public institution or the autonomous management where the good is in their concrete administration.

It can receive goods from the public domain for free use, according to art. 136(4) of the Constitution, a *public utility institution*, a notion that includes the associations and foundations recognized by the Government as being of public utility, under the conditions provided by the Government Ordinance no. 26/2000 regarding associations and foundations.

The purpose of the contract is to convey the right of use free of charge on a movable or immovable property in the public domain of the state or of the administrative-territorial units.

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<sup>1</sup> *Idem*, p. 209-215.

Regarding the use, the holder has the right to use the good respecting the destination established by the contract and according to the purpose of the public utility association/foundation.

The settlement of disputes arising in connection with the attribution, conclusion, execution, modification and termination of the contract for awarding in use with free title the good public property, as well as those regarding the granting of compensations, is carried out according to the provisions of the Law of administrative contentious.

## **Chapter VII**

### **Administrative operations**

#### **1. The notion of administrative operations**

The administrative operations are the technical-material activities carried out by the public administration for the elaboration, adoption or execution of the administrative acts or for the award, conclusion and execution of the administrative contracts.

Administrative operations can intervene in the preparation phase of issuing administrative acts (on-the-spot reporting minutes, reports, opinions, agreements, expertise, data transmissions, drafting of administrative acts, etc.), in the issuing phase of administrative acts (summoning of the collegiate administrative bodies, establishing the agenda, drawing up the minutes of meetings, stamping, dating, recording the act, etc.), in the execution phase of the administrative acts (communication, publication of administrative acts, etc.)

Also administrative operations also intervene when awarding, concluding and executing administrative contracts. There are such administrative operations: carrying out the opportunity studies that are the basis for the decision to concede a good public property, drafting the award acts, drafting and publishing the participation announcements, organizing public auctions, minutes of receiving the works performed on the basis of a public procurement contract, etc.

#### **2. The features of administrative operations**

Administrative operations have the following features:

a) intervene in all the procedural phases necessary for the issuance/adoption and execution of the administrative acts (in the previous, concomitant and subsequent phases of the issuance/adoption of the administrative acts) as well as in all the stages necessary for the award, conclusion and execution of the administrative contracts.

b) administrative operations often constitute conditions of validity for administrative acts and administrative contracts<sup>1</sup>. In these cases, performing the administrative operations provided by the law also ensures the legality of the administrative act. Thus the issuing of a diploma of graduation of some courses is done only after the person has been subjected to examination operations that attest his degree of preparation.

c) administrative operations are material facts and not express expressions of will made with the intention of producing legal effects (ie to give birth, modify or extinguish rights and obligations). They do not produce legal effects

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<sup>1</sup> See Alexandru Negoită, *op. cit. (Drept administrativ)*, 1996, p. 180.

by themselves, but only included in the administrative act to which they have contributed.

We note that while administrative acts directly produce legal effects on those to whom they are addressed, effects that the public authority issuing the act envisages, administrative operations do not produce legal effects by virtue of the will of the perpetrator, but these effects they occur because the law provides (by law - *ope legis*)<sup>1</sup>. For example, a building permit is an individual administrative act that produces the legal effects envisaged by the issuing public authority with regard to the conditions that the respective construction must fulfill. In order to issue the building permit, a series of notices provided by Law no. 50/1991 *regarding the authorization of the execution of the construction works*<sup>2</sup>. These opinions are administrative operations. In order to obtain the building permit, the opinions provided by the law must be favorable. The effect produced by these opinions is that the authorization depends on them, an effect provided by law and which does not depend on the will of the administrative structure that gives the opinion<sup>3</sup>.

d) the administrative operations cannot be the object of a direct action in the administrative contentious court<sup>4</sup>. The control over the administrative operations will be able to be realized only in a subsidiary way, within the control that the court exercises on the unilateral or bilateral administrative act attacked and only in relation to it<sup>5</sup>. Thus, for example, if on the basis of a negative opinion the request for a building permit is rejected, the dissatisfied person cannot bring a legal action against the opinion which is an administrative operation, but the direct action will be brought against the administrative act of rejection of the request<sup>6</sup>.

### 3. Form and legality of administrative operations

The administrative operations are usually recorded in written form, allowing the verification of the opportunity and legality of the procedures for carrying them out.

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<sup>1</sup> Dumitru Brezoianu, *op.cit. (Drept administrativ român)*, 1997, p. 125 ; Alexandru Negoită, *op. cit. (Drept administrativ)*, 1996, p. 133; Ioan Alexandru, Mihaela Cărăușan, Ion Popescu, Dragoș Dincă, *op. cit. (Drept administrativ)*, 2002, p. 255, 256.

<sup>2</sup> Republished in the Official Gazette, Part I no. 933 of October 13, 2004, as subsequently amended.

<sup>3</sup> See Dumitru Brezoianu, *op.cit. (Drept administrativ român)*, 1997, p. 125, 126; Ioan Alexandru, Mihaela Cărăușan, Ion Popescu, Dragoș Dincă, *op. cit. (Drept administrativ)*, 2002, p. 256.

<sup>4</sup> Ioan Santai, *Rolul avizelor în cadrul litigiilor având ca obiect controlul judecătoresc al legalității actelor și faptelor administrative*, „Revista română de drept” no. 7/1983, p. 11; Dumitru Brezoianu, *op.cit. (Contentiosul administrativ)*, 1995, p. 38.

<sup>5</sup> According to the provisions of art. 18 (2) of Law no. 554/2004 of the administrative litigation the court is competent to rule also on the legality of the administrative operations that were the basis for issuing the administrative act subject to judgment.

<sup>6</sup> See Dumitru Brezoianu, *op.cit. (Drept administrativ român)*, 1997, p. 126; Ioan Alexandru, Mihaela Cărăușan, Ion Popescu, Dragoș Dincă, *op. cit. (Drept administrativ)*, 2002, p. 256.

The administrative operations must always repeat the provisions of the normative and administrative acts that regulate the conditions for their realization. Illegal administrative operations may result in the revocation, cancellation or non-existence of the administrative act in which they are included.

## **Chapter VIII**

### **Control of the activity of the public administration**

#### **1. The notion of control of the activity of the public administration**

By controlling<sup>1</sup> the activity of the administration, the compliance of its activity with the legal provisions and the requirements of the social requirements is carried out.

**The purpose of the control** is to verify the way in which the controlled institutions and each civil servant carry out their attributions provided by law, in accordance with the general objectives of the public administration. Following the control, proposals can be made in order to improve the activity and measures can be taken to sanction officials who have not performed their duties or have done them defective.

#### **2. The modalities of the control**

The control of the activity of the public administration can take the following ways:

a) *Control of legality* - consists in reporting and confronting the elements subject to the control with the provisions of the legal norms.

b) *Control of profitability and efficiency* - mainly uses accounting methods, aiming to evaluate the costs in relation to the human and material resources used.

c) *Opportunity control* - verifies that the administrative authorities have acted at the appropriate time and under the optimum conditions for issuing and executing the administrative act, related to the social and responsible fulfillment of the social needs.

d) *Materiality control* - aims to verify the existence of goods and inventory objects in the patrimony of public administration authorities.

#### **3. Forms of control**

The forms of control over the activity of the public administration can be classified using the following criteria:

##### **1. In relation to the time of the control:**

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<sup>1</sup> The term "control" derives from the French word *contra-rolle* - being a fiscal role verification tool used for a long time to carry out "accounting verification". Subsequently, the meaning of the term was extended to be used in the sense of checking results or activities in any field - see Ioan Alexandru, *Administrația publică. Teorii. Realități. Perspective*, Lumina Lex, Bucharest, 1999, p. 508.

- Pre-requisite or preventive control - is performed before issuing the administrative act and aims to verify compliance with the legal conditions for its issuance.

- Concurrent control - it captures the administrative processes in progress, allowing the operative intervention. It is generally performed by the heads of compartments, sections etc. being synonymous with the management activity.

- Subsequent control - it is exercised after the issuance of the administrative act giving the possibility of checking including the effects produced by the act. This is the judicial control of the administrative acts performed by the administrative litigation court.

## **2. Depending on the nature of the control authority:**

- The administrative control exercised by authorities of the public administration.

- Control exercised by authorities and persons outside the public administration (parliamentary control, public opinion control, judicial control).

## **3.1. Administrative control**

### **3.1.1. Notion**

**The administrative control** represents the control realized by the public administration, in accordance with the law, on its own activity. This control usually aims to verify both the legality and the opportunity to issue administrative acts.

Administrative control has two forms: *internal administrative control* and *external administrative control*.

### **3.1.2. Internal administrative control**

Internal administrative control represents the control exercised within the administrative institution by senior officials over the activity of subordinate officials. The subject with control tasks and the controlled subject are part of the same authority of the public administration.

Internal administrative control can concern both the legality of the activity of the subordinate civil servants, and whether they acted under conditions of opportunity, efficiency and profitability.

Internal control may be exercised at the request of a person when bearing the name of a *gracious* or *ex officio* appeal. **The gracious appeal** is the complaint addressed by a private individual to the public authority from which an individual administrative act emanates, requesting its retraction or modification, on the grounds that the act causes an injury to his right or legitimate interest.



### 3.1.3. External administrative control

**External administrative control** represents the control exercised by certain authorities of the public administration or decision officials outside the administrative institution subject to control.

External administrative control has the following **forms**:

- a) *Hierarchical administrative control*
- b) *Administrative tutelage control*
- c) *Specialized external administrative control*
- d) *Control through special administrative jurisdictions.*

#### 3.1.3.1. Hierarchical administrative control

**The hierarchical administrative control** is performed by the hierarchically superior administrative authorities over the inferior ones, based on the subordination relationship between them. Thus, for example, there is a hierarchical administrative control of the Government control over the activity of the ministries.

Hierarchical administrative control in that it is exercised by a hierarchically superior institution over a subordinate institution differs from the internal administrative control in which the controller and the controlled subject belonged to the same public institution.

Hierarchical administrative control can be exercised at the request of a person when bearing the name of the *hierarchical* or *ex officio* appeal. **The hierarchical appeal** is the complaint addressed by a private individual to the higher administrative authority, requesting the revocation or modification of the individual administrative act issued by the subordinate lower authority, because it damages their legitimate rights or interests.

#### 3.1.3.2. Control of administrative tutelage

The administrative tutelage control is performed by certain authorities of the central public administration on the acts of the decentralized administrative authorities, in the cases expressly provided by law<sup>1</sup>.

The administrative tutelage control refers exclusively to the legality of the administrative acts, not the opportunity to issue them.

Unlike hierarchical administrative control, administrative tutelage control is exercised only in cases expressly provided by law and only by the authorities indicated by law<sup>2</sup>.

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<sup>1</sup> See Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 397; Constantin G. Rarincescu, *op. cit. (Contenciosul administrativ...)*, 1936, p. 316, 317.

<sup>2</sup> See Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 57.

According to the provisions of art. 3 of Law no. 554/2004 the control of administrative tutelage is exercised by prefect on the acts of the authorities of the local public administration and of the National Agency of the Civil Servants on the acts of the central and local public authorities regarding the public function.

According to art. 123 (5) of the Constitution the prefect can attack, before the administrative contentious court, an act of the county council, of the local council or of the mayor, if he considers the act illegal. The contested act is suspended by law.

The exercise of the supervision control by the prefect is justified by the fact that according to the provisions of art. 123 of the Constitution, the prefect is the representative of the Government at the local level, being the guarantor of the respect of the law and of the public order at local level. In this capacity, the prefect has the role of ensuring that all administrative acts adopted by local public authorities comply with national regulations, thus maintaining the unitary character of the state. Given the existence of local autonomy, the prefect will not be able to directly annul the administrative acts of the local authorities which he considers legal, but will have to bring an action before the competent administrative litigation court.

The National Agency of Civil Servants has, according to the provisions of art. 401 (1) letter e) of the Administrative Code, the task of monitoring and controlling the application of the legislation regarding the public function and civil servants within the public authorities and institutions. By virtue of this attribution, the National Agency of Civil Servants has, according to art. 403 of the Administrative Code, active procedural legitimation and can refer the competent administrative litigation court regarding:

a) acts by which the authorities or public institutions violate the legislation regarding the civil service and civil servants, established as a result of their own control activity;

b) the refusal of public authorities and institutions to apply the legal provisions in the field of civil service and civil servants.

The act challenged by the National Agency of Civil Servants is suspended by law.

### ***3.1.3.3. Specialized external administrative control***

**The specialized external administrative control** is exercised by certain authorities of the public administration, in the cases indicated by law.

This control can be performed by:

- specially constituted bodies for control (the Court of Accounts, the People's Advocate, the General Directorate of Tax Antifraud organized under the subordination of the National Agency for Fiscal Administration, the Environmental Guard, etc.);

- of different inspections (Labor Inspection, State Sanitary Inspection, etc.), state inspectorates (State Inspectorate for Construction, etc.) or police (Romanian Border Police, Local Police, etc.), which are subordinated to ministries, other central bodies of public administration or local administrative authorities.

### ***3.1.3.4. Control through special administrative jurisdictions***

The administrative jurisdictions are authorities of the public administration that have the legal competence to solve, following a procedure based on the principles of contradictory nature, to ensure the right to defense and the independence of the administrative-judicial activity, certain legal disputes through the adoption of administrative administrative acts.

This control is exercised only upon request and aims to verify the legality of certain administrative acts expressly provided by law.

According to the provisions of art. 21 of the Constitution special administrative jurisdictions are optional and free. Therefore, when the organic law provides that the person injured by a certain administrative act may address an administrative authority, vested with the powers of special administrative jurisdiction, the person may choose between challenging the administrative act either to that administrative authority or directly to the court of administrative litigation.

Administrative jurisdictions are created within the public administration<sup>1</sup>, as opposed to the courts that belong to the judiciary.

The administrative authorities, invested by the organic law with the attributions of special administrative jurisdiction have the advantage of being free, their notification being exempted from the payment of stamp fees.

An example of an administrative authority vested with the powers of administrative jurisdiction is the National Council for Settlement of Appeals currently regulated by Law no. 101/2016 *on remedies regarding the award of public procurement contracts, sectoral contracts and works concession contracts and services concession, as well as for the organization and functioning of the National Council for Solving Complaints*<sup>2</sup> having the role of settled the disputes regarding the procedures for awarding these contracts.

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<sup>1</sup> See Prosper Weil, *op. cit.* (*Le droit administratif*), 1992, p. 96.

<sup>2</sup> Published in the Official Gazette, Part I no. 393 of May 23, 2016. The National Council for Solving the Appeals was established by the Government Emergency Ordinance no. 34/2006 regarding the award of public procurement contracts, public works concession contracts and service concession contracts (published in the Official Gazette, Part I no. 418 of May 15, 2006, as subsequently amended). Government Emergency Ordinance no. 34/2006 was repealed by Law no. 98/2016 regarding public procurement (published in the Official Gazette, Part I no. 390 of May 23, 2016). The National Council for Solving the Complaints was maintained by the new regulation given by Law no. 101/2016 which expressly provides in art. 37 (1) that it is an independent body with administrative-jurisdictional activity.

## 3.2. Control exercised by authorities and persons outside the public administration

### 3.2.1. Parliamentary control

The Parliament, according to art. 61 (1) of the Constitution, as the supreme representative body of the Romanian people and the sole legislative authority of the country, fulfills the function of control over the way in which the authorities of the public administration implement the provisions of the laws and fulfill the political values of achieving the common good.

The parliamentary control over the authorities of the public administration is exercised mainly through:

a) **investigations** carried out by the permanent commissions of the two Chambers or by commissions of inquiry established temporarily. The manner in which the parliamentary investigations are carried out is stipulated by the Regulations of each Chamber<sup>1</sup>. The investigations may concern the investigation of the legality of the activity carried out by an institution of the public administration, in the conditions in which it is considered necessary to clarify the causes and the circumstances in which events have taken place or actions with negative effects have taken place, as well as to establish the conclusions, responsibilities and measures that are required.

b) **questions and interpellations**. Each Member of Parliament may address questions and interpellations to the Government, ministers or other heads of public administration bodies, who are obliged to answer them. **The question** consists of a simple request to answer if a fact is true, if an information is accurate, if the Government or other bodies of public administration understand to communicate to the Senate/Chamber of Deputies the information or documents requested or if the Government intends to take a judgment in a particular problem<sup>2</sup>. **The interpellation** consists of a request addressed to the Government or to a member thereof asking for explanations on the Government's policy on important issues of its internal or external activity<sup>3</sup>.

c) **reports and information**. The heads of the autonomous administrative authorities that function, according to their organic laws of establishment and organization, "under the authority" of the Parliament (the Court of Accounts, the People's Advocate, the National Bank of Romania, the Romanian Intelligence

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<sup>1</sup> See Senate Decision no. 28/2005 regarding the Regulation of the Senate (published in the Official Gazette, Part I no. 948 of October 25, 2005, as subsequently amended), the Decision of the Chamber of Deputies no. 8/1994 approving the Regulation of the Chamber of Deputies (published in the Official Gazette, Part I no. 50 of February 25, 1994, as subsequently amended).

<sup>2</sup> See art. 158(2) of the Regulation of the Senate and art. 167(2) of the Regulation of the Chamber of Deputies.

<sup>3</sup> See art. 162(1) of the Regulation of the Senate and art. 175(2) of the Regulation of the Chamber of Deputies.

Service, etc.) have the obligation to present reports in the plenary session of the Chambers. regarding the activity carried out. Thus the institution of the People's Advocate works with the Parliament, having the obligation according to art. 60 of the Constitution and art. 5 of Law no. 35/1997, to present, in the joint sitting of the two Houses of Parliament, reports, annually or at their request. As regards the information, the parliamentarians can request from the central and local public administration bodies, by a request addressed to the President of the Chamber or the chairman of the permanent committee of which they are part, any information or documents, in certified copy, useful for carrying out their activity.

d) **the simple motion and the censure motion.** According to art. 112 (2) of the Constitution the Chamber of Deputies or the Senate may adopt **a simple motion** expressing its position on an internal or external policy issue or, as the case may be, on a question that has been the subject of an interpellation. If a simple motion is approved, the decision of the Chamber of Deputies/Senate will be sent to the Government, which will take into account the position expressed in the respective motion. In the conditions provided by art. 113 of the Constitution, the Chamber of Deputies and the Senate, in a joint sitting, can withdraw the confidence granted to the Government by adopting **a censure motion**, with the vote of the majority of the deputies and senators. If the motion of censure is adopted, the Government is considered to be dismissed.

### 3.2.2. Control exercised by the public opinion

The control exercised by the public opinion can take the form of press investigations, of the petitions that the citizens make in relation to the activity of the public administration, of the requests for access to the information of public interest or of the participation of the citizens and of the associations legally constituted in the process of elaborating the acts and at the decision-making process.

### 3.2.3. Judicial control

Judicial control is *a posteriori* control<sup>1</sup>, exercised after the adoption/issuance of the administrative act, at the request of the one who considers himself injured in his legitimate rights and interests through this act.

The judicial control of the administrative acts is usually performed by the administrative litigation courts, under the conditions provided by Law no. 554/2004.

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<sup>1</sup> See Prosper Weil, *op. cit.* (*Le droit administratif*), 1992, p. 91.

## **Chapter IX**

### **Liability in administrative law**

#### **1. The notion of liability in administrative law**

The legal responsibility represents a complex of related rights and obligations, provided by the legal norms, rights and obligations that arise as a result of the commission of an unlawful act and which constitute the framework for the fulfillment of the state constraint, that is to say the application of the sanction<sup>1</sup>.

Legal liability is the most serious form of social responsibility.

Liability in administrative law is a form of legal liability that intervenes when administrative law rules are violated by committing an unlawful administrative act, also called *administrative misconduct*.

The author of the administrative offense is the passive subject of the liability while the public authority that has the competence to apply the sanction is the active subject of the liability.

#### **2. Forms of liability specific to administrative law**

Depending on the type of disciplinary deviation and its consequences, three forms of liability specific to administrative law can be identified:

a) **the administrative-disciplinary liability** - it is involved in the case of committing a disciplinary deviation by which violates norms of administrative law.

b) **contraventional liability** - it is involved in the case of committing an unlawful act that is expressly qualified by law as a contravention.

c) **administrative-patrimonial liability** - it intervenes if by committing an unlawful act, rules of administrative law are violated by a public authority and its obligation to repair the material or moral damages produced.

#### **3. The administrative-disciplinary responsibility**

##### **3.1. The notion of administrative-disciplinary responsibility**

The administrative-disciplinary liability is the legal situation that consists of the complex of related rights and obligations, content of the sanctioning legal relation, established between the public authority that applies the sanction and the

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<sup>1</sup> See Mircea N. Costin, *Răspunderea juridică în dreptul R.S.R.*, Dacia, Cluj, 1974, p. 31-32.

person who committed a disciplinary infringement by violating the rules of administrative law<sup>1</sup>.

### 3.2. The features of administrative-disciplinary responsibility

The main features of the administrative-disciplinary responsibility are:

a) *The active subject* of the administrative-disciplinary responsibility (the one who applies the sanction) can be:

- usually an administrative body;
- by exception another public body [for example according to article 13(4) of Law no. 554/2004 the administrative litigation court is competent to oblige the head of the public authority that does not send the requested documents within the deadline established by the court to pay to the state, as a judicial fine, 10% of the gross minimum wage in the economy for each day of unjustified delay] or a civil servant.

b) *The passive subject* of the administrative-disciplinary responsibility (the author of the disciplinary deviation) can be:

- a public administration body. For example, according to art. 143 (1) of the Administrative Code the local council is dissolved of law in case it does not meet for two consecutive months, although it has been summoned according to the legal provisions;

- a civil servant under the conditions provided by the Administrative Code and the special regulations adopted for different categories of civil servants: the Statute of the parliamentary civil servant<sup>2</sup>, the Statute of the diplomatic and consular body<sup>3</sup>, the Statute of the police officer<sup>4</sup>, the Statute of the customs personnel<sup>5</sup>, the Statute of the civil servants with special status of the National Administration of the Penitentiaries<sup>6</sup> etc.

- a person who performs a public dignity function (dignitary). For example, the suspension from office of the President of Romania, under the conditions provided by art. 95 of the Constitution by the vote of the two Houses of Parliament, meeting in a joint sitting, in case of serious acts that violate the provisions

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<sup>1</sup> For similar definitions of the administrative-disciplinary responsibility formulated in the doctrine see: Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, 2005, vol. 2, p. 361; Verginia Vedinaș, *op. cit. (Drept administrativ)*, 2015, p. 297.

<sup>2</sup> Law no. 7/2006 regarding the statute of the parliamentary civil servant, republished in the Official Gazette, Part I no. 345 of May 25, 2009, as subsequently amended.

<sup>3</sup> Law no. 269/2003 regarding the Statute of the diplomatic and consular body of Romania, published in the Official Gazette, Part I no. 441 of June 23, 2003, as subsequently amended.

<sup>4</sup> Law no. 360/2002 regarding the Statute of the policeman, published in the Official Gazette, Part I no. 440 of June 24, 2002, as subsequently amended.

<sup>5</sup> Government Emergency Ordinance no. 10/2004 regarding the Statute of the customs personnel, published in the Official Gazette, Part I no. 256 of March 23, 2004, as subsequently amended.

<sup>6</sup> Law no. 293/2004 regarding the Statute of civil servants with special status from the National Prison Administration, republished in the Official Gazette, Part I no. 264 of April 10, 2014.

of the Constitution, was qualified by the doctrine as being the administrative-disciplinary responsibility of the head of state<sup>1</sup>.

- a non-state body (association, foundation, political party, commercial company, etc.);

- a natural person, regardless of its quality.

a) *The objective basis* of the administrative-disciplinary liability is given by the administrative-disciplinary deviation by which, as a rule, a rule of administrative law is violated.

b) *The subjective basis* of the administrative-disciplinary liability is the guilt. In order to incur the administrative-disciplinary responsibility it is necessary that the disciplinary deviation be carried out by the author with guilt. Guilt is a subjective condition of responsibility. It represents the psychic attitude of the person who, acting with unconstrained (free) will a fact that presents a social danger, had, at the time of execution, the representation of his socially dangerous fact and consequences. There is no guilt when the perpetrator acts with a lack of discernment (due, for example, to mental alienation) or acts with a forced will of external actions that are reflected in his psyche (for example, the physical constraint that the perpetrator could not resist or the moral constraint exercised by threatening with serious danger to the person of the perpetrator or of another and who could not be removed in another way).

c) *The character of administrative-disciplinary sanctions.* Administrative-disciplinary sanctions are not deprived of liberty, as are, for example, criminal sanctions.

From the above it follows that there are numerous administrative-disciplinary sanctions provided by a multitude of normative acts. Thus there are administrative-disciplinary sanctions:

- *the warning* in case of disciplinary deviations that present a concrete social danger reduced to the social values protected by norms of administrative law.

- *fine.* For example Law no. 26/1990 *regarding the trade register*<sup>2</sup> stipulates that those traders who do not comply with the provisions of the law and the deadlines for entering entries in the Trade Register may be obliged to pay a fine.

- *the diminution of the wage rights under the conditions of the law.* For example, art. 492 (3) C. adm. provides as administrative-disciplinary sanction applicable to civil servants the diminution of the wage rights by 5-20% over a period of up to 3 months.

- *penalties for late payment of budgetary obligations regarding taxes.*

- *suspension of the exercise of certain rights* (for example, suspension of the right of advancement in the salaries of civil servants).

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<sup>1</sup> See Verginia Vedinaş, *op. cit. (Drept administrativ)*, 2015, p. 297; Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, 2005, vol. 1, p. 330-335.

<sup>2</sup> Republished in the Official Gazette, Part I no. 49 of February 04, 1998, as amended



- *relegation from office* (eg relegation to civil service for a period of up to one year).

- *dismissal, dissolution of the collegiate body*, etc.

## **4. Contraventional liability**

### **4.1. The notion of contravention**

Contraventional liability is the main form of administrative liability<sup>1</sup>, which intervenes only in the case of committing a deed expressly qualified by normative acts or normative administrative acts as *contravention*.

The framework regulation in the matter of contraventions is currently implemented by the Government Ordinance no. 2/2001 *regarding the legal regime of contraventions*<sup>2</sup>. The provisions of Government Ordinance no. 2/2001 is supplemented by the provisions of the Criminal Code and the Civil Procedure Code, as the case may be.

The Government Ordinance no. 2/2001 constitutes the general legal framework in contraventional matters that includes norms having the main character with which the special regulations are completed<sup>3</sup>.

According to the provisions of art. 1 of the Government Ordinance no. 2/2001 the contravention is the act committed with guilt, established and sanctioned by law, ordinance, by decision of the Government or, as the case may be, by decision of the local council of the commune, the city, the municipality or the sector of the Bucharest municipality, the county council or the Council. General of the Municipality of Bucharest.

### **4.2. The features of the contraventions**

The contraventions have the following features:

- a) *the deed is committed with guilt*. Guilt exists when the wrongful act committed intentionally or negligently. The intention can be direct (when the perpetrator foresees the result of his deed, following his production by committing that deed) or indirect (when the perpetrator foresees the result of his deed and, although he does not follow it, accepts the possibility of its occurrence). The fault may be guilty of provision (called reckless or easily) when the offender provides the result of his act, but do not accept it, believing without reason that he will not occur and fault simple (called negligence) when the offender

<sup>1</sup> See Rodica Narcisa Petrescu, *op. cit.* (*Drept administrativ*), 2009, p. 587.

<sup>2</sup> Published in the Official Gazette, Part I no. 410 of July 25, 2001, approved with modifications by Law no. 180/2002, as subsequently amended.

<sup>3</sup> See II. Ioan Santai in I. Iulian Poenaru, II. Ioan Santai, *Noul regim al contravențiilor. Ordonanța nr. 2/2001*, „Dreptul” no. 12/2001, p. 11.

does not provide the result of his act, though he should and could foresee it.

b) *the legality of establishing and sanctioning contraventions*. According to art. 1 of the Government Ordinance no. 2/2001 the contraventions can be established and sanctioned by law, ordinance, by decision of the Government or, as the case may be, by decision of the local council of the commune, the city, the municipality or the sector of the municipality of Bucharest, the county council or the General Council of the Municipality of Bucharest.

### 4.3. Subjects of contravention liability

*The active subject of the contraventional liability* is, as a rule, a central or local public authority that has the competence to ascertain and apply the contraventional sanction through its ascertaining agents. The active subject of the contraventional liability can, under the conditions of the law, be a legal person of private law if it is involved in the realization of a public service<sup>1</sup>.

*The passive subject of the contravention liability* may be a natural or legal person who has committed a contravention.

The natural person is liable for a contravention from the age of 14, according to the provisions of art. 11 (2) of the Government Ordinance no. 2/2001.

For the offenses committed by minors who have turned 14 years the minimum and maximum of the fine established in the normative act for the deed committed are reduced by half.

A minor who has not attained the age of 16 years cannot be sanctioned for performing an activity for the benefit of the community.

The legal person is liable contravening in the cases and under the conditions provided by the normative acts by which the contraventions are established and sanctioned [art. 3 (2) of the Government Ordinance no. 2/2001].

The contraventional liability of the legal person does not exclude that of the natural person who committed the contravention<sup>2</sup>.

### 4.4. The contraventional sanctions provided by the Government Ordinance no. 2/2001 regarding the legal regime of contraventions

The Government Ordinance no. 2/2001 stipulates in art. 5 that the contraventional sanctions are main and complementary.

The main contravention sanctions are:

- a) the warning;
- b) the contravention fine;

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<sup>1</sup> See Antonie Iorgovan, *op. cit.* (*Tratat de drept administrativ*), 2005, vol. 2, p. 395.

<sup>2</sup> Mihai Adrian Hotca, *Regimul juridic al contravențiilor*, C.H. Beck, Bucharest, 2006, p. 62; Rodica Narcisa Petrescu, *op. cit.* (*Drept administrativ*), 2009, p. 593.

c) providing an activity for the benefit of the community.

Complementary contravention sanctions are:

a) confiscation of goods destined, used or resulting from contraventions;  
b) suspending or canceling, as the case may be, the opinion, agreement or authorization to exercise an activity;

c) closing the unit;

d) blocking of the bank account;

e) suspension of the activity of the economic agent;

f) withdrawal of the license or approval for certain operations or for foreign, temporary or definitive trade activities;

g) dismantling the works and bringing the land into its original state.

The sanction established must be proportional to the degree of social danger of the act committed.

The complementary sanctions are applied according to the nature and severity of the act.

For one and the same contravention, only one main contravention sanction and one or more complementary sanctions can be applied.

#### **4.5. Finding the contravention**

According to the provisions of art. 15 of the Government Ordinance no. 2/2001 the contravention is established by a report concluded by the persons specified in the normative act that establishes and sanctions the contravention, generically called constable agents. The following may be ascertaining agents: mayors, officers and non-commissioned officers of the Ministry of Interior, specially empowered, persons empowered for this purpose by ministers and other leaders of central public administration authorities, prefects, presidents of county councils, mayors, by the general mayor of Bucharest, as well as by other persons provided for in special laws.

#### **4.6. Enforcement of contraventional sanctions**

According to art. 21 of the Government Ordinance no. 2/2001 in the case where by the normative act of establishing and sanctioning the contraventions is not provided otherwise, the certifying agent, through the minutes of finding, applies the sanction. If, according to the normative act establishing and sanctioning the contravention, the finding agent does not have the right to apply the sanction, the report of the finding shall be sent immediately to the body or competent person to apply the sanction. In this case the sanction is applied by written resolution on the minutes.

The sanction is applied within the limits provided by the normative act and must be proportional to the degree of social danger of the committed crime,

taking into account the circumstances in which the deed was committed, the manner and means of its execution, the purpose pursued, the the follow-up produced, as well as the personal circumstances of the offender and the other data entered in the report [art. 21(3) of the Government Ordinance no. 2/2001].

#### **4.7. Appeals against sanctioning offenses**

According to the provisions of art. 31 of the Government Ordinance no. 2/2001 against the report of finding the contravention and applying the sanction, a complaint can be made within 15 days from the date of its delivery or communication.

The complaint is submitted to the court in whose constituency the offense was committed. The control of the application and execution of the main and complementary contraventional sanctions is the exclusive competence of this court. The complaint suspends enforcement.

Unless otherwise provided by law, the decision resolving the complaint may be appealed only by appeal. The appeal is settled by the administrative and fiscal litigation section of the court. The appeal suspends the execution of the decision [art. 34 (2) of the Government Ordinance no. 2/2001].

### **5. The administrative-patrimonial responsibility**

#### **5.1. The notion of administrative-patrimonial responsibility**

The administrative-patrimonial liability is that form of the legal responsibility that consists in obliging the public authorities, according to the law, to repair the material or moral damages caused to the individuals.

Law no. 554/2004 of the administrative contentious enshrines the principle of public authorities' liability for material and moral damages caused by illegal administrative acts, by the unjustified refusal to solve a request or by the non-resolution of the request within the legal term. The court competent to judge the action aimed at obtaining damages is the administrative litigation court.

#### **5.2. Conditions of administrative-patrimonial liability**

In order to be trained the administrative-patrimonial responsibility it is necessary to fulfill the following conditions:

a) the existence of an illegal administrative act, an unjustified refusal of the public administration to resolve a request or the resolution within the legal term of an application.

According to the provisions of art. 52 (1) of the Constitution the person injured in his right or in a legitimate interest, by a public authority, by an administrative act or by not resolving within the legal term of an application, is entitled

to obtain the recognition of the claimed right or of the right of the legitimate interest, annulment of the act and reparation of the damage.

Usually the person injured in a right or a legitimate interest, by a public authority, by an illegal administrative act introduces an action in the annulment of the act which will include an end of claim regarding the claim for damages for the material damages and morally suffered. In order to admit the action, the court must ascertain the illegality of the contested administrative act.

The claim for damages may be brought later. Thus, under the conditions provided by art. 19 of Law no. 554/2004 *of the administrative contentious* when the injured person requested the annulment of the administrative act, without at the same time requesting compensation, they can be requested within one year from the date when the person knew or had to know the extent of the damage.

*b) the existence of a material and/or moral prejudice.* The prejudice is the result of harm (damage), of patrimonial or non-patrimonial nature, effect of the violation of the subjective rights and legitimate interests of a person<sup>1</sup>.

According to art. 18 (3) of Law no. 554/2004 in the case of solving the request, the court will also decide on the damages for the material and moral damages caused, if the applicant has requested this.

The prejudice can be material and/or moral. *The material prejudice* is a negative consequence likely to be a monetary assessment, which results from the infringement of a legitimate heritage right or interest<sup>2</sup> (for example the destruction or degradation of a good). *The moral prejudice* is an unacceptable negative consequence of pecuniary evaluation, which results from the infringement of a non-patrimonial right or interest<sup>3</sup>. Moral prejudice always consists of a physical or mental pain of the victim and is the result, in principle, of the harm of the health and the bodily integrity; the restriction of the possibilities of normal family and social life (leisure prejudice); touching caused to the physical harmony and appearance of a person (aesthetic damage); the death of a person with whom we have a strong affection (emotional damage); touching on the dignity, honor and honor of a person; violation of the right to one's own image; touching on privacy<sup>4</sup>.

*c) the existence of the causal relationship between the illegal administrative act (the unjustified refusal to solve a request or the failure to resolve the request within the legal term) and the damage caused.*

For the existence of administrative-patrimonial liability, it is necessary to investigate whether the damage caused is the direct consequence of an illegal activity of the public administration (illegal administrative act, unjustified refusal to solve a request or non-resolution of the request within the legal term).

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<sup>1</sup> See Liviu Pop, *Teoria generală a obligațiilor*, Lumina Lex, Bucharest, 1998, p. 199.

<sup>2</sup> *Idem*, p. 773.

<sup>3</sup> *Ibid.*, p. 773.

<sup>4</sup> Constantin Stătescu, Corneliu Bîrsan, *Drept civil. Teoria generală a obligațiilor*, 3<sup>rd</sup> ed., All Beck, Bucharest, 2000, p. 148-153; Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 629.

d) *the existence of the guilt of the public authority in case of subjective liability*. The Civil Code stipulates as a general rule for non-contractual civil liability the fact that the one who causes harm to another by an unlawful act, committed with guilt, is obliged to repair it [art. 1357 (1) of the Civil Code].

In administrative law, Law no. 554/2004 *of the administrative contentious* does not require the applicant to prove the guilt of the public authority, this being presumed. Thus, the presumption of guilt by the public authority results from the illegal nature of the administrative act, the unjustified refusal to solve a request or the failure to resolve the request within the legal term. The fault of the public administration consists in the defective fulfillment of its prerogatives of public power, resulting in damages to individuals by violating or not recognizing their legitimate rights or interests.

### 5.3. Forms of administrative-patrimonial liability

The administrative-patrimonial liability can be:

- a) **an objective liability** that intervenes regardless of the guilt of the responsible public authority;
- b) **a subjective liability** based on the guilt of the responsible public authority.

Objective liability can take the following forms:

- *the state's patrimonial liability for the damages caused by the judicial errors*. According to the provisions of art. 52 (3) of the Constitution the state is liable for the damages caused by the judicial errors. The responsibility of the state is established under the conditions of the law and does not remove the responsibility of the magistrates who exercised their function with bad faith or serious negligence.

- *the patrimonial liability of the public administration authorities for the limits (risks) of the public service*. In this type of liability, the injured person must not prove the fault of the public administration, but must prove before the court that the damage suffered is due to a limit of organization of the public service, such as an inherent failure related to the structure of the public service<sup>1</sup>.

**Subjective liability** can take the following forms:

- *the patrimonial liability of the public authorities for the damages caused by illegal administrative acts, by the unjustified refusal to solve a request or by not resolving the request within the legal term*. Under the conditions provided by Law no. 554/2004 the person injured in his right or in a legitimate interest, by a public authority, by an illegal administrative act can bring an action in

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<sup>1</sup> See Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, vol. 2, 2005, p. 464; Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 625; Verginia Vedinaş, *op. cit. (Drept administrativ)*, 2015, p. 336.

the annulment of the act which will include an end of request regarding the request of compensation for the material and moral damages suffered. In order to admit the action, the court must ascertain the illegality of the contested administrative act.

- *the patrimonial liability of the public authorities for the damages caused by ordinances or provisions of Government ordinances declared unconstitutional.* According to the provisions of art. 126 (6) of the Constitution the administrative litigation courts are competent to resolve the requests of the persons injured by ordinances or, as the case may be, by provisions of ordinances declared unconstitutional.

- *the patrimonial liability of the public authorities for the damages caused by unilateral administrative acts issued in connection with the award, conclusion, modification or termination of the administrative contracts.* This patrimonial responsibility is carried out under the conditions provided by the special legislation regulating various types of administrative contracts. Thus, for example, under the conditions provided by the Administrative Code the administrative-patrimonial liability of the grantor can be incurred, which, by means of a unilateral administrative act, modifies the regulatory part of the concession contract or denounces the contract for exceptional reasons related to the national or local interest, as the case may be.

- *the patrimonial liability of the public authorities for the damages caused by not executing the administrative contentious decisions in time.* In the conditions provided by art. 24 (3) of Law no. 554/2004 the executing court will be able to grant to the applicant penalties for delay if the public authority does not implement the court decision within the time limit and will apply a fine to the obliged person.

## Chapter X

### Public services

#### 1. The public service - notion, features, categories

I. Alexandru defines the public service as "that state organization or local authorities, established by the competent authorities, in order to ensure the fulfillment of some requirements of the members of the society, under administrative or civil law in the process of executing the law"<sup>1</sup>.

Public services have the following **characteristics**:

- meeting public needs responds to the general interest;
- the establishment of public services is the exclusive attribute of the deliberative authorities (parliament, local councils, county councils);
- the coordination and management of public services is carried out by an executive authority of public administration (thus at national level the Government manages the services for which the state is responsible, at county level the president of the county council coordinates the realization of public services and of public utility of county interest and in municipalities, cities and municipalities the mayor coordinates the realization of public services of local interest);
- submission of a legal regime governed by the principles of public law.

In the legal literature<sup>2</sup> it was appreciated that the following principles should be based on the organization and functioning of public services:

- *the principle of continuity* which expresses the fact that they were created to carry out the activity continuously, without interruptions;
- *the principle of adaptability* that expresses the necessity of adapting the public service to the changes and the demands of the general interest;
- *the principle of neutrality* that has the meaning of creating and operating public services only to serve the general interests and not certain interests for the benefit of some;
- *the principle of equality* which is in relation to the precedent and which expresses the fact that all interested persons have equal access, without differentiation or discrimination, to the satisfaction of some needs, which fall within the object of activity of the respective public service.

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<sup>1</sup> Ioan Alexandru (coord.), *Drept administrativ*, Omnia, Braşov, 1999, p. 110.

<sup>2</sup> Jean-Philippe Colson, *Droit public économique*, 3<sup>e</sup> édition, L.G.D.J., Paris, 2001, p. 107-111; Jean Fougereuse, *Le droit administratif en schémas*, Ellipses Édition Marketing S.A., 2008, p. 32-39; Corneliu Manda, Doina Banciu, Cezar Manda, *Administraţia Publică şi Cetăţeanul. Structuri. Autorităţi. Informaţie publică*, Technical Publishing House, Bucharest, 1997, p. 73-74; M. Văraru, *Tratat de drept administrativ român*, Publishing House of Socec & Co., Bucharest, 1928, p. 94-103.



The public service can be organized either at national level, for the whole country (public service of air transport, rail) or at local level (public transport within a locality).

The specialized literature distinguishes the following categories of public services:

- the public service of legislation realized at national level by the Parliament, which adopts obligatory legal norms, which regulates, uniformly, the social relations;

- the judicial public service that is performed by the courts and resolves with "legal truth power" the legal conflicts;

- public administrative services that ensure the execution of laws and judgments, public order, national security, creation of optimal health conditions, public education, culture, etc. Such are, for example, civil status offices, hospitals, police, army, etc. These have the sole purpose of satisfying the public interest, the financial resources being provided from the state budget or, as the case may be, from local budgets<sup>1</sup>;

- public industrial and commercial services, which involve carrying out activities in exchange for which the user or the beneficiary is obliged to pay a fee to the service provider<sup>2</sup>. Such are the community services of public utilities regulated by Law no. 51/2006 *of the community services of public utilities* through which the essential needs of utility and general public interest with social character of the local authorities are ensured, regarding: a) water supply; b) sewage and sewage treatment; c) collection, drainage and evacuation of rainwater; d) production, transport, distribution and supply of thermal energy in centralized system; e) sanitation of localities; f) public lighting; g) administration of the public and private domain of the administrative-territorial units, as well as others; h) local public transport. These are included in the doctrine within the public services of private management<sup>3</sup>, in contrast to the other three mentioned above which are considered public services of public management. The industrial and commercial public service preserves the fundamental purpose of the public service: to satisfy the general interest, but its activity is not usually financed from the central/local budget, but it obtains commercial benefits by offering to individuals of paid supplies or services (direct payment of services). to users). Therefore, unlike the others that are subject to a regime of public law, industrial and commercial public services are subject to a mixed regime, of private law and public law, but private law is the rule<sup>4</sup> (the administrative law regulating the regime of authority acts issued by these organs and the status of some of the staff members who serve him and who have the status of civil servants).

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<sup>1</sup> Aladar Sebeni, *op. cit.*, 1999, p. 6.

<sup>2</sup> *Ibid.*

<sup>3</sup> Sorin David, *Contractul de concesiune*, „Dreptul” no. 9/1991, p. 40.

<sup>4</sup> See Prosper Weil, *op. cit.* (*Le droit administratif*), 1992, p. 68; Jean Fougereuse, *op. cit.* (*Le droit administratif en schémas*), 2008, p. 25.

The doctrine emphasizes that only commercial and industrial public services can be the object of the concession<sup>1</sup> due to their lucrative nature.

## 2. Forms and modes of management of public services

The term "management" means the administration of the assets or assets of a person by his or her representative or all the operations performed by a manager regarding the receipt, preservation and release of material assets or money values, from a commercial company or institution<sup>2</sup>.

The management of the public service can be done by a public person (state, local communities, institutions) or a private person (natural or legal).

The forms of management of the industrial and commercial public services at local level encountered in the legislation (Law no. 51/2006 of *the community services of public utilities*) and the doctrine are *the direct (public) management* and *the delegated management*.

### 2.1. Direct (public) management

Direct (public) management is represented by situations in which the local community, through its representative authorities, provides the public service itself or transfers it to a public institution under its control. Article 28(1) of Law no. 51/2006 shows that, within the direct management, the deliberative and executive authorities, on behalf of the administrative-territorial units that they represent, assume and exercise immediately all the competences and responsibilities that fall to them according to the law regarding the provision of public utilities services, respectively in the administration, operation and operation of the public utilities systems related to them.

According to the provisions of art. 28(2) of Law no. 51/2006 the direct management is realized by means of operators of public law established at the level of the administrative-territorial units, based on the decisions of giving in administration adopted by their deliberative authorities; these operators can be:

- a) functional compartments organized in the structure of the specialized apparatus of the mayor or, as the case may be, of the county councils;
- b) public services of local or county interest, without legal personality, established and organized by decisions of the deliberative authorities of the administrative-territorial units;

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<sup>1</sup> In this regard Lucica Matei, *Management public*, Economica, Bucharest, 2001, p. 343; Sorin David, *op. cit.*, 1991, p. 41, Aladar Sebeni, *op. cit.*, 1999, p. 6; Mihai T. Oroveanu, *Concesiunea serviciului public*, „Studii de drept românesc”, April-June 1995, p. 158.

<sup>2</sup> *Mic dicționar enciclopedic (Small encyclopedic dictionary)*, 3<sup>rd</sup> ed., Scientific and Encyclopedic Publishing House, Bucharest, 1986.

c) public services of local or county interest, with legal personality, established and organized by decisions of the deliberative authorities of the administrative-territorial units.

## 2.2. Delegated management

Delegated management is the process of entrusting the administration of the public service by the administrative authority of a company, usually from the private sector. Law no. 51/2006 shows in art. 29 paragraph (1) that in the case of the delegated management the authorities of the local public administration assign to one or more operators all the time only a part of their competences and responsibilities regarding the provision of the public utilities services, as well as the concession of the public utilities systems related to the services, respectively the law and the obligation to administer and operate them, on the basis of a management delegation contract.

The contracts for delegation of management are approved by award decisions adopted by the deliberative authorities of the administrative-territorial units and signed by mayors, respectively by the presidents of the county councils based on their mandate [art. 29(3) of Law no. 51/2006].

The delegated management is performed, according to the provisions of art. 29(4) of Law no. 51/2006, through some operators or regional operators of private law, which can be:

a) commercial companies with integral social capital of the administrative-territorial units, established by their deliberative authorities;

b) companies resulting from the reorganization of the autonomous management of local or county interest or of the public services of local or county interest, whose social capital is wholly owned by the administrative-territorial units, as associate or sole shareholder;

c) companies with private social capital;

d) companies with mixed social capital. Through the companies with mixed social capital, semi-direct management is carried out, as it is a process of *mixed administration* of the public service, in the sense of the exploitation in direct management together with the provision of a part of the public service by an external company (from the private sector).

In Romania we observe first of all that at local level Law no. 51/2006 of *the community services of public utilities* defines and lists these services and then shows that they can be the subject of the management delegation. Apart from these provisions, there is no locally regulated clear delimitation of public activities that can be outsourced to those that cannot be. The same thing is observed with regard to public activities at national level. We note that references to the essential functions by which the state's prerogatives are exercised are summarized in the Constitution (Title III - *Public authorities*). But beyond these it is often very difficult to distinguish between the essential functions and the accessory

functions. We appreciate that in the face of the universal phenomenon of "privatization" of public services, *de lege ferenda* is a need for clear division in the future Code of administrative procedure of Romania of the core function of the annexed functions, of a technical character, which may be entrusted to private persons. In addition, we note that government policies for the development of the public-private partnership system (as it exists, for example in England's *Public Private Partnerships - the Government Approach 2000*) are almost non-existent.

In Romania, unlike Germany or Italy, the possibility of concluding agreements (contracts) that determine the content of an administrative decision or which is substituted is not regulated. The contract has the advantage that it is a more flexible instrument than the unilateral administrative act, allowing to find individual solutions, adapted to the needs of the citizens<sup>1</sup>. *De lege ferenda* we propose the regulation in the future Code of administrative procedure of Romania of the administrative contract for implementing the provisions of the normative acts and unilateral administrative acts. Through such an administrative contract, priority is given to the negotiation techniques and an externalization of the responsibility regarding the realization of the public interest is carried out. We appreciate that such outsourcing must have the following limitations<sup>2</sup>:

- first of all, such a contract cannot have the object of negotiating the competence of the public authority. Jurisdiction is public and cannot be modified by agreement of the parties.

- secondly, the recourse to the administrative contract cannot take place when the public interest demands urgent measures (for example, recourse to public procurement).

- thirdly, if a contract is concluded instead of a unilateral administrative act for the edict whose rule of law requires the approval or opinion of another authority, this contract should not take effect until after the authority in question has its competition in the form required by law.

- in case of non-observance of the contractual provisions by the contracting party, the public authority retains the right to resort to the unilateral administrative act for their implementation.

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<sup>1</sup> Cătălin-Silviu Sărau, *op. cit. (Contractele administrative...)*, 2009, p. 367

<sup>2</sup> *Ibid.*

## Chapter XI

### Public domain and private domain

#### 1. Regulation of the general regime of public property

The general regime of public property is regulated by art. 136 of the Constitution, by the provisions of art. 554 and 858-875 of the Civil Code<sup>1</sup> and art. 284-353 of the Administrative Code. Through these regulations, the legislature outlines, in general, the regime of public property by unifying the main aspects of this regime: the notion and the legal characters, the legal content, the object of the public property right, the modes of acquisition and termination, including the legal modalities of exercise (administration, concession, renting or free use of public utility goods).

#### 2. The notion and features of public property law

According to art. 136 (1) of the revised Constitution "Property is public or private". It follows that property law can have two forms: public property law and private property law.

Public property right is a kind of property right.

The public property right has a legal definition, being defined by art. 858 of the Civil Code. As the property right belonging to the state or to an administrative-territorial unit on the goods which, by their nature or by the declaration of the law, are of public interest or use, provided they are acquired by one of the ways provided by law<sup>2</sup>.

Public property law has the following characteristics (defining elements)<sup>3</sup>:

a) the public property right is a form of the property right (together with the private property right)

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<sup>1</sup> See Cătălin-Silviu Săraru, *Discuții referitoare la reglementarea proprietății publice în noul Cod civil*, „Dreptul” no. 11/2010, p. 90-107.

<sup>2</sup> See for similar definitions in doctrine Ion P. Filipescu, Andrei I. Filipescu, *Drept civil. Dreptul de proprietate și alte drepturi reale*, Universul Juridic, Bucharest, 2006, p. 115; Corneliu Bîrsan, *Drept civil. Drepturile reale principale*, Hamangiu, 3<sup>rd</sup> ed., Bucharest, 2008, p. 85; Mircea N. Costin, Călin M. Costin, *op. cit. (Dicționar de drept civil de la A la Z)*, 2007, p. 393; Marian Nicolae, *Considerații asupra Legii nr. 213/1998 privind proprietatea publică și regimul juridic al acesteia*, „Dreptul” no. 6/1999, p. 3, 4.

<sup>3</sup> See Liviu Pop, *Dreptul de proprietate și dezmembrămintele sale*, Lumina Lex, Bucharest, 1996, p. 55; Vasile Pătulea, Corneliu Turianu, *Dreptul de proprietate și alte drepturi reale*, vol. II (*Dreptul de proprietate publică, dreptul de proprietate privată, apărarea dreptului de proprietate, publicitatea imobiliară*), Wolters Kluwer, Bucharest, 2008, p. 12; Mona-Lisa Belu Magdo, *Proprietatea publică și regimul juridic al acesteia*, „Revista de Drept Comercial” no. 11/1999, p. 40, 41.

- b) the holders of the public property right are the only state and territorial administrative units;
- c) the state and the administrative-territorial units exercise the right of public property by virtue of their quality as legal persons of public law;
- d) the exercise of the public property right is performed by the "general administration" of the public domain by the Government regarding the goods in the public domain of national interest and the local councils and the county councils regarding the goods in the public domain of local interest based on the capacity of administrative law and within the limits of the powers granted by law. Under the conditions of art. 136 paragraph (4) of the revised Constitution and of art. 867-870 of the Civil Code, the holder of the right of general administration can give the goods from the public domain in concrete administration to the autonomous management or public institutions.
- e) the object of the property right is made up of the goods that belong to the public domain of national interest when the public property right is exercised by the state and from the public domain of local interest, when the public property right belongs to the administrative-territorial units. The notions of public property and public domain are equivalent in terms of the assets they encompass.
- f) the exercise of this right of property takes place only under public law.
- g) the public property right has specific characteristics that distinguish it from the private property right, being inalienable, indescribable and unsinkable.

### 3. Holders of public property rights

Art. 136 (2) of the revised Constitution shows that "the public property is guaranteed and protected by law and belongs to the state or to the administrative-territorial units". It follows from this imperative provision of the Constitution that no other subject of public law or private law can be the holder of the public property right but may have, at most, rights derived from it, such as the administration, concession<sup>1</sup>, etc. Thus, according to the provisions of art. 136 (4) of the Constitution, under the conditions of the organic law, the public property goods may be given for administration to autonomous management or public institutions or may be concessioned or leased; also, they can be given free of charge to public utility institutions. Therefore, the legal persons of private law<sup>2</sup> and the natural persons cannot own property belonging to the public domain of the state or of the administrative-territorial units, but only under concession or lease.

Legal persons without patrimonial purpose (associations and foundations) of public utility can obtain, under the conditions of the organic law, a right

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<sup>1</sup> See Eugen Chelaru, *op. cit.* (*Administrarea domeniului ...*), 2008, p. 56; Corneliu Bîrsan, *op. cit.* (*Drept civil. Drepturile reale principale*), 2008, p. 87; Marian Nicolae, *op.cit.* (*Considerații asupra Legii nr. 213/1998...*), 1999, p. 6, 7.

<sup>2</sup> See also the Decision of the Constitutional Court no. 107/2004 published in the Official Gazette no. 392 of May 4, 2004.

of free use on public property. Also the public institutions and the autonomous management can receive in public administration goods, under the conditions of the organic law, without which they become owners of these goods.

### **3.1. State**

The state exercises the public property right with regard to public domain assets of national interest on the basis of public power prerogatives. These goods are given in the general administration of the Government.

Taking into account the doctrinal orientations and the current legal regulations, we consider that the state is a legal person of public law<sup>1</sup>, a quality in which he is the holder of both the public property right on the public domain goods of national interest and the private property right on the goods from private domain of national interest.

### **3.2. The administrative-territorial units**

There are administrative-territorial units the commune, the city, the county; under the law, some cities may be declared municipalities (art. 95 of the Administrative Code). The administrative-territorial units exercise the right of public ownership regarding the goods in the public domain of local interest. These assets are given in the general administration of local and county councils.

## **4. General administration and concrete administration of public property goods**

The exercise of the public property right is done through the general administration and the concrete administration of the public domain goods.

The general administration of the goods of the public domain of the state is exercised by the Government. Thus according to the provisions of art. 15 letter d) of the Administrative Code the Government exercises the function of administration of the state property, which ensures the administration of the public and private property of the state, as well as the management of the services for which the state is responsible.

The general administration of the goods in the public domain of the county is exercised by the County Council [art. 173 (1) letter c) of the Administrative Code]. The county council can decide on the administration, concession, renting or giving in free use of the public property of the county [art. 173 (4) letter a) of the Administrative Code]

The general administration of the goods in the public domain of communes, cities and municipalities is exercised by the Local Council [art. 129 (2)

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<sup>1</sup> See Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *op.cit. (Teoria generală a dreptului)*, 2008, p. 324.

letter c) of the Administrative Code]. The local council can decide on the administration, concession, renting or giving in free use of the public property of the commune, city or municipality, as the case may be [art. 129 (6) letter a) of the Administrative Code]

Under the conditions of art. 136 paragraph (4) of the revised Constitution and of art. 867-870 of the Civil Code, the holder of the right of general administration can give the goods from the public domain in concrete administration to the autonomous management or public institutions.

## 5. The characters of the public property right

From the provisions of art. 136(4) of the Constitution and art. 861 of the Civil Code. Results in three characters of the public property right: the inalienability, the imprescriptibility and the immunity from seizure of the goods in the public domain<sup>1</sup>.

Public property right is inalienable. According to the provisions of art. 136(4) of the Constitution "public property goods are inalienable. Under the conditions of the organic law, they can be given in administration to autonomous management or public institutions or they can be concessioned or rented; also, they can be given free of charge to public utility institutions". Therefore, the goods that form the object of the public property right are removed from the civil circuit, they cannot be alienated.

When the public interest imposes it, the goods in the public domain may be constituted, under the conditions provided by art. 136(4) Constitution and art. 866 of the Civil Code, real rights derived from public property law (administrative easements<sup>2</sup> established by law in favor of the public domain): the right of administration of public institutions and autonomous management; the right of concession on public domain goods; the right of free use of public utility institutions. The inalienable character of the goods in the public domain is also preserved in these cases, because it is not about the alienation or acquisition of the goods in the public domain, but about specific ways of exercising the right of public property, under a regime of public law<sup>3</sup>.

**Public property right is imprescriptible extinctive and acquisitive.** The imprescriptibility of public property goods is expressly provided by art. 861(1) of the Civil Code and results from the rule of inalienability of these goods. In the conditions in which the law does not distinguish (*ubi lex non distinguit, nec nos distinguere debemus*) the goods that are the object of the public property are imprescriptible both extinctive and acquisitive.

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<sup>1</sup> On the characteristic features of the public domain see also Liviu Giurgiu, *Considerații în legătură cu domeniul public*, „Dreptul” no. 8/1995, p. 40-42.

<sup>2</sup> On the administrative easements and the difference from the easements specific to private law see Emil Bălan, *Dreptul administrativ al bunurilor*, C.H. Beck, Bucharest, 2007, p. 31.

<sup>3</sup> See Valeriu Stoica, *Drept civil. Drepturile reale principale*, C.H. Beck, Bucharest, 2009, p. 180.



**Extinctive imprescriptibility of public property.** By prescription, according to the provisions of art. 2500(1) of the Civil Code is extinguished the material right to action if it has not been exercised within the period established by law. What is extinguished by the prescription is the right to action in the material sense defined according to art. 2500 (2) as the right to compel a person, with the help of the public force, to execute a certain benefit, to respect a certain legal situation or to bear any other civil sanction, as the case may be. The material right to action having as object goods public property constitutes an exception from this rule, being imprescriptible according to the provisions of art. 861 (1) of the Civil Code.

**The imprescriptibility of public property goods.** According to the provisions of art. 861(2) of the Civil Code the property of the public goods does not extinguish by default and cannot be acquired by third parties through usucapion or, as the case may be, by the possession of good faith on movable property.

**Public property right has immunity from seizure.** The immunity from seizure of public property assets results from their inalienability rule and is expressly provided by art. 861(1) of the Civil code.

Public property goods cannot be acquired by forced execution under the conditions provided by art 1516 et seq. of the Civil Code by creditors who wish to realize their claims against the state or the administrative-territorial units. Also, public property assets cannot be enforced even when they are given to the administration of public institutions or autonomous management, when they are given for free use to public utility institutions or when they are concessioned or rented according to the law.

## **6. Acquisition of the public property right**

According to the provisions of art. 863 of the Civil Code the public property right is acquired:

- a) by public procurement, carried out according to the law;
- b) by expropriation for a cause of public utility, according to the law;
- c) by donation or legacy, accepted under the conditions of the law, if the good, by its nature or by the will of the dispatcher, becomes of public interest or use;
- d) by convention with an onerous title, if the good, by its nature or by the will of the acquirer, becomes of public interest or use;
- e) by transferring a good from the state's private domain into its public domain or from the private domain of an administrative-territorial unit in its public domain, according to the law;
- f) by other ways established by law.

### **6.1. Acquisition of public property right through public procurement**

The public procurement is regulated by Law no. 98/2016 *on public procurement*<sup>1</sup> and Law no. 99/2016 *on sectoral acquisitions*<sup>2</sup>.

The public procurement contract is the contract with an onerous title, assimilated, according to the law, the administrative act, concluded in writing between one or more economic operators and one or more contracting authorities, whose purpose is the execution of works, the supply of products or the provision of services.

### **6.2. Acquisition of the public property right by expropriation for the cause of public utility**

By expropriation is meant the forced passage in public property, by judicial decision, of some buildings that are privately owned, with a fair and prior compensation, under a cause of public utility<sup>3</sup>.

The general regulation of expropriation for cause of public utility is realized by art. 44(3) and (6) of the Constitution, by art. 562(3) and the other articles regarding expropriation of the Civil Code and of Law no. 33/1994 *regarding the expropriation for a cause of public utility*<sup>4</sup>. For certain infrastructure works of public interest, the special regulations of Law no. 255/2010 *regarding the expropriation for a cause of public utility, necessary to achieve objectives of national, county and local interest*<sup>5</sup>.

Expropriation is an exception from the inviolable character of the private property right provided by art. 136 (5) of the Constitution and can be carried out only under the conditions of the law<sup>6</sup>.

According to the provisions of art. 44 (3) of the Constitution "no one can be expropriated except for a cause of public utility, established according to the law, with just and prior compensation".

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<sup>1</sup> Published in the Official Gazette, Part I no. 390 of May 23, 2016.

<sup>2</sup> Published in the Official Gazette, Part I no. 391 of May 23, 2016.

<sup>3</sup> See Emil Bălan, *op. cit. (Dreptul administrativ al bunurilor)*, 2007, p. 82. For the analysis of expropriation in comparative law see Laura Maria Crăciunean, *Câteva considerații privind exproprierea pentru cauză de utilitate publică în dreptul comparat și în jurisprudența Curții Europene a Drepturilor Omului*, „Revista de Drept Public” no. 2/2006, p. 116-131.

<sup>4</sup> Republished in the Official Gazette, Part I no. 472 of July 5, 2011. Law no. 33/1994 is supplemented by the *Regulation regarding the working procedure of the commissions for carrying out the preliminary research in order to declare the public utility for works of national or local interest* adopted by the Government Decision no. 583/1994 (published in the Official Gazette, Part I no. 271 of September 26, 1994).

<sup>5</sup> Published in the Official Gazette, Part I no. 853 of December 20, 2010, as subsequently amended.

<sup>6</sup> See Emil Bălan, *op. cit. (Dreptul administrativ al bunurilor)*, 2007, p. 82.

According to the provisions of art. 2 of Law no. 33/1994 can be expropriated immovable property owned by natural persons or legal persons for or without profit purpose, as well as those that are in the private property of communes, cities, municipalities and counties.

### **6.3. Acquisition of public property rights by donation or legacy**

By donation or legacy accepted under the conditions of the law, a good can enter the public domain of the state or of an administrative-territorial unit if the good, by its nature or by the will of the dispatcher, becomes of public interest or use.

By donation, according to art. 2 point 22 of Law no. 500/2002 *regarding the public finances*<sup>1</sup>, a public institution receives money or material assets from a legal or natural person with a non-refundable title and without consideration.

The public property right can also be acquired through a legacy if the good, by its nature or by the will of the dispatcher, becomes of public use or interest. The legacy is defined by art. 986 of the Administrative Code. As the testamentary disposition by which the testator stipulates that, at his death, one or more legatees to acquire his entire estate, a fraction of it or certain certain goods.

Donations and connections with tasks or for which there are arrears of taxes or fees can be accepted, according to art. 291 (5) of the Administrative Code:

a) only with the approval of the ministry with attributions in the field of public finances, in the case of donations and legacies made to the state;

b) only with the approval of the local council or, as the case may be, of the county council, with the qualified majority of two thirds of the number of local councilors in office, in the case of donations and bequests made to the territorial-administrative units.

### **6.4. Acquisition of the public property right by convention for an onerous title**

The public property right may be acquired by convention for free, if the good, by its nature or by the will of the acquirer, becomes of public interest or use. Thus, the right of public property can be acquired, within the limits allowed by law, through civil and commercial contracts (sale-purchase contracts, exchange contracts, etc.), when the acquired goods are affected to a public utility.

The conclusion of a sale-purchase contract in order to acquire a good that will enter the public domain can be made only if there are no legal provisions regarding public procurement provided by Law no. 98/2016 *on public procurement* and Law no. 99/2016 *on sectoral procurement*, in which case the procedures

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<sup>1</sup> Published in the Official Gazette, Part I no. 597 of August 13, 2002, as subsequently amended.

for concluding the public procurement administrative contracts will have to be respected. The price from the sale-purchase contract will be established by an evaluation commission formed by the buyer.

### **6.5. Acquisition of the public property right by transferring a good from the private domain of the state or of the administrative-territorial units in their public domain**

The evolution of the needs of the company requires that different goods be transferred in the public domain of the state or of the territorial administrative units in their private domain or even in the public domain of an administrative-territorial unit in the public domain of the state and vice versa, transfer always justified by a cause of public utility.

The realization of the public interest in the best conditions required that in practice to meet the following situations of acquiring the public property right through the transfer of goods:

a) the transfer of the good from the state's private domain into its public domain, by Government decision, according to the provisions of art. 296(1) of the Administrative Code.

b) the transfer of the good from the private domain of the administrative-territorial units in their public domain, by decision of the county council, respectively of the General Council of the Municipality of Bucharest or of the local council, according to the provisions of art. 296(2) of the Administrative Code.

c) the transfer in the public domain of a good from the patrimony of the companies, to which the state or a territorial-administrative unit is a shareholder or associate, can be done only with the agreement of the general meeting of the shareholders of the respective company and with the payment of the value of the good, according to art. 296(4) of the Administrative Code.

d) the transfer of a good from the public domain of the state to the public domain of an administrative-territorial unit is made at the request of the county council or of the local council of the commune, city or municipality, as the case may be, by decision of the Government, according to art. 292(1) of the Administrative Code.

e) the transfer of a good in the public domain of an administrative-territorial unit in the public domain of the state is made, at the request of the Government, by decision of the county council or of the local council of the commune, city or municipality, as the case may be, according to art. 293 of the Administrative Code.

f) the transfer of a good from the public domain of an administrative-territorial unit in the public domain of another administrative-territorial unit, from the territorial area of the same county, is made at the request of the requesting local council, by decision of the local council of the commune, of the city or of

the municipality in which the property is located, according to art. 294(1) of the Administrative Code.

## 6.6. Acquisition of property rights by other means established by law

Besides the ways of acquiring the public property analyzed above, in the legislation we also find other ways of acquiring, such as accession, the acquisition of the public property right on the movable archaeological goods discovered by accident or through archaeological research, the requisitions, the payment.

**Accession** is regulated by art. 567-601 of the Civil code. These rules will also apply in the case of acquiring the right of public property, insofar as they are compatible with the legal regime of public property.

By accession, the owner of a good becomes the owner of everything that aligns with the good or is incorporated into it, unless the law provides otherwise.

The accession can be *natural*, when the union or incorporation is the consequence of a natural event or *artificial*, when it results from the act of the owner or another person.

**The acquisition of the public property right on the movable archaeological goods** discovered by chance or through archaeological investigations is realized according to the provisions of Law no. 182/2000 *regarding the protection of the mobile national cultural heritage*<sup>1</sup>. Thus, according to the provisions of art. 46(1) of Law no. 182/2000 archaeological, epigraphic, numismatic, paleontological or geological goods, discovered in systematic research with archaeological or geological purpose or in archaeological rescue or preventive research, as well as those discovered accidentally by works of any kind, carried out in places that are the exclusive object of public property, according to art. 136 paragraph (3) of the Romanian Constitution, it enters public property, according to the legal provisions.

**The acquisition of the public property right through the requisition of goods** is regulated by Law no. 132/1997 *regarding the requisition of goods and services in the public interest*<sup>2</sup>.

The requisition of goods represents the exceptional measure by which the public authorities empowered by law oblige economic operators, public institutions, as well as other legal and natural persons to *temporarily dispose* of movable or immovable property, according to the law.

The requisitioned goods are made available to the forces destined for national defense or public authorities, to declare partial or total mobilization of the armed forces or the state of war, to establish the state of siege or emergency, both for preventing, locating, removing the consequences of disasters, as well as during these situations.

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<sup>1</sup> Republished in the Official Gazette, Part I no. 259 of April 9, 2014.

<sup>2</sup> Republished in the Official Gazette, Part I no. 261 of April 10, 2014.

**The acquisition of the public property right can also be achieved by giving in payment** regulated by art. 263 of the Fiscal Procedure Code<sup>1</sup>. Thus, the tax receivables administered by the central tax authority, with the exception of those withholding tax and related accessories, customs duties and other receivables transmitted for collection to the central tax authority, as well as the tax claims administered by the local tax authority, can be extinguished, at the request of the debtor, at any time, with the consent of the fiscal creditor, by passing into the public property of the state or, as the case may be, of the administrative-territorial unit of immovable property representing construction and related land, as well as land without constructions, even if they are subject to forced execution by the competent fiscal body.

## **7. Extinction of the public property right**

According to the provisions of art. 864 of the Civil code. The public property right is extinguished if the good has been lost or passed into the private domain, if the use or public interest has ceased, in compliance with the conditions provided by law.

When the good loses its materiality, the public property right will naturally cease to exist. Thus, for example, when the public real estate building in which a prefecture operates is destroyed by an earthquake or a public property painting, it is destroyed in a fire, and the public property right over them will cease.

When the use or public interest for which a certain good public property is served it ceases to be decommissioned<sup>2</sup> (downgraded in the case of communication paths - roads, waters - or goods belonging to the cultural heritage). Through the decommissioning or decommissioning operation the goods enter the private domain. The transition from the public domain to the private domain will be made, according to the provisions of art. 361 of the Administrative Code, as the case may be, by decision of the Government, the county council or the local council, unless otherwise provided by the Constitution or the law.

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<sup>1</sup> Adopted by Law no. 207/2015, published in the Official Gazette, Part I no. 547 of July 23, 2015, as subsequently amended.

<sup>2</sup> See Ioan Alexandru, Mihaela Cărauşan, Sorin Bucur, *Drept administrativ*, Lumina Lex, Bucharest, 2005, p. 441; Emil Bălan, *op. cit. (Dreptul administrativ al bunurilor)*, 2007, p. 76.

## 8. The goods that are the object of the public property right

### 8.1. The notion of good

The goods are the external object, derived<sup>1</sup> (mediated<sup>2</sup>) from the patrimonial legal relation.

In the doctrine it was appreciated that the *good* is understood as an economic value that is useful for satisfying the material or spiritual need of man and which is likely to be appropriated (appropriated) in the form of patrimonial rights<sup>3</sup>.

An author defines the assets as the totality of the movable or immovable elements that compose the patrimony of a person, understanding by them the material things (the tangible goods) that belong to them and the rights (other than the property) to which he owns them (incorporeal goods)<sup>4</sup>.

This last definition, having a descriptive character, captures the two meanings of the notion of "good"<sup>5</sup>:

- *Stricto sensu* by "good" we mean anything about which there may be patrimonial rights and obligations.

- *Lato sensu* by "good" we mean any element of the assets of a person (both the actual work and the rights regarding the respective work).

### 8.2. The notions of "domain", "public domain", "private domain"

The domain represents an assembly of movable or immovable property, tangible or intangible, belonging to the holders of the power to administer public tasks: state, county, city, commune<sup>6</sup>.

The term domain comes from the Latin *dominium*, a term that can be translated by "ownership", "property".

The domain represents a universality that allows its divisibility into two masses of goods: the *public domain* and the *private domain*<sup>7</sup>.

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<sup>1</sup> See Nicolae Popa, *op. cit.* (*Teoria generală a dreptului*), 2002, p. 276; Gheorghe Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, 5<sup>th</sup> ed., Publishing House and Press „Șansa” SRL, 1998, Bucharest, p. 98.

<sup>2</sup> Eugen Chelaru, *op. cit.* (*Administrarea domeniului...*), 2008, p. 18.

<sup>3</sup> Gheorghe Beleiu, *op. cit.* (*Drept civil român. Introducere în dreptul civil...*), 1998, p. 98; Gabriel Boroș, *Drept civil. Partea generală. Persoanele*, 3<sup>rd</sup> ed., Hamangiu, 2008, p. 97; Ion P. Filipescu, Andrei I. Filipescu, *op. cit.* (*Dreptul de proprietate și alte drepturi reale*), 2006, p. 38.

<sup>4</sup> Ovidiu Ungureanu, Cornelia Munteanu, *Tratat de Drept civil. Bunurile. Drepturile reale principale*, Hamangiu, Bucharest, 2008, p. 68.

<sup>5</sup> See Mircea N. Costin, Călin M. Costin, *op. cit.* (*Dicționar de drept civil de la A la Z*), 2007, p. 81.

<sup>6</sup> Emil Bălan, *op. cit.* (*Dreptul administrativ al bunurilor*), 2007, p. 13.

<sup>7</sup> *Idem*, p. 7.

*The public domain* represents the totality of the objects that form the object of the public property right belonging to the state or to the administrative-territorial units.

*The private domain* represents the totality of the objects that form the object of the private property right of the state or of the administrative-territorial units, respectively the goods that do not belong to the public domain.

**The relation between the notion of "public good" and that of "public domain".** Between the two notions there is a connection of the part-whole type<sup>1</sup>, the public domain being formed of public goods.

### 8.3. Classification of public domain goods

Public domain assets can be classified by the holder of the public property right in:

a) **goods from the public domain of the state.** According to the provisions of art. 286(2) of the Administrative Code the public domain of the state is made up of the goods provided in art. 136 paragraph (3) of the Constitution, from those provided in Annex no. 2 at the Administrative Code, as well as other goods which, according to the law or by their nature, are of national use or public interest. Article 136 paragraph (3) of the Constitution shows that "the riches of public interest of the basement, the airspace, the waters with renewable energy potential, of national interest, the beaches, the territorial sea, the natural resources of the economic area and the continental shelf, as well as other goods established by the law organic, they are the exclusive object of public property".

In Annex no. 2 of the Administrative Code the goods that are part of the public domain of the state are listed as an example. Among these assets are: national parks; nature reserves and nature monuments; the natural heritage of the Danube Delta Biosphere Reserve; railway infrastructure, including tunnels and works of art; national roads - highways, express roads, European national roads, main, secondary; historical and archaeological sites and sites; museums, art collections declared of national public interest, etc.

b) **goods from the public domain of the counties.** According to the provisions of art. 286 (3) of the Administrative Code the public domain of the county is made up of the goods provided in Annex no. 3 of the Administrative Code, as well as other goods of public use or interest of the county, declared as such by decision of the county council, if they are not declared by law as goods of use or of national public interest.

In Annex 3 to the Administrative Code the goods belonging to the county public domain are listed as an example: county roads; historical and archaeolog-

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<sup>1</sup> Marian Nicolae, *op.cit.* (*Considerații asupra Legii nr. 213/1998...*), 1999, p. 8.



ical sites and sites that are not declared of national public interest; the water supply networks created in the zonal or micro-zonal system, as well as the treatment stations with their installations, constructions and land etc.

**c) goods in the public domain of communes, cities and municipalities.**

According to the provisions of art. 286(4) of the Administrative Code the public domain of the commune, city or municipality is made up of the goods provided in Annex no. 4 of the Administrative Code, as well as other goods of local use or public interest, declared as such by decision of the local council, if they are not declared by law as goods of use or of national or county public interest.

In Annex 4 to the Administrative Code the goods that are part of the local public domain of the communes, cities and municipalities are listed as an example: communal roads, neighborhoods and streets; public, commercial markets, fairs, sheds and public parks, as well as leisure areas; lakes and beaches that are not declared of national or county public interest; water supply networks, sewerage, district heating, wastewater treatment and treatment stations, with related installations, constructions and lands; social housing, etc.

## **9. Ways of using public goods**

Public domain goods can be used:

a) by the direct exercise by the holder of the public property right of all the prerogatives conferred by this right (possession, use and disposition);

b) by indirect exercise, by another of the public property right. Thus, according to the provisions of art. 136(4) of the Constitution the public property goods can be given to the administration to the autonomous management or public institutions or they can be concessioned or rented; also, they can be given free of charge to public utility institutions.

### **9.1. Public property concession contract**

**Definition.** The public property concession contract is that administrative contract whereby a public authority, called the concedant, transmits, for a fixed period, to a person, called a concessionaire, who acts at his risk and responsibility, the right and obligation to operate a good property publishes in exchange for a royalty. The right of concession on public property is, according to art. 866 of the Civil Code, a main real right corresponding to the public property right.

**The legal framework.** The concession contract for public property goods is regulated by art. 302-331 of the Administrative Code and by art. 871-873 of the Civil Code.

**The Contracting Parties.** They have the capacity of concedant, on behalf of the state, the county, the city or the commune:

a) the ministries or other specialized bodies of the central public administration, for the public property of the state;

b) county councils, local councils or public institutions of local interest, for the public property of the county, city or commune.

Therefore, the quality of concedant may be held both by the holders of the general administration right of the public property (county councils, local councils), but also by the holders of the concrete administration right of these goods (ministries or other specialized bodies of central public administration, institutions of public interest).

The quality of a concessionaire can be any natural or legal person, Romanian or foreign.

**Object of the contract.** The object of the concession contract is the exploitation of a good public property of the state or of the administrative-territorial units, in accordance with the objectives of the grantor. For example, the grantor's objectives may be: better conditions for citizens in the use of the good, development of social and economic activities that involve the use of that good, etc.

**Litigation.** According to art. 330 of the Administrative Code the settlement of disputes arising in connection with the award, conclusion, execution, modification and termination of the public property concession contract, as well as those regarding the award of damages, is carried out according to the provisions of the administrative litigation law.

## **9.2. The attribution in use for free of charge of a good public property**

The right to use for free of charge is regulated by art. 136 paragraph (4) of the revised Constitution, by art. 866, 874 and 875 of the Civil Code and by art. 349-353 of the Administrative Code

According to art. 874 paragraph (3) of the Civil code in conjunction with the provisions of art. 867, the right of free use is constituted by a decision of the Government, of the county council or, as the case may be, of the local council.

Based on the decision of incorporation, the contract for awarding in use for free of charge of a good public property will be concluded, by which will be established the use and value of the good.

The contract for awarding in use for free of charge of a good public property is that administrative contract by which the public authority exercising the general administration of the public property goods (Government, county council, local council) or, as the case may be, the public institution/autonomous management that exercises the concrete administration of the good transmits, for a fixed period, to a public utility institution the right of use of a good public property, free of charge, under the conditions established by the law and the instrument of incorporation.

### 9.3. The administration of a good public property

**Notion.** The public property right belongs to the state and to the administrative-territorial units. The exercise of the public property right is carried out by the general administration of the public domain by the Government regarding the public domain goods of national interest, by the county council regarding the goods in the public domain and the local councils regarding the goods in the public domain. local interest based on the capacity of administrative law and within the limits of the powers granted by law.

Under the conditions of art. 136 paragraph (4) of the revised Constitution and of art. 867-870 of the Civil code, the holder of the right of general administration (Government, county council or, as the case may be, local council), by decision, can give the goods from the public domain in concrete administration to autonomous management or public institutions.

**The legal framework.** The right of concrete administration of public property assets is regulated by art. 136 paragraph (4) of the revised Constitution, by art. 861 paragraph (3) and art. 866, 867-870 of the Civil Code, art. 4-6 of the Government Ordinance no. 15/1993 *regarding some measures for restructuring the activity of the autonomous management*<sup>1</sup>, by art. 4 paragraph (2) and (3) of the Government Emergency Ordinance no. 30/1997 *regarding the reorganization of the autonomous management*<sup>2</sup>, by art. 298-301 of the Administrative Code.

**The contracting parties.** The one who transmits the good in concrete administration is the holder of the general administration right (Government, county council or, as the case may be, local council). The right of concrete administration is established in favor of autonomous management and public institutions.

The *autonomous management* were established by Law no. 15/1990 *regarding the reorganization of the state economic units as autonomous management and commercial companies*<sup>3</sup> as legal persons having economic management and financial autonomy that are organized and functioning in the strategic branches of the national economy - the armament, energy, mining and natural gas industries, post office and rail transport - as well as in some areas belonging to other branches established by the Government. According to art. 3 paragraph 2 of Law no. 15/1990, the autonomous management were established by decision of the Government, for those of national interest, or by decision of the county and municipal bodies of the state administration. The autonomous management was reorganized by the Government Ordinance no. 15/1993 *regarding some measures for restructuring the activity of the autonomous management* and through the

<sup>1</sup> Published in the Official Gazette, Part I no. 202 of August 23, 1993, as subsequently amended.

<sup>2</sup> Published in the Official Gazette, Part I no. 125 of June 19, 1997, approved with amendments by Law no. 207/1997, as subsequently amended.

<sup>3</sup> Published in the Official Gazette, Part I no. 98 of August 8, 1990, as subsequently amended.

Government Emergency Ordinance no. 30/1997 *regarding the reorganization of autonomous management*. According to the provisions of the Government Emergency Ordinance no. 30/1997, the authorities of the central or local public administration under the authority of which the autonomous management carried out their activity could decide their reorganization as companies, being renamed, if they had as object activities of national public interest, national companies or national companies.

Only autonomous management can receive public property in concrete administration, not national companies or companies resulting from the reorganization of autonomous authorities.

*The contracting public institutions* can be any public structures, central (ministries or other bodies subordinated to the Government, authorities of the autonomous central specialized administration, authorities subordinated to the ministries or the autonomous central authorities), deconcentrated in the territory (prefectures, public services of the central public authorities decentralized in the territory ) or local (public services and other structures subordinated to the county councils or local councils), with or without legal personality, with collegial or single-person management, established by law or based on the law, regardless of the source of financing, which acts with public power.

**Subject of the contract.** The purpose of the contract is to convey the right of concrete administration, free of charge, to a movable or immovable property in the public domain of the state or of the administrative-territorial units.

**Litigation.** The settlement of disputes arising in connection with the award, modification and termination of the contract for the administration of the public good property, as well as those regarding the granting of compensations, is carried out according to the provisions of the Law of administrative contentious.

#### 9.4. The contract to rent a good public property

The contract for renting a good public property is regulated by art. 136 paragraph (4) of the revised Constitution, art. 861 of the Civil Code, art. 332-348 of the Administrative Code. Over time, special regulations have been adopted regarding the leasing of various public goods, such as, for example, the Government Ordinance no. 19/2002 *regarding some measures for the establishment and use of the residential fund of protocol and movable goods in the public domain of the state, under the administration of the Autonomous Management "Administration of the State Protocol Patrimony"*<sup>1</sup>. The regulations regarding the contract for the lease of a good public property are supplemented with the provisions regarding the lease of art. 1777-1835 of the Civil Code.

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<sup>1</sup> Published in the Official Gazette, Part I no. 87 of February 1, 2002, approved with amendments by Law no. 640/2002, as subsequently amended.

The contract for the lease of a public good property is that contract by which the holder of the right of public property or of administration on a good that belongs to the public domain of the state or to the administrative-territorial units, called lessor, is obliged to ensure the use of this good to a natural person or legal, called tenant, for a fixed period of time, in exchange for a price, called rent. The lease is a species of the lease contract regulated by art. 1777-1850 of the Civil Code.

## **10. The private domain**

According to the provisions of art. 354 of the Administrative Code the private domain of the state or of the administrative-territorial units is made up of goods that are owned by them and which are not part of the public domain. On these goods, the state or the administrative-territorial units have the right of private property.

Private property is subject to the same regulations as private property, unless otherwise provided by law. The Constitution specifies in art. 44(2) that the private property is guaranteed and protected equally by the law, regardless of the owner. Also, according to the provisions of art. 553 (4) of the Civil Code. The objects of private property, regardless of the holder, are and remain in the civil circuit, unless otherwise provided by law. They may be alienated, subject to forced prosecution and may be acquired in any manner provided by law.

The law may establish, for reasons of general interest, rules distinct from those of the common law on private property (for example rules specific to the legal regime of public law).

The existence of goods in the private domain of the state and of the administrative-territorial units is justified by the fact that the exploitation of these goods obtains important budgetary resources. Also in the private domain can be found goods that contribute to the functioning of public institutions and services, but without directly affecting the public use or interest. Private property can also represent a "reserve" for the public domain<sup>1</sup>, some of which will be affected by an administrative act of a public utility and thus included in public property (for example, a state-owned private building can be passed into the public domain to serve as the headquarters of a public institution).

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<sup>1</sup> See in this regard Emil Bălan, *op. cit. (Dreptul administrativ al bunurilor)*, 2007, p. 127.

## **Chapter XII**

### **Civil service and civil servants**

#### **1. The civil service**

##### **1.1. The notion of civil service**

The general regulation of the civil service and civil servants is currently implemented by the Administrative Code. Previously, the regulation was made by Law no. 188/1999 *regarding the Statute of civil servants*<sup>1</sup>.

According to the provisions of art. 5, letter. y) of the Administrative Code the civil service represents the whole of the duties and responsibilities, established under the law, in order to exercise the prerogatives of public power by the public authorities and institutions.

Article 373 of the Administrative Code provides for the principles underlying the exercise of the public function: the principle of legality; the principle of competence; the principle of performance; the principle of efficiency and effectiveness; the principle of impartiality and objectivity; the principle of transparency; the principle of responsibility, in accordance with the legal provisions; the principle of orientation towards the citizen; the principle of stability in the exercise of the public function; the principle of good faith, in the sense of respecting the rights and fulfilling the mutual obligations; the principle of hierarchical subordination.

The totality of the functions of an institution of the public administration, corresponding to the scheme of organization of the respective institution, with its structural divisions and subdivisions, constitutes the state of functions of that institution, approved according to the law<sup>2</sup>.

##### **1.2. Features of the civil service**

The civil service has the following features<sup>3</sup>:

a) any public function is a set of tasks that form the competence of the institutions and authorities of the public administration. By the effective exercise of the function, the competence of the public institution is realized according to the specialized tasks, legally established<sup>4</sup>.

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<sup>1</sup> Republished in the Official Gazette, Part I no. 365 of May 29, 2007, as subsequently amended.

<sup>2</sup> See Ion Popescu Slăniceanu, *Funcția publică*, Infodial, Bucharest, 2000, p. 79.

<sup>3</sup> *Idem*, p. 73-79.

<sup>4</sup> *Idem*, p. 77.

b) the attributions (rights and obligations) that make up the content of the civil service are established by law or by acts issued in accordance with and in execution of the law.

c) through the public function the general interests of the company are realized. The legislator determines the competence of civil servants, whose purpose is to organize in the most efficient way the public service.

d) the exercise of the public function contributes to the realization of the public power, either in a direct form, in the case of decision functions, which involve the issuing of legal acts of power, authority, or in an indirect form, through the actions of preparation, execution and control in connection with the exercise of public authority<sup>1</sup>.

e) the civil service has a character of continuity, existing as long as it is considered necessary to satisfy a social need.

f) the civil service is obligatory. The exercise of the activities that fall within the content of the civil service is a right, but also an obligation for civil servants and not a privilege.

g) organization and exercise of public functions are usually financed from funds from the state budget or from local budgets.

## **2. The civil servant**

### **2.1. The notion of a civil servant**

The civil servant is defined by art. 371(1) of the Administrative Code as the person appointed, under the conditions of the law, in a public office.

All civil servants within the autonomous administrative authorities and within the public authorities and institutions of the central and local public administration constitute the body of civil servants.

### **2.2. Features of the civil servant**

From the analysis of the doctrine<sup>2</sup> in the field and of the legislative provisions we deduce the following general features of the civil servants:

1) civil servant can be, according to art. 16 (3) of the Constitution, only the person who has Romanian citizenship and domicile in the country.

2) the civil servant is the person appointed in a public function within a public authority or institution.

Unlike dignitaries who are elected or appointed on political criteria in terms of public dignity (for example, local councilors are elected by citizens, while the prime minister and ministers are appointed on political criteria), civil servants are always appointed by act administrative in public functions.

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<sup>1</sup> *Idem*, p. 76.

<sup>2</sup> *Idem*, 2000, p. 104-112.

Based on the administrative act of appointment accepted by the person who will occupy the civil service, the service relations of the civil servant will be born and exercised, in the form of a complex of rights and obligations that arise exclusively from the law.

Unlike civil servants, personnel holding contractual positions in public institutions and authorities are employed by an individual employment contract that includes rights and obligations negotiated freely by the parties, within the limits provided by the Labor Code.

3) the appointment of civil servants is made following the fulfillment of the conditions provided by law for access to the occupation of a public function. Failure to comply with these conditions will lead to the impossibility of occupying the public office by the respective person

4) the occupation of a public function is done for an indefinite period. Only in this way can one of the fundamental principles underlying the exercise of the public function provided by art. 373 of the Administrative Code - **stability in the exercise of the public function**<sup>1</sup>.

5) civil servants carry out their tasks in order to achieve the competence of the public authority or institution in the structure of which the respective public function is located. The attributions that form the competence conferred by law to the public authority or institution are exercised by public officials in order to optimally serve the interests of the community, these being related to the function and not to the person.

6) civil servants are usually remunerated from public funds from the state budget or from local budgets.

7) the civil servant's service relation is regulated by a special statute. The peculiarities of the civil servant's service relation is determined by the fact that he is exclusively in the service of the public interest have imposed in time the creation of a legal regime of public law, derogating from the labor relations regulated by the Labor Code. Thus the rights and obligations of civil servants, the elements related to the career and the responsibility of the civil servants were included in a regulation distinct from the Labor Code, respectively in the Statute of the civil servants.

## **2.3. Rights and obligations of civil servants**

### **2.3.1. General considerations**

The rights and obligations of civil servants are predominantly regulatory in nature, being largely established unilaterally by the Statute of civil servants

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<sup>1</sup> On the principle of stability in the civil service see Cristian Clipa, *Caracterul obligatoriu al actului administrativ de numire într-o funcție publică și stabilitatea pe post a funcționarului public – corelații necesare*, „Revista de Drept Public” no. 4/2010, p. 17-20.



contained in the Administrative Code, by the special statutes of civil servants, as well as by various other regulations, but also following negotiations. through collective agreements.

Unlike civil servants, the rights and obligations of contract staff are established by the individual employment contract - a private law contract, in accordance with the legislation in force, having a predominantly negotiated nature.

The rights and obligations of civil servants are regulated in order to ensure the proper functioning of the public service.

### 2.3.2. Rights of civil servants

The specific rights granted to the civil servant are a means by which public authorities and institutions carry out their tasks. Therefore, the exercise of these specific rights also represents a duty for civil servants, the refusal to fulfill them being sanctioned, according to the law<sup>1</sup>.

We will outline in the following the main rights of the civil servant regulated by the Administrative Code:

**1. The right to benefit from the protection of the law in the exercise of its powers.** According to the provisions of art. 427 of the Administrative Code civil servants benefit from the exercise of their powers of law protection. The public authority or institution is obliged to ensure the protection of the civil servant against threats, violence, acts of insult to which he or she may be victim in the exercise of the public function.

**2. The civil servant's career right.** The right to a career is not expressly regulated by the Statute of civil servants. However, it results indirectly from the consecration of the principle of stability in the exercise of the public function in art. 373 of the Administrative Code and the rule of exercising the service relations for an indefinite period [art. 374(2) of the Administrative Code], as well as all the regulations of the Statute regarding the career of the civil servant, which provide for the recruitment by competition of the civil servants and the consecration of the possibility of career development by promotion, in the ways established by law.

**3. The right to opinion.** According to the provisions of art. 412 of the Administrative Code the right to the opinion of civil servants is guaranteed.

In fulfilling their duties, civil servants have the obligation to respect the dignity of the public function held, correlating the freedom of dialogue with promoting the interests of the public authority or institution in which they operate. In their activity, civil servants have the obligation to respect the freedom of opinion and not to be influenced by personal considerations or popularity. In expressing opinions, civil servants should have a conciliatory attitude and avoid generating conflicts due to the exchange of views.

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<sup>1</sup> See Ion Popescu Slăniceanu, *op. cit.* (*Funcția publică*), 2000, p. 174.

**4. Equal opportunities and treatment regarding career development in the civil service.** According to the provisions of art. 449(5) of the Administrative Code any discrimination between civil servants on political, trade union, religious, ethnic, gender, sexual orientation, material status, social origin or any other nature is prohibited.

Access to and promotion of the civil service and its exercise must be based on objective criteria that prevent any form of discrimination.

**5. The right of the official to be informed about the decisions regarding his career.** According to art. 414 of the Administrative Code the civil servant has the right to be informed about the decisions that are taken in applying the Statute of the civil servants and which directly concern him.

**6. The right of association in trade union and professional organizations.** The right of association of citizens in trade unions and other forms of association is enshrined in art. 40 of the Constitution. In applying the constitutional provision of art. 415(1) of the Administrative Code stipulates that the right of trade union association is guaranteed to civil servants and art. 415(2) of the Administrative Code shows that civil servants can freely set up trade union organizations, join them and exercise any mandate within them.

**7. The right to strike, in accordance with the law.** By art. 416 of the Administrative Code civil servants are entitled to strike, according to the law. Civil servants who are on strike do not benefit from salary and other salary rights during the strike.

**8. Wage rights.** According to the provisions of art. 417 of the Administrative Code for the activity carried out, civil servants have the right to premium salaries and other rights, according to the legislation regarding the remuneration of paid staff from public funds.

**9. The right to rest daily and weekly.** Civil servants who have the obligation to fulfill the duties of the function they exercise, also have the right to rest in order to restore the workforce, to protect their integrity and health. The right to daily and weekly rest of the civil servant is guaranteed by fixing the working time by art. 419(1) of the Administrative Code 8 hours a day and 40 hours a week.

**10. The right to leave.** According to art. 421(1) of the Administrative Code, the civil servants have the right, in accordance with the law, to rest holidays, medical holidays and other holidays. An additional protection is provided to the civil servant by the provision of art. 421(2) of the Administrative Code which shows that during sick leave, maternity leave and childcare leave, the employment relationships can be terminated and can only be modified on the initiative of the civil servant concerned.

**11. The right to work protection.** Art. 422(1) of the Administrative Code stipulates that public authorities and institutions have the obligation to provide civil servants with normal conditions of work and hygiene, so as to protect

their physical and mental health and integrity. The labor protection will be realized according to the provisions of Law no. 319/2006 *on occupational safety and health*<sup>1</sup>.

**12. The right to health protection.** According to the provisions of art. 423 of the Administrative Code servants benefit from medical assistance, prostheses and medicines, according to the law.

**13. The right to a pension.** Art. 425 of the Administrative Code shows that civil servants benefit from pensions, as well as other state social insurance rights, according to the law.

**14. The right to be elected or appointed to a public dignity function.** According to the provisions of art. 420 of the Administrative Code, the civil servants can be elected or appointed to a public dignity function, according to the law.

Law no. 161/2003 *regarding some measures to ensure transparency in the exercise of public dignities, public functions and in the business environment, the prevention and sanctioning of corruption* is shown in art. 97(2) that "*the civil servant's service relation is suspended:*

*a) during the election campaign, until the day after the elections, if not elected;*

*b) until the termination of the eligible function or of the public dignity function, in case the civil servant has been elected or appointed".*

**15. The right to compensation for damages suffered because of the public authority.** According to the provisions of art. 428 of the Administrative Code the public authority or institution is obliged to compensate the public official in the event that he suffered, due to the authority or public institution, a material injury during the performance of his duties.

**16. Other specific rights.** Thus, for example, according to art. 418 of the Administrative Code, the civil servants who, according to the law, are obliged to wear a uniform during the service, receive it free of charge. Art. 380 (4) letter a) of the Administrative Code allows special statutes to establish other rights for civil servants.

### 2.3.3. Obligations of civil servants

The main obligations of the civil servants regulated by the Statute of the civil servants included in the Administrative Code are:

**1. Obligation to perform their duties.** According to the provisions of art. 431(1) of the Administrative Code, the civil servants have the obligation to fulfill their professionalism, impartiality and in accordance with the law the duties of the service and to refrain from any fact that could harm the natural or legal persons or the prestige of the body of civil servants.

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<sup>1</sup> Published in the Official Gazette, Part I no. 646 of July 26, 2006, as subsequently amended.

Also art. 433 of the Administrative Code stipulates that civil servants have the obligation to provide a quality public service for the benefit of the citizens, by actively participating in decision-making and their transposition into practice, in order to achieve the competences of public authorities and institutions.

**2. The obligation to comply with the orders received from the hierarchical superior (the obligation of hierarchical subordination).** One of the principles underlying the exercise of the public function is the principle of hierarchical subordination according to the provisions of art. 373 of the Administrative Code. Also in art. 437(2) of the Administrative Code shows that the civil servant is obliged to comply with the provisions received from the hierarchical superiors.

**3. The obligation to comply with the prohibitions provided by law regarding the involvement in the activity of political parties and the expression of political convictions.** The civil servants are forbidden, according to the provisions of art. 98 of the Law no. 161/2003, to be members of the governing bodies of political parties and to publicly express or defend the positions of a political party. Civil servants who, according to the law, belong to the category of high civil servants cannot be members of a political party, subject to the sanction of dismissal from the public office.

**4. The obligation to keep the state secret, the service secret and the confidentiality of the information that they become aware of in the exercise of the public function.** According to the provisions of art. 439 of the Administrative Code, civil servants have the obligation to maintain state secrecy, service secrecy, as well as confidentiality regarding the facts, information or documents they are aware of in the exercise of the public function, under the law, except for information of public interest.

**5. Obligation to solve the problems of citizens impartially.** According to the provisions of art. 447(3) of the Administrative Code, civil servants must adopt an impartial and justified attitude in order to solve the problems of citizens clearly and efficiently.

Civil servants have the obligation to ensure equal treatment of citizens in front of public authorities and institutions, a principle according to which civil servants have the duty to prevent and combat any form of discrimination in fulfilling their professional duties [art. 447(6) of the Administrative Code].

**6. The obligation to have a behavior that ensures the prestige of the public function exercised.** Civil servants have the obligation to loyally defend the prestige of the public authority or institution in which they operate, as well as to refrain from any act or fact that may harm their image or legal interests [art. 434(1) of the Administrative Code].

**7. Prohibition to accept, in consideration of their public function, gifts or other benefits.** According to the provisions of art. 440 of the Adminis-

trative Code, civil servants are forbidden to request or accept, directly or indirectly, for themselves or others, in consideration of their public function, gifts or other benefits.

**8. Prohibition to use the prerogatives of the public office held for purposes other than those provided by law.** It is forbidden to use by public officials, for purposes other than those provided by law, the prerogatives of the public function held. By the activity of taking decisions, advising, drafting normative acts, evaluating or participating in investigations or control actions, public servants are prohibited from pursuing benefits or benefits in their personal interest or producing material damage or morals of other people.

**9. Prohibition on using public resources for purposes other than the exercise of the function.** The civil servants are obliged to ensure the protection of the public and private property of the state and of the administrative-territorial units, to avoid the occurrence of any damage, acting in any situation as a good owner. Civil servants have the obligation to use the working time, as well as the goods belonging to the public authority or institution only for carrying out the activities related to the public function held.

**10. Limiting participation in purchases, concessions or rentals.** According to the provisions of art. 444 of the Administrative Code a civil servant cannot purchase a property that is in the private property of the state or of the administrative-territorial units, subject to sale under the conditions of the law, in the following situations:

a) when it became aware, during or as a result of the performance of the duties of the service, about the value or quality of the goods to be sold;

b) when he participated, in the exercise of his duties, in organizing the sale of the respective good;

c) when it can influence the sales operations or when it has obtained information to which the persons interested in buying the good did not have access.

**11. Obligation to declare wealth.** According to the provisions of art. 445(4) of the Administrative Code upon appointment to a public office, as well as upon termination of the service relation, civil servants are obliged to submit, in accordance with the law, the declaration of wealth to the head of the public authority or institution. The wealth statement is updated annually, according to the law.

The purpose of the obligation of the civil servant to declare his wealth is to prevent the cases of illegal acquisition of the wealth by corruption, when the civil servant uses his function to obtain material advantages that are not due to him.

**12. Prohibition to directly receive applications whose resolution falls within their competence or to discuss directly with the petitioners.** Civil servants are forbidden to receive requests directly whose resolution falls within their

competence or to discuss directly with the petitioners, except for whom such attributions are established, as well as to intervene to resolve these requests.

The purpose of this ban is to protect the prestige of the public servant, protecting him from suspicion in committing corruption offenses<sup>1</sup>.

**13. The obligation to respect the legal regime of the conflict of interests and the incompatibilities established according to the law.** According to the provisions of art. 445 of the Administrative Code, the civil servants have the obligation to comply precisely with the legal regime of conflict of interests and incompatibilities, established according to the law.

The *conflict of interests* is understood according to the provisions of art. 70 of the Law no. 161/2003 the situation in which the person exercising a public dignity or a public function has a personal interest of a patrimonial nature, which could influence the fulfillment with objectivity of the attributions assigned to them according to the Constitution and other normative acts.

In the event of a conflict of interest, the civil servant is obliged to refrain from resolving the request, taking the decision or participating in a decision and informing immediately the hierarchical chief to whom he is directly subordinated.

The *incompatibilities* regarding public dignities and public functions are those regulated by the Constitution, the law applicable to the public authority or institution in which the persons exercising a public dignity or a public function carry out their activity, as well as the provisions of the Law no. 161/2003.

The general regime of incompatibilities of civil servants is found in art. 94-98 of the Law no. 161/2003. The quality of civil servant is incompatible according to the provisions of art. 94 (1) of the Law no. 161/2003 with any other public function than the one in which it was appointed, as well as with the functions of public dignity.

## **2.4. The legal nature of the civil servant's service relation**

The administrative act of appointment together with the consent expressed in steps of the civil servant to occupy a public function and the predominantly regulatory nature of his rights and obligations determine us to appreciate that the source of the legal relation of public function is an administrative contract. We mention that the High Court of Cassation and Justice by its jurisprudence has enshrined the contractual legal nature (administrative contract) of the civil servant's service relation<sup>2</sup>.

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<sup>1</sup> See Mircea Preda, *Drept administrativ. Partea generală*, 4<sup>th</sup> ed., Lumina Lex, Bucharest, 2006, p. 134; Verginia Vedinaș, *op. cit. (Statutul funcționarilor publici)*, 2009, p. 192, 193.

<sup>2</sup> Decision no. 14/2008 issued by the United Sections, regarding the examination of the appeal in the interest of the law, declared by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, published in the "Official Monitor of Romania", part I, no. 853 of December 18, 2008.

The Decision no. 14/2008 of the High Court emphasizes the particularities of the employment relation of the civil service with respect to the employment relation of the employee, concluding that "the act of appointment to the public authority together with the request and/or acceptance of the position by the future civil servant forms the will agreement, the administrative contract". The analysis of the elements of this type of administrative contract starts, in the mentioned decision, from the provisions of art. 2 paragraph (2) of the Law no. 188/1999, which shows that "the civil servant is the person appointed, under the conditions of the law, in a public function". As such, it is emphasized in the Decision, "civil servants do not carry out their activity under an employment contract, they are in service relationships resulting from the administrative act of appointment to office". What distinguishes the employment relationship of the civil service from the employment relationship of the employee is that the civil servant is a bearer of public power, which he exercises within the limits of his function<sup>1</sup>.

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<sup>1</sup> Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, 3<sup>rd</sup> ed., Universul Juridic, Bucharest, 2014, p. 24.

## **Chapter XIII**

### **The administrative contentious**

#### **1. The notion of administrative contentious**

The term "contentious" comes from the Latin word *contendere* = to fight, confront and, from a legal perspective, serves to designate the character of judicial acts and procedures that involve contradictory debates, summoning of parties, etc., the processes that are carried out before the courts being similar for a long time "to some legal battles where each party is fighting contradictory for the recognition and defense of its right"<sup>1</sup>.

The administrative contentious institution comprises all the legal rules governing the settlement of disputes in which at least one of the parties is a public authority, litigation aimed at harming a person's right or legitimate interest through an administrative act or by not resolving within the legal term of a request.

Currently the regulation of this institution in Romania is achieved by Law no. 554/2004 of the *administrative contentious*<sup>2</sup>.

The way in which the administrative contentious in a state is regulated reflects the degree of democratization of that country, the extent to which legal guarantees are made available to the citizen in order to defend against the abuses of public authorities<sup>3</sup>.

The regulation of the administrative contentious must provide the specialized courts with clear procedural rules, capable of drawing up the procedural rights of the litigating parties, having as final aim the protection of the substantial rights violated by the illegal administrative acts.

#### **2. Categories of administrative contentious**

Depending on the solutions that can be pronounced by the court, the administrative contentious can be: administrative annulment contentious or administrative contentious with full jurisdiction.

**The annulment contentious** presupposes that the administrative litigation court can only pronounce by a court decision on the annulment of an administrative act challenged on the grounds that it was issued or adopted in violation of the legal provisions. In the case of the annulment case, the litigation court is

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<sup>1</sup> See Constantin G. Rarincescu, *op. cit.*, 1936, p. 105, n.s. 1.

<sup>2</sup> Published in the Official Gazette, Part I, no. 1154 of December 7, 2004, as subsequently amended.

<sup>3</sup> Verginia Vedinaş, Liliana Vişan, Diana Iuliana Pasăre, *Argumentare juridică europeană în favoarea necesităţii modificării Legii contenciosului administrativ. Succintă prezentare a Legii nr. 262/2007*, „Revista de Drept Public” no. 3/2007, p. 77, 78.



not competent to solve the problem of damages repair. The damages can be repaired by means of a separate litigation, by the common law courts.

**The administrative contentious with full jurisdiction** is one in which the administrative litigation court is competent to annul the administrative act of authority by which a claimant was injured in a right recognized by his law, to oblige the public authority to issue an administrative or other act, as well as the award of damages for the repair of the damages produced by the administrative act contested. Law no. 554/2004 provides in art. 1 that any person who is considered injured in his or her right or in a legitimate interest, by a public authority, by an administrative act or by not resolving within the legal term of an application, can address the competent administrative litigation court, for the annulment of the act, the recognition of the claimed right or the legitimate interest and the reparation of the damage caused to it. Thus we find that the Romanian legislator has consecrated the administrative contentious of full jurisdiction.

Depending on the nature of the interest injured by the contested administrative act, the administrative contentious may be **objective** or **subjective**.

The administrative contentious is **objective** when the litigation is based on a legitimate public interest aimed at according to art. 2(1) letter r) of the Law no. 554/2004 the law order and the constitutional democracy, guaranteeing the fundamental rights, freedoms and duties of the citizens, satisfying the community needs, realizing the competence of the public authorities. The contentious objective concerns a litigation against the administrative act strictly related to the violation of normative acts governing its issuance or adoption. The actions brought under the conditions provided by the Law no. 554/2004 by the Public Ministry, the People's Advocate, the National Agency of Civil Servants, the prefect and any other subject of public law for the defense of a legitimate public interest.

The administrative contentious is **subjective** when the litigation is based on a subjective right or a legitimate private interest that is alleged to be harmed by an administrative act. The injured right is defined by art. 2 (1) letter o) of Law no. 554/2004 as any right provided by the Constitution, by law or by other normative act, to which an administrative act is affected. The legitimate private interest represents according to art. 2 (1) letter p) of the Law no. 554/2004 the possibility to claim a certain conduct, considering the realization of a future and predictable subjective right, foreshadowed. The subjective contentious concerns a litigation that has at its center the concern with the violation of subjective rights or legitimate interests of the people, without worrying about the objective legality of the administrative act. Thus, we will be in the presence of a subjective contentious when a person is harmed in his/her private legitimate interest by refusing the public authority to issue the requested building permit and introducing an action in the administrative contentious which requires the public authority to issue the building permit and to pay damages for the material and moral damages caused.

In conclusion, we emphasize that the action in contentious annulment can have both objective and subjective character, as opposed to the action in the contentious full jurisdiction that can have only a subjective character<sup>1</sup>.

### **3. The conditions of admissibility of the direct action in the administrative contentious**

#### **3.1. The procedural quality of the parties in administrative contentious**

The procedural quality is a question of legitimation (*legitimatio ad causam*) which is required among the conditions required for the person to be a litigant or a party to the trial<sup>2</sup> in any type of litigation submitted to the courts. **The active procedural quality** implies the existence of an identity between the person of the applicant and the person who holds the right in the legal report deduced from the judgment<sup>3</sup>. **The passive procedural quality** implies the existence of an identity between the person of the defendant and the obligee in the same legal relationship<sup>4</sup>.

**Active procedural quality in the administrative contentious processes may have**, according to art. 1 of the Law no. 554/2004:

**a) any person who is considered injured in his or her right or in a legitimate interest**, by a public authority, by an administrative act or by the non-resolution within the legal term of an application.

According to the provisions of art. 2 paragraph (1) letter a) of the Law no. 554/2004 are assimilated to the injured person, within the meaning of the administrative litigation law:

**- the group of natural persons**, without legal personality, holder of subjective rights or legitimate private interests. An example of a group of natural persons without legal personality is the simple society regulated by art. 1890-1912 of the Civil code. In the event that several natural persons who are not constituted in a collective entity (group of persons) promote an action in administrative contentious against an administrative act by which they were injured in a legitimate right or interest we will be in the presence of active procedural co-

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<sup>1</sup> See in this regard Anton Trăilescu, *op. cit. (Drept administrativ)*, 2010, p. 330.

<sup>2</sup> See Pavel Perju, *Sinteză teoretică de practică a instanțelor judecătorești din circumscripția Curții de Apel Suceava în materia dreptului procesual civil*, „Dreptul” no. 1/1995, p. 78.

<sup>3</sup> Viorel Mihai Ciobanu, *Tratat teoretic și practic de procedură civilă*, vol. I, Național, Bucharest, 1997, p. 280.

<sup>4</sup> *Ibid.*

participation<sup>1</sup>, if the conditions provided by art. 59 of the Code of Civil Procedure are fulfilled.<sup>2</sup>

- **the social bodies** that invoke the injury by the administrative act attacked either of a legitimate public interest or of the legitimate rights and interests of certain determined individuals they represent. Interested social organizations are, according to art. 2 paragraph (1) letter s) of the Law no. 554/2004, non-governmental structures, trade unions, associations, foundations and the like, whose activity object is the protection of the rights of different categories of citizens or, as the case may be, the proper functioning of public administrative services.

**b) the injured third party through an administrative act addressed to another subject of law.** The Law no. 554/2004 enshrines in art. 1 paragraph (2) the possibility to address to the administrative litigation court and to the injured person in his right or in a legitimate interest through an administrative act of individual character, addressed to another subject of law.

The role of the regulation art. 1 paragraph (2) of the Law no. 554/2004 is to cover those situations in practice where the administrative act infringes the subjective rights and legitimate interests of third parties. Thus, the implementation of a building permit may prejudice the rights of third parties, distinct from the beneficiary of the permit. Previous to the Law no. 554/2004, if such third parties demanded in court the cancellation of the building permit, the actions were rejected as inadmissible, since the applicant could not justify the existence of the subjective right<sup>3</sup>.

**c) The People's Advocate.** By the Law no. 554/2004 expressly provided for the possibility of the People's Advocate to have active procedural quality in the administrative litigation processes. Thus, art. 1 paragraph (3) of the Law no. 554/2004 stipulates that "The People's Advocate, following the control carried out, according to his organic law, if he considers that the illegality of the act or the refusal of the administrative authority to carry out his legal duties can be removed only through justice, he can notify the competent administrative litigation court from the petitioner's home. The petitioner rightfully acquires the status of complainant, to be cited as such. If the petitioner does not approve the action filed by the People's Advocate at the first court term, the administrative litigation court shall annul the application".

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<sup>1</sup> See, in this regard, Anton Trăilescu, Alin Trăilescu, *Legea contenciosului administrativ. Comentarii și explicații*, 4<sup>th</sup> ed., C.H. Beck, Bucharest, 2018, p. 27.

<sup>2</sup> According to the provisions of art. 59 of the Code of Civil Procedure "several persons may be together applicants or defendants if the object of the trial is a common right or obligation, if their rights or obligations have the same cause or if there is a close connection between them".

<sup>3</sup> See the decision of the Supreme Court of Justice no. 3538/2000 issued by the Administrative Contentious Section regarding the attack by a number of doctors of an administrative act for the cancellation of a polyclinic; the decision of the Supreme Court of Justice no. 57/2003 issued by the Administrative Contentious Section through which a certificate attesting the right of ownership by an injured third party was challenged in court. ([www.scj.ro](http://www.scj.ro)).

**d) The Public Ministry.** The constitutional role of the Public Ministry is that of representing the general interests of the society, defending the order of law, as well as the rights and freedoms of citizens [art. 131 paragraph (1) of the Constitution]. The Public Ministry exercises its powers through prosecutors constituted in prosecutor's offices, according to the law [art. 131 paragraph (2) of the Constitution].

By the Law no. 554/2004 expressly provided for the possibility of the Public Ministry to have an active procedural quality in the administrative litigation processes, through the possibility of introducing:

- **actions in objective administrative contentious.** Thus, according to art. 1 paragraph (5) of the Law no. 554/2004, "when the Public Ministry considers that by issuing a normative administrative act, a legitimate public interest is harmed, the competent administrative court is notified to the issuing public authority". The action brought by the prosecutor will be specific to the contentious in the annulment, aiming strictly at the annulment of the act. The possibility of claiming damages is excluded because the Public Ministry acts to defend the objective legality, the public order and not a subjective right.

- **actions in subjective administrative contentious.** Article 1 paragraph (4) of the Law no. 554/2004 shows that "the Public Ministry, when, following the exercise of the powers provided by its organic law, considers that the violations of the rights, freedoms and legitimate interests of the persons are due to the existence of individual unilateral administrative acts of the public authorities issued with excess power, with their prior agreement, notifies the administrative litigation court from the domicile of the natural person or from the headquarters of the injured legal person. The petitioner rightfully acquires the status of plaintiff, to be cited as such".

**e) the public authority issuing a unilateral unlawful administrative act,** in case the act can no longer be revoked, as it entered the civil circuit and produced legal effects. According to the provisions of art. 1 paragraph (6) of the Law no. 554/2004 "the public authority issuing a unilateral unlawful administrative act may request the court to annul it, in case the act can no longer be revoked as it entered the civil circuit and produced legal effects. In the case of admitting the action, the court decides, if it has been notified by the request for legal action, and on the validity of the legal acts concluded on the basis of the illegal administrative act, as well as on the legal effects produced by them. The action may be brought within one year from the date of issue of the act".

**The revocation** represents the legal operation by which the issuing body or the higher hierarchical body abolishes (removes) the administrative act in question, ex officio or at the request of the interested subjects of law<sup>1</sup>. Revocation can

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<sup>1</sup> On the institution of revocation in administrative law see Ion Brad, *Revocarea actelor administrative*, Universul Juridic, Bucharest, 2009.

only take place in the case of individual administrative acts. Normative administrative acts are removed from force by abrogation.

**f) the person injured in his legitimate rights or interests, by means of ordinances or provisions of unconstitutional Government ordinances.** The Law no. 554/2004 regulates in art. 1 paragraph (7) the fact that "the person injured in his legitimate rights or interests by means of ordinances or provisions of ordinances of the unconstitutional Government may address the administrative litigation court, under the conditions of this law".

Thus the legislation introduced in the Constitution is amended in its 2003 amendment which states that "the administrative courts are competent to resolve the claims of the injured persons by ordinances or, as the case may be, by provisions of ordinances declared unconstitutional" [art. 126 paragraph (6) thesis II of the revised Constitution].

According to the provisions of art. 9 paragraph (1) of the Law no. 554/2004 "The person injured in his right or in a legitimate interest by ordinances or provisions of ordinances may bring an action at the administrative litigation court, accompanied by the exception of unconstitutionality, insofar as the main object is not finding the unconstitutionality of the ordinance or the provision of the ordinance". This article must be correlated with the provisions of art. 146 letter d) of the Constitution according to which the Constitutional Court "rules on the exceptions of unconstitutionality regarding the laws and ordinances, raised before the courts or commercial arbitration".

**g) the prefect.** The prefect can bring actions in administrative contentious, under the conditions provided by art. 123 paragraph (5) of the Constitution, of the Law of the administrative contentious and of the Administrative Code.

Thus, on the occasion of exercising the control of administrative guardianship, the prefect can directly attack before the administrative contentious court the acts issued by the authorities of the local public administration, if they consider them illegal [art. 3 paragraph (1) thesis I of the Law no. 554/2004]. The object of the application is the cancellation on the ground of illegality of an act of the county council, of the local council or of the mayor [art. 123 paragraph (5) of the Constitution].

The action in administrative contentious brought by the prefect is an action in objective contentious in the annulment. The action brought by the prefect at the administrative litigation court on the occasion of exercising the legality control of the local public administration authorities acts can only have the total or partial annulment of an administrative act, the prefect not being able to request the payment of material or moral damages<sup>1</sup>. Also, the action introduced by the prefect concerns the protection of a legitimate public interest regarding the defense of the order of law and constitutional democracy, being a typical objective contentious action.

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<sup>1</sup> See Verginia Vedinaş, *op. cit.*, 2015, p. 505.

**h) The National Agency of Civil Servants.** The Law no. 554/2004 included the National Agency of Civil Servants, together with the prefect, in the category of authorities that can exercise an administrative guardianship control.

The National Agency of Civil Servants has, according to the provisions of art. 401(1) letter e) of the Administrative Code, the task of monitoring and controlling the application of the legislation regarding the public function and civil servants within the authorities and public institutions. By virtue of this attribution, the National Agency of Civil Servants has, according to art. 403 of the Administrative Code, Active procedural legitimation and may refer the competent administrative litigation court regarding the acts by which the authorities or public institutions violate the legislation regarding the public function and civil servants, found as a result of their own control activity.

The action in administrative contentious brought by the National Agency of Civil Servants under these conditions is a contentious action in the annulment.

**i) any subject of public law, according to the law.** The Law no. 554 confer by art. 1 paragraph (8) active procedural quality to any subject of public law, according to the law.

Subjects of public law (public authorities) can exercise actions in subjective contentious when they are harmed in their right and actions in objective contentious when a legitimate public interest is defended<sup>1</sup>. The public authorities may have legal personality conferred by the regulatory act by which they were established<sup>2</sup> (for example, the Presidential Administration, the Government, the ministries, the administrative-territorial units, etc.) or they may be lacking legal personality (the county council, the local council, the mayor, etc.).

Some public authorities without legal personality can be vested with normative or administrative acts with the power to represent in court a legal person of public law. Thus, according to the provisions of the Administrative Code the mayor is the one representing the city, commune or municipality in court.

**The passive procedural quality** in administrative contentious actions have the public authorities that have adopted the contested administrative act, whether or not they have legal personality<sup>3</sup>.

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<sup>1</sup> See Dacian Cosmin Dragoș, *Legea contenciosului administrativ. Comentarii și explicații*, 2<sup>nd</sup> ed., C.H. Beck, Bucharest, 2009, p. 54.

<sup>2</sup> According to the provisions of art. 191 of the Civil Code: "(1) The legal persons of public law are established by law. (2) By exception from the provisions of paragraph (1), in certain cases provided by law, legal persons under public law may be established by acts of central or local public administration authorities or by other means provided by law".

<sup>3</sup> Article 1 paragraph (1) of the Law no. 554/2004 refers to "any person who considers himself injured in his right or in a legitimate interest, by a **public authority**, by an administrative act or by not resolving within the legal term of a request ...", without to distinguish whether or not the defendant public authority has legal personality. In this respect, the Administrative and Fiscal Litigation Section of the High Court of Cassation and Justice was pronounced by Decision no. 1352/2007 where it was shown that "the lack of legal personality of the issuing authority does not exclude the procedural capacity in the administrative litigation, in order to have the capacity of

In the matter of administrative contentious, the public authority has a passive procedural quality insofar as it has the *capacity of administrative law*, consisting in the ability provided by law to exercise public power prerogatives, by issuing administrative acts, in the process of organizing the law and executing it. specifically the law<sup>1</sup>.

### **3.2. The injury of a subjective right or legitimate interest by the act under appeal**

The administrative act cannot be preventively attacked, in the absence of injury<sup>2</sup>. Accepting the theory of "preventive action" would be equivalent to an interference of the judiciary in the fields of competence of the legislative and executive powers, as it would allow the intervention of the justice and in situations other than those arising from the excess of power and the violation of the rights and freedoms enshrined by Constitution, which would undermine the principle of separation and balance of powers in the state, enshrined in art. 1 paragraph (4) of the Constitution. Moreover, according to art. 126 paragraph (6) of the Constitution, the administrative litigation courts are competent to resolve the claims of the injured persons, which excludes the idea of invoking virtual damages or purely speculative personal approaches, in support of the act of investing the courts.

According to art. 1 paragraph (1) of the Law no. 554/2004, the grounds for actions in administrative contentious introduced by the natural or legal persons may be the injury of a person's right or a legitimate interest, by a public authority. The legitimate interest can be both private and public.

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defendant or respondent being sufficient to prove that public authority is the issuer of the administrative act". (Decision referred to in Anton Trăilescu, Alin Trăilescu, *Legea contenciosului administrativ. Comentarii și explicații*, 2<sup>nd</sup> ed., C.H. Beck, Bucharest, 2014, p. 15).

<sup>1</sup> See the Decisions of the High Court of Cassation and Justice no. 1845/2012 and 1237/2015, Section for administrative and fiscal litigation, ([www.scj.ro/1258/Jurisprudenta](http://www.scj.ro/1258/Jurisprudenta)). In the matter of the administrative litigation, the legal personality of the public authority is not relevant, but its capacity as an administrative law, respectively the ability to issue administrative acts, in the exercise of prerogatives of public power or of a public service [Decision of the High Court of Cassation and Justice no. 3372/2012 delivered by the Administrative and Fiscal Litigation Section ([www.scj.ro/1258/Jurisprudenta](http://www.scj.ro/1258/Jurisprudenta))]. In the case law of the High Court of Cassation and Justice, it has been argued that, "transposed in the procedural plan, the administrative capacity confers the capacity of the public authority to stand trial, whether or not it has legal personality and therefore the legal capacity in the civil sense of the notion" (Decision To the High Court of Cassation and Justice no. 3092/2007, Section of administrative contentious, *apud* Gabriela Bogasiu, *Legea contenciosului administrativ comentată și adnotată cu legislație, jurisprudență și doctrină*, Universul Juridic, Bucharest, 2008, p. 63).

<sup>2</sup> See in this regard the Decision of the Constitutional Court no. 465/2007 (Official Gazette no. 367 of May 30, 2007) and no. 352/2012 (Official Gazette no. 414 of June 21, 2012).

**The injured right** is defined by art. 2 paragraph (1) letter o) of the Law no. 554/2004 as any right provided by the Constitution, by law or by other normative act, to which an administrative act is affected. The subjective right is defined in the doctrine as representing the possibility (faculty, prerogative) of a person, recognized and protected by the objective law, of having a certain conduct and of claiming the person(s) obliged to have a behavior (conduct) corresponding to his right, behavior that may be required when required by the state constraint force<sup>1</sup>.

**The legitimate private interest** is defined by art. 2 paragraph (1) letter p) of the Law no. 554/2004 as being the possibility to claim a certain conduct, considering the achievement of a future and predictable subjective right, foreshadowed. **The legitimate public interest** is defined by art. 2 paragraph (1) letter r) as that interest aimed at the law order and the constitutional democracy, guaranteeing the fundamental rights, freedoms and duties of the citizens, satisfying the community needs, realizing the competence of the public authorities.

The nature of the injured interest indicates the type of administrative contentious. Actions based on subjective law or private legitimate interest are specific to subjective administrative contentious. On the contrary, when the action is based on the legitimate public interest, the administrative contentious will be objective.

### **3.3. Existence of an administrative act in typical or assimilated form within the meaning of the Law of the administrative contentious**

The applicant must invoke the injury of a subjective right or a legitimate interest through an administrative act.

The administrative act is defined by art. 2 paragraph (1) letter c) of the Law no. 554/2004 as the unilateral act of an individual or normative character issued by a public authority, under a regime of public power, in order to organize the execution of the law or the concrete execution of the law, which gives rise, modifies or extinguishes legal relationships.

According to the provisions of art. 2 paragraph (1) letter c<sup>1</sup>) of the Law no. 554/2004 are assimilated to the administrative acts, within the meaning of the present law, and the contracts concluded by the public authorities that have as object the valuation of the public property goods, the execution of the works of public interest, the provision of the public services, the public acquisitions; other categories of administrative contracts may be provided for by special laws.

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<sup>1</sup> See Nicolae Popa, *Teoria generală a dreptului*, All Beck, Bucharest, 2002, p. 36; Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *op. cit.*, 2008, p. 296; Dinu Ștefănescu, *Contribuții la elaborarea unei noi definiții a dreptului subiectiv*, „Dreptul” no. 7-8/1991, p. 82; Henri Lévy-Bruhl, *op. cit.*, 1964, p. 5, 6; D. Brezoianu, *op. cit.*, 1995, p. 13.



Also, according to the provisions of art. 2 paragraph (2) of the Law no. 554/2004 is assimilated to unilateral administrative acts and the unjustified refusal to resolve a request regarding a legitimate right or interest or, as the case may be, the failure to respond to the applicant within the legal term.

Legal acts that have a different legal nature (civil law, labor law, family law, etc.) will not be subject to judicial control under the terms of the Administrative Contentious Law, but, eventually, under the conditions of common law or special laws<sup>1</sup>. Thus, for example, the disposition of the mayor for the termination of the employment contract of a person employed within his own specialized apparatus, without having the capacity of civil servant, can be challenged on the procedural way specific to the labor disputes<sup>2</sup>.

From the mentioned provisions of the Law no. 554/2004 it follows that they can form the object of the action in administrative contentious, both *the typical administrative acts and acts* (administrative contracts) *and facts*<sup>3</sup> assimilated to the administrative acts from the perspective of the administrative contentious (the unjustified refusal to solve a request regarding a right or a legitimate interest and failure to respond to the applicant within the legal term)<sup>4</sup>.

### 3.4. The act under appeal must come from a public authority

Law no. 554/2004 defines in art. 2 paragraph (1) lit. b) the issuing public authority as any state body or of the administrative-territorial units that act, in regime of public power, for the satisfaction of a public interest.

Mainly the administrative acts are adopted/issued by public administration authorities. But administrative acts can also issue/adopt structures within the Parliament<sup>5</sup>, as well as the organs of the judiciary in their organizational activity

<sup>1</sup> See Ioan Santai, *Condițiile controlului judecătoresc direct asupra actelor administrative în temeiul Legii contenciosului administrativ*, „Dreptul” no. 6/1991, p. 14.

<sup>2</sup> See Gabriela Bogasiu, *Legea contenciosului administrativ comentată și adnotată*, 4<sup>th</sup> ed., Universul Juridic, Bucharest, 2018, p. 127.

<sup>3</sup> Tudor Drăganu, *Actele administrative și faptele asimilate lor supuse controlului judecătoresc potrivit Legii nr. 1/1967*, Dacia, Cluj-Napoca, 1970, p. 72.

<sup>4</sup> By the Decision of the High Court of Cassation and Justice no. 3794/2014 pronounced by the Section of administrative and fiscal litigation shows that "to be admissible an action in administrative litigation is not sufficient the condition that the defendants sued in court are public authorities, as defined by the provisions of art. 2 paragraph (1) letter b) of the Law no. 554/2004, but it is necessary to challenge an administrative act or a fact assimilated to the administrative acts, respectively to be invoked an unjustified refusal to solve a request or to request that the request be found not resolved within the legal term, terms defined in the provisions of art. 2 paragraph (1) letters c), h) and i) of the Law no. 554/2004" ([www.scj.ro/736/Cautare-jurisprudenta](http://www.scj.ro/736/Cautare-jurisprudenta)).

<sup>5</sup> The High Court of Cassation and Justice showed that "it is true that in the activity of the two Houses of Parliament can also be issued or adopted acts that meet the legal features of the administrative act, but the distinction between the acts of authority by which they carry out their own should not be ignored. their competence and the acts of authority through which a strictly administrative activity is carried out, regarding their own organization and functioning; only the latter can be subjected to legality control under the conditions of administrative litigation" - see the

or in concrete execution of the law. Thus, for example, the order by which the Secretary General of the Senate sanctions a parliamentary civil servant or the order by which the president of the High Court of Cassation and Justice appoints or dismisses the economic manager are administrative acts issued by public authorities within the legislative or judicial power<sup>1</sup>.

Therefore, not only the acts emanating from public administrative authorities, but also administrative acts that come from any public authority, within the meaning of art. 2 paragraph (1) letter b) of the Law no. 554/2004<sup>2</sup>.

Law no. 554/2004 provides in art. 2 paragraph (1) letter b) the second thesis, the fact that, within the meaning of this law, assimilated to the public authorities, the legal persons of private law who, under the law, have obtained the status of public utility or are authorized to provide a public service, under the power regime public.

The legal persons of private law who, under the conditions of the law, have obtained the status of public utility are the associations and foundations recognized by the Government as being of public utility, under the conditions provided by the Government Ordinance no. 26/2000 *regarding associations and foundations*<sup>3</sup>. According to the provisions of art. 38<sup>1</sup> of the Government Ordinance no. 26/2000, by *public utility* is meant any activity that is carried out in areas of general public interest or of some communities. The associations and foundations recognized by the Government as being of public utility have the right to be assigned to them for free use the goods of public property and to participate, together with the state bodies or of the administrative-territorial units in the realization of the public services. Thus, for example, the General Association of Sport Hunters and Fishermen (AGVPS) is a non-governmental association of

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decision of the High Court of Cassation and Justice no. 2342/2007 issued by the Administrative and Fiscal Litigation Section cited by Gabriela Bogasiu, *op. cit.*, 2018, p. 90.

<sup>1</sup> See Emanuel Albu, *op. cit.*, 2008, p. 39.

<sup>2</sup> For the analysis of the sphere of the notion of "issuing public authority" that has a passive procedural quality in the administrative litigation see Anton Trăilescu, Alin Trăilescu, *op.cit.*, 2014, p. 23-25.

<sup>3</sup> Official Gazette no. 39 of January 31, 2000. According to the provisions of art. 38 paragraph (1) of the Government Ordinance no. 26/2000 an association or foundation can be recognized by the Romanian Government as being of public utility if the following conditions are met cumulatively: a) its activity is carried out in the general interest or of some communities, as the case may be; b) it has been operating for at least 3 years and has achieved part of the objectives set, proving an uninterrupted activity through significant actions; c) presents an activity report from which to carry out the activity of a significant previous activity, by carrying out programs or projects specific to its purpose, accompanied by the annual financial statements and the budgets of incomes and expenses for the last 3 years prior to the submission of the application for the recognition of the status of public utility; d) has a patrimony, logistics, members and staff, corresponding to the fulfillment of the proposed purpose; e) proves the existence of contracts of collaboration and partnerships with public institutions or associations or foundations in the country and abroad; f) shows significant results regarding the proposed purpose or presents letters of recommendation from competent authorities at home or abroad, recommending the continuation of the activity.

public utility having an exclusive competence, delegated by the state through normative acts, in the field of hunting and sport fishing. In this capacity AGVPS can issue administrative acts.

Law no. 554/2004 assimilates the public authorities and the legal persons of private law who, under the conditions of the law, are authorized to provide a public service, under a regime of public power. Thus, a graduation diploma issued by a particular university is an administrative act because any university provides the public education service, under the powers delegated by the state and under the supervision of the Ministry of Education<sup>1</sup>.

### 3.5. Compliance with the prior administrative procedure

According to the provisions of art. 7 paragraph (1) of the Law no. 554/2004 before addressing the competent administrative litigation court, the person who considers himself injured in his right or in a legitimate interest through an *individual administrative act* addressed to him must ask the issuing public authority or the hierarchical authority superior, if it exists, within 30 days from the date of communication of the act, the revocation, in whole or in part, of it. For good reasons, the injured person, the addressee of the act, can file the preliminary complaint, in the case of unilateral administrative acts, and within the 30-day period, but not later than 6 months from the date of the act's issuance.

In the case of *the normative administrative act*, the prior complaint can be formulated at any time [art. 7 paragraph (1)<sup>1</sup> of the Law no. 554/2004].

The prior complaint is defined by art. 2 paragraph (1) letter j) of the Law no. 554/2004 as "the request by which the issuing or hierarchically superior public authority is requested, as the case may be, the review of an administrative act of an individual or normative character, for the purpose of revoking or modifying it".

The prior complaint referred to in art. 7 of the Law no. 554/2004 was called in the doctrine *administrative appeal*.

*The gracious appeal* can be defined, under the conditions of the Law no. 554/2004, as the complaint addressed by a person to the public authority from which an individual administrative act emanates, requesting its retraction or modification, on the ground that the act causes an injury to his right or legitimate interest.

*The hierarchical appeal* can be defined, according to the Law no. 554/2004, as the complaint addressed by a person to the higher administrative

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<sup>1</sup> By the Decision of the High Court of Cassation and Justice no. 75/2014 pronounced by the Section of administrative and fiscal litigation (<http://www.scj.ro/736/> *Cautare-jurisprudenta*) a private university was classified on the basis of the provisions of art. 2 paragraph (1) letter b), the second thesis of the Law no. 554/2004 in the category of local public authorities.

authority, requesting the revocation or modification of the individual administrative act issued by the subordinate lower authority, because it damages their legitimate rights or interests.

In order to bring the action in administrative litigation the injured person can exercise, as a preliminary procedure, either the gracious appeal or the hierarchical appeal.

### **3.6. The action in the administrative dispute should be brought within the deadlines provided by law**

According to the provisions of art. 11 paragraph (1) of the Law no. 554/2004 the requests by which the cancellation of an individual administrative act, of an administrative contract, the recognition of the claimed right and the repair of the caused damage can be submitted within 6 months from:

- a) the date of communication of the response to the prior complaint;
- b) the date of communication of the unjustified refusal to solve the request;
- c) the date of expiration of the deadline for solving the prior complaint, respectively the date of expiration of the legal term for solving the request;
- d) the expiration date of the 30-day term, calculated from the communication of the administrative act issued in the favorable solution of the request or, as the case may be, of the prior complaint. In this case, the public authority issues the administrative act at the request of the applicant or following his previous complaint, but unjustifiably refuses to execute it<sup>1</sup>. After the expiration of the term of 30 days from the communication of the administrative act, term in which the act had to be executed by the public authority, the applicant will be able to address directly to the administrative litigation court, within a period of 6 months, without having to carry out the procedure prior complaint. The preliminary complaint procedure would be unnecessary in this case, since the issuing authority agreed with the applicant's request and issued the administrative act accordingly.

### **4. Administrative acts not subject to the control of the administrative courts and the limits of the control**

The judicial control over the administrative acts is exercised, according to the provisions of art. 52 paragraph (2) of the Constitution, within the limits provided by the organic law. In applying this constitutional provision, the Law no. 554/2004 has shown what these limits are, by establishing categories of administrative acts that are totally exempted from the legality control of the admin-

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<sup>1</sup> See in this regard Anton Trăilescu, Alin Trăilescu, *op.cit.*, 2014, p. 125, 126.

istrative litigation courts (absolute exceptions) and of some categories of administrative acts that have a specific legal regime of control of legality exercised over them imposed by their issuance in extraordinary situations<sup>1</sup>.

#### **4.1. Administrative acts that are totally exempted from the legality control of the administrative litigation courts**

Law no. 554/2004 enshrines in art. 5 paragraph (1) and (2) the following exceptions to the rule of appeal of administrative acts to the administrative court of appeal:

- a) the administrative acts of the public authorities regarding their relations with the Parliament;
- b) military command acts;
- c) administrative acts for the modification or cancellation of which another legal procedure is provided for by the organic law.

We note that art. 5 of Law no. 554/2004 establishes these exceptions from the rule of attacking administrative acts at the administrative litigation court, they were not subtracted from the possibility of appealing to the courts of common law, pursuant to art. 21 of the Constitution regarding the free access to justice<sup>2</sup>. However, the courts of common law will not be able to subrogate to the jurisdiction of the administrative court and to rule on the annulment of an administrative act, they will decide only on the damages requested by the injured persons in their rights through these acts.

##### **4.1.1. The administrative acts of public authorities concerning their relations with the Parliament**

The administrative acts regarding the relations with the Parliament are exempted from the control of the administrative litigation courts, according to the provisions of art. 126 paragraph (6) of the Constitution and art. 5 paragraph (1) letter a) of the Law no. 554/2004. These acts are defined by art. 2 paragraph (1) letter k) of the Law no. 554/2004 as being the acts issued by a public authority, in carrying out its duties, provided by the Constitution or by an organic law, in the relations of a political nature with the Parliament.

Such administrative acts of the public authorities regarding the political relations with the Parliament are:

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<sup>1</sup> See Verginia Vedinaş, *Tratat teoretic şi practic de drept administrativ*, vol. II, Universul Juridic, Bucharest, 2018, p. 244 şi 255.

<sup>2</sup> See in this regard Corneliu-Liviu Popescu, *Contenciosul administrativ potrivit dispoziţiilor constituţionale revizuite*, „Dreptul” no. 2/2004, p. 17; Dacian Cosmin Dragoş, *op. cit.*, 2009, p. 175-176.

- **the acts of the President of Romania in his political relations with the Parliament**<sup>1</sup>: the act by which the President of Romania appoints a candidate for the position of prime minister, according to art. 85 paragraph (1) of the Constitution; the act by which the President of Romania appoints the Government, based on the confidence vote granted by the Parliament; the submission for ratification of an international treaty by the President of the Parliament under art. 91 of the Constitution, the dissolution by the President of the Parliament, under the conditions of art. 89 of the Constitution, the consultation of the Parliament by the President in case of a referendum under the conditions of art. 90 of the Constitution, the declaration by the President of the mobilization of the armed forces under the conditions of art. 92 paragraph (2) of the Constitution, the declaration by the President of the state of emergency or siege under the conditions of art. 93 of the Constitution, etc.

- **the acts of the Government in its relations with the Parliament**<sup>2</sup>: statements regarding the policy of the Government; the provision of information and acts required by the Houses of Parliament under the conditions provided by art. 111 of the Constitution, the simple ordinances adopted by the Government that will be submitted to the Parliament's approval under the conditions of art. 115 paragraph (3) of the Constitution, if the enabling law provides for this; the emergency ordinances adopted by the Government and compulsory subject to the approval of the Parliament, under the conditions of art. 115 paragraph (5) of the Constitution, etc.

#### 4.1.2. Command acts of a military character

The command acts of military character are exempted from the control of the administrative litigation courts according to the provisions of art. 126 paragraph (6) of the Constitution and art. 5 paragraph (1) letter b) of the Law no. 554/2004. The command act with military character is defined by art. 2 paragraph (1) letter l) of the Law no. 554/2004 as the administrative act regarding the strictly military problems of the activity within the armed forces, specific to the military organization, which presuppose the commanders' right to issue subordinates in matters regarding the management of the troops, in time of peace or war or, as the case may be, when performing military service.

The exception of the military command acts from the control of the administrative litigation courts is based on the need to ensure those conditions of unity, capacity and speed necessary for the military operations and to ensure the spirit of discipline of the subordinates to the authority of the superiors<sup>3</sup>. Therefore, they will enter into the concept of command acts of a military character: all

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<sup>1</sup> See Rodica Narcisa Petrescu, *op. cit.*, 2009, p. 478; Dacian Cosmin Dragoș, *op. cit.*, 2009, p. 177.

<sup>2</sup> See Dacian Cosmin Dragoș, *op. cit.*, 2009, p. 176, 178.

<sup>3</sup> *Idem*, p. 311.

orders and instructions of service regarding the measures of preparing the troops, the mobilization and the concentration of troops, the assignment and execution of orders, maneuvers, exercises and military operations<sup>1</sup>.

#### **4.1.3. Administrative acts for amending or abolishing which, by organic law, another judicial procedure is provided**

Law no. 554/2004 instituted among the absolute exceptions and the administrative acts for the modification or cancellation which is provided, by organic law, another judicial procedure [art. 5 paragraph (2) of the Law]. These acts were included by some authors from the Romanian doctrine in the category of administrative acts excepted because of the existence of a **parallel appeal**<sup>2</sup>. However, we appreciate that the situation regulated by art. 5 paragraph (2) of the Law no. 554/2004 can not be classified as a parallel appeal, except by extending the scope of this notion beyond the framework outlined in French law from where the theory of parallel appeal was taken at the beginning of the 20<sup>th</sup> century<sup>3</sup>. Thus, in French law the parallel appeal means that the person injured by an administrative act can choose between two contentious (procedural) ways to obtain the recognition of his right<sup>4</sup>. However, we observe that in Romanian law art. 5 paragraph (2) of the Law no. 554/2004 refers to the exclusion from the administrative litigation procedure of the administrative acts for which special organic laws have provided different judicial procedures for their modification or cancellation. It is not, therefore, the possibility of the injured party to choose between several possible legal remedies in court depending on what he wants to obtain through the action, the injured party being forced to strictly follow the procedure provided by the special law.

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<sup>1</sup> *Idem*, p. 179.

<sup>2</sup> See Antonie Iorgovan, Liliana Vișan, Alexandru Sorin Ciobanu, Diana Iuliana Pasăre, *op. cit.*, 2008, p. 150; Dacian Cosmin Dragoș, *op. cit.*, 2009, p. 180-185; Oliviu Puie, *Contenciosul administrativ*, Universul Juridic, Bucharest, 2009, vol. I, p. 395-409; Gabriela Bogasiu, *op. cit.*, 2008, p. 126.

<sup>3</sup> See Constantin G. Rarincescu, *op. cit.*, 1936, p. 329-332.

<sup>4</sup> See J. Rivero, J. Waline, *op. cit.*, 1994, p. 208 - the authors give the following example: a public agent whose administration has refused to pay an indemnity can sue, either an appeal of full jurisdiction, seeking the conviction of the administration to pay this amount, or an appeal for excess power, seeking to annul the refusal decision; M. Hauriou, *Précis élémentaire de droit administratif*, Société anonyme du Recueil Sirey, Paris, 1925, p. 309 - the author gives as an example the possibility of choosing the route to be followed, established in the French case law, for which the public administration expropriated a land: 1. the interested party, if found in time, can sue against the delimitation act an appeal for excess power, if the delimitation act is canceled, he will obtain the restitution in kind of his land (*Conseil d'Etat*, May 27, 1863, *Drillet de Lanigou*); 2. the person concerned may also bring before the civil court an action for payment of an expropriation allowance (*Conflits*, 11 janv. 1873, *Paris-Labrosse*; 1 er mars 1893, *Guillé*).

#### **4.2. Administrative acts that have a specific legal regime of the control of legality exercised over them**

Article 5 paragraph (3) of the Law no. 554/2004, as amended by the Law no. 212/2018, shows that in the litigations regarding the administrative acts issued for the application of the regime of the state of war, of the state of siege or of the emergency, those regarding the defense and national security or those issued for the restoration of public order, as well as for removing the consequences natural calamities, epidemics and epizootics **are not applicable the provisions of art. 14 regarding the judicial suspension of the execution of the administrative act.**

Before the amendment of the Law no. 554/2004 by the Law no. 212/2018 in art. 5 paragraph (3) it was foreseen that these four categories of administrative acts could be challenged, at the administrative contentious court only for excess of power, which determined that in the doctrine they would have called *relative exceptions*<sup>1</sup> from the rule of attacking the administrative acts at the court of administrative disputes. By virtue of art. 21 of the Constitution regarding the free access to justice these acts could be challenged in the courts of common law, but only for damages; also, the appeal procedures provided for by the special laws could be used.

At present, the only limitation that also constitutes the specific legal regime of the control of legality exercised by the administrative litigation court over them is given by the fact that in the case of these administrative acts the provisions of art. 14 of the Law no. 554/2004 regarding the judicial suspension of their execution. This limitation is justified by the fact that such administrative acts adopt measures imposed by the public interest in situations of major importance for preserving the territorial integrity of the state and national security, surviving the rule of law, maintaining the health of the population and removing the consequences. natural disasters.

#### **5. The competent courts to judge the administrative litigation actions**

*The administrative litigation courts* are represented, according to the provisions of art. 2(1) letter g) of the Law no. 554/2004 by the Administrative and fiscal litigation section of the High Court of Cassation and Justice, the administrative and fiscal litigation sections of the courts of appeal and the administrative-fiscal courts. Until the establishment of the administrative-fiscal courts, the disputes are solved by the administrative contentious sections of the courts (art. 30 of the Law no. 554/2004).

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<sup>1</sup> See Verginia Vedinaş, *op. cit.*, vol. II, 2018, p. 241; Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck, Bucharest, 2016, p. 500.



**Material jurisdiction of the administrative litigation courts.** The administrative courts have general material jurisdiction, which means that whenever such a dispute is not given by a special law in the jurisdiction of other courts, its solution is within the jurisdiction of the courts provided for by the Administrative Law<sup>1</sup>.

Article 10 paragraph (1) of the Law no. 554/2004 establishes the substantive competence of the administrative litigation courts according to the following rules:

1. when the object of the administrative act concerns taxes and duties, contributions, customs debts, as well as their accessories - the jurisdiction of the administrative litigation court is established according to value. Thus, the administrative acts regarding taxes and taxes, contributions, customs debts, as well as their accessories of up to 1,000,000 lei are settled in substance by the administrative-fiscal courts (the administrative-fiscal contentious sections of the courts), and those with a value of more than 1,000,000 lei is solved in the fund by the administrative and fiscal contentious sections of the courts of appeal.

2. when the object of the administrative act does not concern taxes and duties, contributions, customs debts, as well as their accessories - the competence of the administrative litigation court is determined according to the position of the issuing public authority in the system of public authorities. Thus, the disputes regarding the administrative acts issued or concluded by the local and county public authorities are resolved in substance by the administrative-fiscal courts (the administrative-fiscal contentious sections of the courts), and those concerning the administrative acts issued or concluded by the central public authorities are settled in fund of the administrative and fiscal litigation sections of the courts of appeal.

The appeal against the judgments given by the administrative-fiscal courts is judged by the administrative and fiscal contentious sections of the courts of appeal, and the appeal against the judgments given by the administrative and fiscal contentious sections of the courts of appeal is judged by the Administrative and fiscal contentious section of the High Court. Courts of Cassation and Justice, unless otherwise provided by special organic law [art. 10 (2) of the Law no. 554/2004].

**Territorial jurisdiction of administrative litigation courts.** According to the provisions of art. 10 (3) of the Law no. 554/2004 the applicant can address the court from his domicile or the one from the defendant's domicile. If the applicant has opted for the court at the defendant's domicile, the exception of territorial incompetence cannot be invoked.

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<sup>1</sup> Anton Trăilescu, *op. cit.* (*Drept administrativ*), 2010, p. 329.

## 6. The indirect judicial control of the administrative acts of individual character by way of the illegality exception

Following the direct action aimed at the annulment of administrative acts, the exception of illegality is the second way by which the courts exercise the control of legality on the acts adopted or issued by the public authorities<sup>1</sup>.

The plea of illegality is a defense that a party in a lawsuit makes against an illegal administrative act that has an impact on the respective cause<sup>2</sup>. The interest of challenging the legality of a unilateral administrative act of an individual character can arise in a multitude of disputes whose object belongs to different matters. In the case of admitting the direct action, the sanction of the administrative act is canceled, and in the case of admitting the exception of illegality, the sanction of inapplicability intervenes.

Based on the doctrinal analysis<sup>3</sup> and the provisions of art. 4 paragraph (1) of the Law no. 554/2004 of the administrative dispute the following features of the exception of illegality are revealed:

- by invoking the exception of illegality it does not tend to annul the administrative act as in the case of direct action, but only to remove it from the settlement of the dispute.
- it is indescribable, it can be invoked at any time and at any stage of the process (court of first instance, appeal or cassation)<sup>4</sup>.
- can have as object only an administrative act of individual character according to art. 4 paragraph (1) of the Law no. 554/2004.
- it can be lifted by any party to the trial or court ex officio.
- can be lifted in any process by the jurisdiction of the courts (civil, commercial, labor law, criminal, in the administrative litigation processes, etc.).
- the exception of illegality is indescribable and can be invoked at any time, even after the deadline for exercising the direct action in the annulment of the act.

The jurisdiction to resolve the exception of illegality belongs to the court vested with the substance of the dispute.

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<sup>1</sup> See Emanuel Albu, *op. cit. (Dreptul contenciosului administrativ)*, 2008, p. 264; Alexandru Negoită, *op. cit. (Drept administrativ)*, 1996, p. 280.

<sup>2</sup> See Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, vol. II, 2005, p. 677.

<sup>3</sup> Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, vol. II, 2005, p. 677-684; Ioan Alexandru, Mihaela Cărauşan, Sorin Bucur, *op. cit. (Drept administrativ)*, 2005, p. 581-583; Dacian Cosmin Dragoş, *op. cit. (Legea contenciosului administrativ...)*, 2009, p. 159-168; Emanuel Albu, *op. cit. (Dreptul contenciosului administrativ)*, 2008, p. 264-291; Anton Trăilescu, *Excepţia de ilegalitate în contextul legislaţiei actuale*, „Dreptul” no. 4/1998, p. 20-23.

<sup>4</sup> In this respect, the Administrative and Fiscal Litigation Section of the High Court of Cassation and Justice was pronounced by Decision no. 2869/2006 [Decision referred to by Gabriela-Victoria Bîrsan, Bogdan Georgescu, *Legea contenciosului administrativ nr. 554/2004 adnotată*, 2<sup>nd</sup>, Hamangiu, Bucharest, 2008, p. 61].

## Chapter XIV

### The system of public administration authorities and institutions

#### 1. The notion of authority and institution of public administration

The Romanian Constitution uses the notion of public authority in *Title III - Public authorities* where the Parliament, the President of Romania, the Government, the specialized central public administration authorities, the public administration authorities from the administrative-territorial units, the judicial authority are analyzed. The notion of **public authority** is defined in the doctrine as representing the totality of the structural forms called to exercise the prerogatives of public power both at the state level and at the local communities<sup>1</sup>. In the legislation by art. 2 (1) letter b) of the Law no. 554/2004 defines the public authority as any state body or of the administrative-territorial units that act, in regime of public power, for the satisfaction of a legitimate public interest.

The public administration authorities operate within the sphere of executive power, ensuring the organization of the execution and the concrete execution of the law. Within the public authorities regulated by Title III of the Constitution are authorities of the public administration: the President of Romania, the Government, the authorities of the specialized central public administration, the authorities of the public administration in the administrative-territorial units.

**Public institutions** are set up under the subordination of the public authorities provided by the Constitution or as autonomous institutions. Often in doctrine the two notions of public institution and public authority are seen as synonymous, given their common purpose to exercise the prerogatives of public power in order to meet the needs of society.

Public institutions may belong to the legislative, executive or judicial power. The public administration institutions are confined to the executive sphere.

The notion of public institution can be defined by reference to art. 136 paragraph (4) of the Constitution which states "Public property assets are inalienable. Under the conditions of the organic law, they can be given in administration to autonomous governments or public institutions or they can be concessioned or rented; also, they can be given free of charge to public utility institutions". This provision is detailed by art. 868(1) of the Civil code. Which shows that "The right of administration belongs to the autonomous regions or, as the case may be, to the authorities of central or local public administration and to other public institutions of national, county or local interest". It follows from these regulations that the notion of public institution encompasses any organization with a status and operating rules established by normative acts, having the role of satisfying certain

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<sup>1</sup> See Verginia Vedinaș, *op. cit. (Drept administrativ)*, 2015, p. 341, 342.

social needs within the executive, legislative and judicial powers, which is neither autonomous nor society commercial<sup>1</sup>. Public institutions act under public law in order to satisfy a public interest.

## **2. Categories of authorities and institutions of public administration**

The public administration in the formal (organic) sense comprises all the public authorities and institutions that carry out, with the purpose and in order to execute the law, an activity with a certain specificity.

In Romania, public administration authorities and institutions can be grouped into:

### **A. authorities and institutions of the state administration**

**B. authorities and institutions of the local public administration** that are organized in the administrative-territorial units on the basis of the principles of local autonomy and administrative decentralization.

Based on the provisions of the Constitution and the Administrative Code we can identify the following public authorities and institutions<sup>2</sup>:

### **I. At the central level**

1) The President and the Government. Romania's Constitution establishes within the semi-presidential republic a dualist or bicephal executive in which the executive function is entrusted to the President of Romania and the Government, who have the powers that they exercise autonomously, within collaborative and not subordinate relationships.

2) The specialized central public administration consisting of:

a) Central public administration authorities subordinated to the Government - administrative structures directly subordinated to the Government [ministries, other specialized bodies according to art. 116 paragraph (2) of the Constitution] or subordinated to the ministries (for example: the National Agency for Fiscal Administration which is subordinated to the Ministry of Public Finance).

b) Autonomous central public administration authorities - are constituted by organic law, according to art. 117 paragraph (3) of the Constitution (examples: the People's Advocate, the Legislative Council, the Court of Accounts, the National Bank of Romania, the Romanian Intelligence Service, the Financial Supervisory Authority, etc.).

### **II. At the county level**

1) state authorities and institutions

a) The prefect as representative of the Government in the territory

b) public services decentralized in the territory of the ministries and other specialized central bodies

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<sup>1</sup> See Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, vol. II, 2005, p. 217 and Ioan Alexandru, *op. cit. (Tratat de administrație publică)*, 2008, p. 291 et seq.

<sup>2</sup> See Verginia Vedinaș, *op. cit. (Drept administrativ)*, 2015, p. 341.

2) local public administration authorities

a) The County Council as a deliberative authority

b) The President of the County Council, as an executive authority

**III. At local level (municipality, city, commune)**

1) The local council, as a deliberative authority of the local public administration

2) The Mayor, as executive authority of the local public administration

## **Chapter XV**

### **The President of Romania**

#### **1. Election and mandate of the President of Romania**

**Election of the President of Romania.** The election of the President is regulated by art. 81 of the Constitution and of the Law no. 370/2004 *for the election of the President of Romania*<sup>1</sup>.

According to the provisions of art. 81 of the Constitution the President of Romania is elected by universal, equal, direct, secret and freely expressed vote. The candidate who declared, in the first round, the majority of votes of the voters registered in the electoral lists is declared elected. In the event that none of the candidates has met this majority, a second round of elections shall be organized, between the first two candidates established in the order of the number of votes obtained in the first round. The candidate who obtained the highest number of votes is declared elected.

No person may perform the office of President of Romania except for a maximum of two terms. These can also be successive.

The person who cumulatively fulfills the following conditions may apply for the office of President of Romania:

- has reached the age of at least 35 years until the day of the elections including [Article 37 (2) of the Constitution];
- has Romanian citizenship and domicile in the country [art. 16 (3) of the Constitution];
- it is not forbidden to associate in political parties, according to art. 40 paragraph (3) of the Constitution<sup>2</sup>;
- he has not previously been elected twice as President of Romania [Article 81 (4) of the Constitution].

The elections will be organized under the conditions provided by the Law no. 370/2004.

At the elections for the President of Romania, candidates proposed by political parties or political alliances, constituted according to the Law of political parties no. 14/2003<sup>3</sup>, as well as independent candidates. Political parties and alliances can only propose one candidate. The member parties of a political alliance

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<sup>1</sup> Republished in the Official Gazette, Part I no. 650 of September 12, 2011, as subsequently amended.

<sup>2</sup> According to the provisions of art. 40 paragraph (3) of the Romanian Constitution, republished "The Constitutional Court judges, the people's lawyers, the magistrates, the active members of the army, the police and other categories of civil servants established by organic law may not be part of political parties."

<sup>3</sup> Republished in the Official Gazette, Part I no. 408 of June 10, 2015.

proposing a candidate cannot nominate candidates separately [art. 4 (1) of the Law no. 370/2004].

Nominations proposed by political parties and alliances, as well as independent nominations can be submitted only if they are supported by at least 200,000 voters. A voter can only support one candidate [art. 4 (2) of the Law no. 370/2004].

**The term of office.** The Romanian constitution adopted in 1991 initially provided that the term of office of the President was 4 years. Following the revision of the Constitution in 2003, the term of the President of Romania was fixed at 5 years [Article 83 (1) of the Constitution].

The mandate of the President of Romania can be extended, by organic law, in case of war or catastrophe [Article 83 (3) of the Constitution].

## 2. The role of the President of Romania

The doctrine of administrative law emphasizes that, according to the provisions of art. 80 of the Constitution, the President of Romania appears in a triple situation: a) Head of State; b) head of the executive, together with the Government; c) guarantor of the Constitution and mediator between the state powers<sup>1</sup>.

As head of state, the President of Romania has the role of representing the Romanian state according to the provisions of art. 80 (1) of the Constitution of Romania. The President of Romania has the role of external representation [thus having, for example, the attribution provided by art. 91 (1) of the Constitution, to conclude international treaties on behalf of Romania, negotiated by the Government, and to submit them for ratification to the Parliament] and internal representation [having, for example, the attribution provided by art. 94 letter a) of the Constitution to confer decorations and titles of honor].

Romania's Constitution establishes a dualist or bicephal executive<sup>2</sup> in which the executive function is entrusted to the President of Romania and the Government, who have the powers that they exercise autonomously, within collaborative and not subordinate relationships.

As head of the executive, the President of Romania is the guarantor of the national independence, unity and territorial integrity of the country according to the provisions of art. 80 (1) of the Constitution, having the attribution of commander of the armed forces and fulfilling the position of president of the Supreme Council of Defense of the Country [art. 92 (1) of the Constitution]. As the chief

<sup>1</sup> See Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, vol. I, 2005, p. 291; Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 61.

<sup>2</sup> Ștefan Deaconu, the comment of art. 86 of the Constitution in Ioan Muraru, Elena Simina Tănăsescu, (coord.), *Constituția României. Comentariu pe articole*, C.H. Beck, Bucharest, 2008, p. 807; Ioan Vida, *Puterea executivă și administrația publică*, Regia autonomă Monitorul Oficial, Bucharest, 1994, p. 37, Ioan Alexandru, *op. cit. (Tratat de administrație publică)*, 2008, p. 294; Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 61; Verginis Vedinaș, *op. cit. (Drept administrativ)*, 2015, p. 350.

of the executive, the President fulfills tasks in the field of defense [declaring the mobilization of the armed forces under the conditions provided by article 92 (2) of the Constitution, taking measures to reject an armed aggression under the conditions provided by article 92 (3) of the Constitution] and in exceptional situations (the establishment of the state of siege or of the state of emergency under the conditions provided by article 93 of the Constitution), having the right to attend the meetings of the Government under the conditions indicated by art. 87 of the Constitution.

As guarantor of the Constitution and mediator between the state powers, the President of Romania watches, according to the provisions of art. 80 (2) of the Constitution, in observance of the Constitution and the proper functioning of public authorities. To this end, the President exercises the mediation function between the state powers, as well as between the state and society.

### 3. The powers of the President of Romania

The powers of the President of Romania are mainly provided in *Chapter II: The President of Romania in Title III: The public authorities* of the Constitution of Romania.

Depending on the subjects to which they are exercised, the powers of the President of Romania can be grouped into<sup>1</sup>:

- a) The powers of the President of Romania in his relations with the Parliament
- b) The powers of the President of Romania in his relations with the judiciary
- c) The powers of the President of Romania as chief of the executive
- d) The powers of the President of Romania in the field of foreign policy
- e) The powers of the President of Romania in relations with the people.

#### 3.1. The powers of the President of Romania in his relations with the Parliament

The President of Romania exercises the following powers in his relations with the Parliament:

**a) promulgation of laws** under the conditions provided by art. 77 of the Constitution. The law is sent for promulgation to the President of Romania. The promulgation of the law is made within a maximum of 20 days after receipt [art. 77 (1) of the Constitution].

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<sup>1</sup> See Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, vol. I, 2005, p. 298-322; Verginia Vedinaș, *op. cit. (Drept administrativ)*, 2015, p. 352-360; Alexandrina Șerban, *Puterile Președintelui Republicii în cadrul executivului*, „Revista de Drept Public” no. 4/2008, p. 14-26.



The promulgation is the operation by which the head of state exercises his constitutional prerogatives regarding the adoption of the law and materializes in a decree that consecrates the completion of the legislative process<sup>1</sup>.

The president can refuse to enact the law in two situations:

- when it considers that the law presents aspects of unconstitutionality and asks for the constitutionality to be verified by the Constitutional Court.
- when he asked Parliament to review the law. The Constitution specifies in art. 77 (2) the fact that before the promulgation, the President may ask the Parliament, once, to review the law, but does not show the reasons why it may be required to re-examine the law. In the doctrine it is appreciated that the reasons why the President can ask Parliament to re-examine the law are related to the adoption procedure, to the non-observance in the content of the regulation of the norms of legislative technique, of observing some derogations from the international treaties to which Romania is a party and from the law of the European Union or even for reasons of opportunity<sup>2</sup>.

According to the provisions of art. 77 (3) of the Constitution, if the President requested a review of the law or if it was requested to verify its constitutionality, the law shall be promulgated within 10 days at the latest after receiving the law adopted after the review or upon receiving the decision of the Constitutional Court, by which it was confirmed constitutionality.

**b) addressing messages to the Parliament.** Article 88 of the Constitution stipulates that the President of Romania sends to the Parliament messages on the main political problems of the nation. The message constitutes an exclusive and unilateral political act of the President of Romania, which the Chambers of Parliament, meeting in joint sitting, have, according to art. 65 paragraph (2) letter a) of the Constitution, only the obligation to receive it<sup>3</sup>.

The message of the President is only a political act, a simple instrument of informing the Parliament, which has no legal effect<sup>4</sup>.

**c) convening of the Parliament.** According to the provisions of the Constitution, the President can convene Parliament in two situations:

- convocation of the newly elected Parliament, within 20 days from the elections [art. 63 (3) of the Constitution];
- the meeting of the Chamber of Deputies and the Senate in extraordinary sessions at the request of the President of Romania [art. 66 (2) of the Constitution].

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<sup>1</sup> See Ioan Vida, the comment of art. 77 of the Constitution in Ioan Muraru, Elena Simina Tănăsescu (coord.), *op. cit. (Constituția României. Comentariu pe articole)*, 2008, p. 721.

<sup>2</sup> *Idem*, p. 724.

<sup>3</sup> The Decision of the Constitutional Court no. 87/1994 (Published in the Official Gazette, Part I no. 292 of October 14, 1994).

<sup>4</sup> See Ștefan Deaconu, the comment of art. 88 of the Constitution in Ioan Muraru, Elena Simina Tănăsescu (coord.), *op. cit. (Constituția României. Comentariu pe articole)*, 2008, p. 825.

**d) dissolution of the Parliament.** The President may dissolve the Parliament under the conditions provided by art. 89 of the Constitution. Thus, after consulting the presidents of the two Chambers and the leaders of the parliamentary groups, the President of Romania can dissolve the Parliament, if he has not granted the confidence vote for the formation of the Government within 60 days from the first request and only after the rejection of at least two investment requests.

Within a year, Parliament may be dissolved only once.

The Parliament cannot be dissolved during the last 6 months of the mandate of the President of Romania, nor during the state of mobilization, war, siege or emergency.

### **3.2. The powers of the President of Romania in his relations with the judiciary**

The Constitution regulates the following powers of the President in his relations with the judiciary:

**a) Appointment of judges and prosecutors.** Judges and prosecutors, with the exception of trainees, are appointed according to the President of Romania, at the proposal of the Superior Council of Magistracy [article 125 (1) and (2) and article 134 (1) of the Constitution].

**b) Granting of individual clemency.** The President of Romania may grant, according to the provisions of art. 94 letter d) of the Constitution, individual clemency.

The clemency is a measure of leniency that consists in forgiving a convicted person of executing the punishment in whole or in part or commuting the punishment to an easier one<sup>1</sup>. From the point of view of the persons to whom they are applied, the clemency is individual, in which case it is granted by the President of Romania, according to art. 94 letter d) of the Constitution, and collective, case in which it is granted by organic law, by the Parliament, according to the constitutional provisions of art. 73 paragraph (3) letter i).

**c) The right to request the prosecution of the members of the Government.** The Constitution of Romania in art. 109 (2) includes the President of Romania, together with the Chamber of Deputies and the Senate, among the subjects who have the right to request the prosecution of the members of the Government for the acts committed in the exercise of their function.

In the situation in which the prosecution of the members of the Government has been requested, the President of Romania may order their suspension from office. In this case the suspension is optional and not obligatory. Instead, the dismissal of a member of the Government will entail his suspension of law

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<sup>1</sup> The Decision of the Constitutional Court no. 89/2003 (published in the Official Gazette, Part I no. 200 of March 27, 2003).

from office. The jurisdiction of the court belongs to the High Court of Cassation and Justice.

### **3.3. The duties of the President of Romania as head of the executive**

The Romanian Constitution establishes a dualist or bicephal executive in which the executive function is entrusted to the President of Romania and the Government. We will analyze in the following the attributions of the President within the executive power.

#### **I. Duties of the President of Romania in relations with the Government.**

##### **a) the nomination of the candidate for the position of prime minister.**

Art. 85 (1) of the Constitution shows that the President of Romania appoints a candidate for the position of prime minister. The nomination of the candidate will be made, according to the provisions of art. 103 (1) of the Constitution, after consulting the party that has the absolute majority in Parliament or, if there is no such majority, the parties represented in the Parliament.

**b) appointment of the Government based on the vote of confidence granted by the Parliament.** Following the nomination of the candidate for the position of prime minister, he will request, within 10 days from the appointment, the confidence vote of the Parliament on the program and of the entire list of the Government [art. 103 (2) of the Constitution]. The program and the list of the Government are debated by the Chamber of Deputies and the Senate, in a joint meeting. The Parliament gives the Government confidence with the vote of the majority of deputies and senators [art. 103 (3) of the Constitution].

On the basis of the confidence vote granted by the Parliament, the President will issue a decree appointing the Government [article 85 (1) of the Constitution]. It appears from the text of the Constitution that the appointment by the President of Romania of the Government is, in this case, an act of executing the Parliament's decision and of investing, on this basis, the ministers, by the head of state. Decision of the supreme representative body of the Romanian people [art. 61 paragraph (1) of the Constitution of Romania] is a compulsory act, which the President could only refuse by committing serious acts of violation of the Constitution<sup>1</sup>.

**c) revocation and appointment of some members of the Government, in case of government reshuffle or vacancy of the position.** According to the provisions of art. 85 (2) of the Constitution in case of government reshuffle or vacancy of the position, the President revokes and appoints, at the proposal of the Prime Minister, some members of the Government.

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<sup>1</sup> The Decision of the Constitutional Court no. 98/2008 (published in the Official Gazette, Part I no. 140 of February 22, 2008).

The Government reshuffle is the replacement of some members of the Government with other persons who are not on the initial list approved by the Parliament, by granting the vote of confidence<sup>1</sup>.

The reshuffle can act as a sanction against the activity that a minister has carried out within the Government or as a result of intervening situations of incompatibility with the position of minister<sup>2</sup>.

The reshuffle referred to in art. 85 (2) of the Constitution cannot look at the change of position of the prime minister or the Government, in its entirety. Art. 107 (2) of the Constitution expressly provides that the President of Romania cannot revoke the Prime Minister.

The Prime Minister is the one who proposes to the President to dismiss some members of the Government and to appoint other persons in the respective positions of ministers.

In the case where the political structure or composition of the Government changes, the President of Romania may exercise the attribution of revocation and appointment of the members of the Government only on the approval of the Parliament, granted at the proposal of the Prime Minister [art. 85 (3) of the Constitution]. Such are the situations in which the number of members of the Government increases or decreases, as well as the situation in which one or more parties are co-opted or removed from the government<sup>3</sup>.

**d) Consultation of the Government on urgent and important issues.**

Art. 86 of the Constitution grants the possibility of the President of Romania to consult the Government on urgent and important issues.

**e) Participation of the President in the meetings of the Government and their presidency.** According to the provisions of art 87 of the Constitution the President of Romania can take part in the meetings of the Government in which there are debated issues of national interest regarding the foreign policy, the defense of the country, ensuring the public order and, at the request of the Prime Minister, in other situations. The President of Romania presides over the meetings of the Government in which he participates.

However, the Constitution does not grant the President the right to vote, nor the right to sign the decisions and ordinances adopted during the meetings of the Government in which he attends and he presides.

**II. The duties of the President of Romania in the field of defense and in exceptional situations.**

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<sup>1</sup> The Decision of the Constitutional Court no. 1560/2009 (published in the Official Gazette no. 824 of 30.11.2009).

<sup>2</sup> Ștefan Deaconu, the comment of art. 85 of the Constitution in Ioan Muraru, Elena Simina Tănăsescu (coord.), *op. cit. (Constituția României. Comentariu pe articole)*, 2008, p. 798.

<sup>3</sup> *Ibid.*, p. 805, 806.

**A. Duties of the President of Romania in the field of defense.** The President of Romania is, according to the provisions of art. 92 (1) of the Constitution, the commander of the armed forces and fulfills the position of president of the Supreme Council of Defense of the Country.

Under these prerogatives, the President of Romania may declare partial or total mobilization of the armed forces, may take measures to repel the armed aggression and grant the highest military ranks.

**B. The powers of the President of Romania in exceptional situations.** The President of Romania may institute in exceptional situations the measures provided by art. 93 of the Constitution. Thus, the President of Romania establishes, according to the law, the state of siege or the state of emergency throughout the country or in some administrative-territorial units and requests the Parliament to approve the measure adopted, within 5 days after taking it. If the Parliament is not in session, it shall be convened by law within 48 hours at the latest of the establishment of the state of siege or of the state of emergency and shall function throughout their duration.

### **III. Other duties that the President exercises as head of the executive.**

In addition to the functions analyzed, the President also exercises as head of the executive, the following powers provided by the Constitution:

**a) The president of Romania fulfills the function of president of the Supreme Council of Defense of the Country,** according to art. 92 (1) of the Constitution.

**b) The president appoints in public functions,** under the conditions provided by law, according to art. 94 letter c) of the Constitution. Thus, the President appoints 3 of the 9 judges of the Constitutional Court, according to the provisions of art. 142 (3) of the Constitution. The other judges are appointed, 3 by the Chamber of Deputies and 3 by the Senate.

### **3.4. The duties of the President of Romania in the field of foreign policy**

The president has, according to the Constitution, the following powers in the field of foreign policy:

**a) conclusion of international treaties on behalf of Romania.** According to the provisions of art. 91 (1) of the Constitution the President concludes international treaties on behalf of Romania, negotiated by the Government, and submits them for ratification to the Parliament, within a reasonable time.

**b) accreditation and recall of Romanian diplomatic representatives abroad.** According to the provisions of art. 91 (2) of the Constitution the President, at the proposal of the Government, accredits and recalls the diplomatic representatives of Romania.

**c) approval of the establishment, cancellation or change of the rank of the diplomatic missions.** The establishment, abolition or change of the rank

of diplomatic missions is done by the President by decree, at the proposal of the Government [art. 91(2) of the Constitution].

**d) accreditation of foreign diplomatic representatives in Romania.**

According to the provisions of art. 91(3) of the Constitution the diplomatic representatives of other states are accredited to the President of Romania. Foreign diplomatic representatives shall deliver to the President the letters of accreditation signed by the heads of the states they represent. The acceptance by the President of Romania of the letters of accreditation is equivalent to accepting the quality of the person of diplomatic representative of his state in Romania<sup>1</sup>.

### **3.5. The duties of the President of Romania in relations with the people**

According to the provisions of art. 2 (1) of the Constitution the national sovereignty belongs to the Romanian people, who exercise it through its representative bodies, constituted by free, periodic and correct elections, as well as by **referendum**.

The national referendum is the form and means of direct consultation and expression of the sovereign will of the Romanian people regarding:

a) revision of the Constitution under the conditions provided by art. 150-152 of the Constitution;

b) dismissal of the President of Romania under the conditions provided by art. 95 of the Constitution;

c) issues of national interest according to the provisions of art. 90 of the Constitution.

The President of Romania, after consulting of the Parliament, can ask the people to express, by referendum, the will regarding issues of national interest (art. 90 of the Constitution).

The issues to be submitted to the referendum and the date of its referendum are set by the President of Romania, by decree.

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<sup>1</sup> See Ștefan Deaconu, the comment of art. 91 of the Constitution in Ioan Muraru, Elena Simina Tănăsescu, (coord.), *op. cit. (Constituția României. Comentariu pe articole)*, 2008, p. 858.

## Chapter XVI

### The Government of Romania

#### 1. The Statute of the Government

The regulation of the institution of the Government of Romania is made mainly by the provisions of *Chapter III: The Government* under *Title III: The Public Authorities of the Constitution of Romania*, the provisions of the Administrative Code and the provisions of Law no. 115/1999 regarding the ministerial responsibility<sup>1</sup>.

The Romanian Constitution provides in art. 102 (1) that the Government has the role, according to its governing program accepted by the Parliament, to ensure the realization of the internal and foreign policy of the country and to exercise the general management of the public administration.

From the content of art. 102 (1) of the Constitution shows that the Romanian Government plays a dual role<sup>2</sup>:

**a) a political role** that consists in carrying out the internal and external policy of the country. The guidelines of the Government's strategy for carrying out the internal and external policy of the country can be found in the Government Program, a document with political value, accepted by the Parliament on the occasion of the Government's investment vote granted under the conditions provided by art. 103 of the Constitution.

In order to carry out the country's internal and external policy, the Government implements its governance program, mainly by transmitting to the Parliament the draft laws drawn up on the basis of the legislative initiative right it has and by working with the two Chambers under the conditions provided by *Chapter IV - Parliament's relations with the Government* of *Title III - Public authorities of the Constitution*.

**b) an administrative role** consisting in the exercise of the general management of the public administration. The existence of the unitary and indivisible Romanian state enshrined in art. 1 of the Constitution requires the existence of a single Government that is at the top of all structures of public administration<sup>3</sup> and which has attributions in all areas of administrative activity. Thus, the Government is a body of public administration with national territorial competence and

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<sup>1</sup> Republished in the Official Gazette, Part I no. 200 of March 23, 2007, as subsequently amended.

<sup>2</sup> See Dana Apostol-Tofan, the comment of art. 102 of the Constitution in Ioan Muraru, Elena Simina Tănăsescu, (coord.), *op. cit. (Constituția României. Comentariu pe articole)*, 2008, p. 941; Verginia Vedinaș, *op. cit. (Drept administrativ)*, 2015, p. 374; Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, vol. I, 2005, p. 362-365.

<sup>3</sup> Antonie Iorgovan in Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituția României revizuită. Comentarii și explicații*, All Beck, Bucharest, 2004, p. 159.

general material competence. The legal content of the attribution of the Government to exercise the general management of the public administration differs as it is about authorities subordinated to the Government (*hierarchical subordination relations* in which the Government has the quality of hierarchical organ superior to the prefect, ministries and the specialized bodies subordinated to them), about autonomous central administrative authorities (*collaborative relations*) or about elected administrative authorities, which perform local autonomy (*administrative tutelage relations*)<sup>1</sup>. By means of the role of exercising the general management of the public administration, the measures approved in the accomplishment of the political role of the Government are fulfilled.

## 2. The Government's investiture

The Government's investiture represents the complex of legal acts and facts, as well as the corresponding procedures, required by the Constitution, to be in the presence of a governmental, legal and legitimate team<sup>2</sup>.

The Government's investiture involves the following steps:

**a) the nomination by the President of Romania of the candidate for the position of prime minister.** According to the provisions of art. 103 (1) of the Constitution the President of Romania appoints a candidate for the position of Prime Minister, after consulting the party that has the absolute majority in Parliament or, if there is no such majority, the parties represented in the Parliament.

**b) formation of the government team and establishment of the governance program.** The candidate for the position of prime minister has at his disposal a period of 10 days from the appointment, according to the provisions of art. 103 (2) of the Constitution, which must make up the complete list of persons who will have the capacity of ministers in the new Government and establish the government program.

**c) granting the vote of confidence of the Parliament on the program and the list of the Government.** Within 10 days of being nominated, the candidate for the position of prime minister will request the confidence vote of the Parliament on the program and the entire list of the Government [art. 103 (2) of the Constitution].

Each candidate for the position of minister, entered in the list of the Government, will be heard, in a joint meeting, by the permanent commissions of the two Chambers whose object of activity corresponds to the area of competence of the future minister. Following the hearing, the committees will draw up a joint advisory opinion, which will be presented to the candidate for the position of prime minister. The respective notices will be submitted to the two permanent offices that have their distribution to the deputies and the senators.

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<sup>1</sup> *Idem*, p. 159.

<sup>2</sup> Antonie Iorgovan, *op. cit.* (*Tratat de drept administrativ*), vol. I, 2005, p. 370.



If, following the hearing, a candidate for the position of minister has received an unfavorable opinion, the nominated prime minister may submit a new proposal or may maintain the initial proposal.

After hearing the candidates for the position of minister in the standing committees, the program and the list of the Government are debated by the Chamber of Deputies and the Senate, in a joint meeting, according to the provisions of art. 103 (3) of the Constitution. The Parliament gives the Government confidence with the vote of the majority of the deputies and the senators (absolute majority).

**d) appointment of the Government by the President of Romania on the basis of the confidence vote granted by the Parliament.** On the basis of the confidence vote granted by the Parliament, the President will issue a decree appointing the Government [art. 85(1) of the Constitution]. It appears from the text of the Constitution that the appointment by the President of Romania of the Government is, in this case, an act of executing the Parliament's decision and of investing, on this basis, the ministers, by the head of state.

### **3. The conditions a person must fulfill in order to be a member of the Government**

According to the provisions of art. 17 of the Administrative Code. The persons who:

- a) have Romanian citizenship and domicile in the country,
- b) enjoys the exercise of electoral rights,
- c) they did not suffer criminal convictions, except for the situation in which the rehabilitation took place.

Incompatibilities with the function of member of the Government regulated by the Constitution. The Constitution provides in art. 105(1) the fact that the function of member of the Government is incompatible with the exercise of another public function of authority, except that of deputy or senator. Also, it is incompatible with exercising a professional representation function paid within the organizations for commercial purpose.

The Constitution shows in art. 105(2) that other incompatibilities are established by organic law.

Incompatibilities with the position of member of the Government regulated by Law no. 161/2003. According to the provisions of art. 84 of Book I, Title IV of the Law no. 161/2003 the function of member of the Government is incompatible with:

- a) any other public office of authority, except that of deputy or senator or of other situations provided by the Constitution;
- b) a function of professional representation paid in commercial organizations;

c) the position of president, vice president, general manager, director, administrator, member of the board of directors or auditor in commercial companies, including banks or other credit institutions, insurance and financial companies, as well as in public institutions;

d) the position of president or secretary of the general meetings of the shareholders or associates in the commercial companies;

e) the function of state representative in the general meetings of commercial companies;

f) the position of manager or member of the boards of directors of the autonomous administrations, companies and national companies;

g) the quality of trader natural person;

h) membership of an economic interest group;

i) a public function entrusted by a foreign state, except for those functions provided in the agreements and conventions to which Romania is a party.

The members of the Government may exercise functions or activities in the field of teaching, scientific research and literary-artistic creation.

**Conflict of interests in the exercise of the function of member of the Government.** The conflict of interests in the exercise of public dignities and functions is regulated by Chapter II of the Title IV of Book I of the Law no. 161/2003.

The person exercising the function of member of the Government is obliged not to issue an administrative act or to conclude a legal act or not to take or not participate in a decision in the exercise of the public function of authority, which produces a material use for himself, for his spouse or his relatives of degree I. These obligations do not concern the issuance, approval or adoption of normative acts (art. 72 of the Law no. 161/2003).

The violation of these obligations constitutes an administrative offense, if it is not a more serious fact, according to the law. The administrative acts issued or the legal acts concluded by the violation of these obligations are struck by absolute nullity (art. 73 of the Law no. 161/2003).

#### **4. The powers of the Government**

In order to carry out the Governance Program, the Government exercises, according to art. 15 of the Administrative Code, the following functions:

a) the strategy function, which ensures the elaboration of the strategy for implementing the Governance Program;

b) the implementation function, which aims to implement the Governance Program;

c) the regulatory function, which ensures the elaboration of the necessary normative and institutional framework in order to achieve the strategic objectives;

d) the function of administration of the state property, through which the administration of the public and private property of the state is ensured, as well as the management of the services for which the state is responsible;

e) the representation function, which ensures, on behalf of the Romanian state, in accordance with the law, internal and external representation, in its field of activity;

f) the function of state authority, which ensures the monitoring and control of the application and observance of regulations in the field of defense, public order and national security, as well as in the economic and social fields and the functioning of the institutions and bodies operating in the subordinate or sub the authority of the Government.

The Government fulfills the following main tasks:

**a) exercises the general management of the public administration.**

The fact that the Government exercises the general management of the public administration is mentioned by the Constitution in art. 102(1). This means that the Government is a central public authority of the public administration with *general material competence*<sup>1</sup>. In view of the general management of the public administration, the Government enters into administrative law relations with the other authorities of the public administration. Depending on their content, these relations may be *subordination relations* based on the exercise of hierarchical control by the Government (thus, the Government exercises hierarchical control over the ministries, specialized bodies in its subordinate as well as the prefects), *collaborative relations* (the relations between the Government and the authorities of the autonomous central public administration) or *relations of administrative tutelage* (relations through which the prefects, as representatives of the Government, exercise the control of legality of the acts of the authorities of the local public administration).

**b) initiates draft laws and submits them for adoption to the Parliament.** The Government exercises its legislative initiative by sending the draft law to the competent Chamber to adopt it, as the first Chamber notified [art. 74 (3) of the Constitution].

**c) issue views on the legislative proposals,** initiated in compliance with the Constitution, and transmit them to the Parliament, within 60 days from the date of the request. Failure to comply with this term is tantamount to implicitly supporting the initiator's form;

**d) issue decisions for organizing the execution of laws, ordinances under a special law of empowerment and emergency ordinances according to the Constitution;**

**e) ensures the execution by the public administration authorities of laws and other normative provisions given in their application;**

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<sup>1</sup> See Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, vol. I, 2005, p. 363.

**f) elaborates annually the project of the state budget and that of the state social insurance**, which it submits, separately, to the Parliament's approval according to the provisions of art. 138 (2) of the Constitution;

**g) approves the strategies and programs of economic development of the country, by branches and fields of activity.** These strategies and programs are part of the governing program accepted by Parliament with the vote of confidence<sup>1</sup> and through them the economic policy of the Government is realized in different branches and fields of activity<sup>2</sup>.

**h) ensures the implementation of the policy in the social field according to the Governance Program;**

**i) ensures the protection of the law order, of the public peace and security of the citizen, as well as of the rights and freedoms of the citizens, under the conditions provided by law;**

**j) to carry out the measures adopted, according to the law, for the defense of the country**, purpose for which it organizes and equips the armed forces.

**k) ensures the achievement of the country's foreign policy** and, within this framework, Romania's integration into European and international structures, according to its governing program accepted by Parliament.

**l) negotiates the international treaties, agreements and conventions that employ the Romanian state; negotiates and concludes, in accordance with the law, conventions and other international agreements at governmental level.** According to the provisions of art. 2 (1) of the Law on Treaties no. 590/2003 Romania, the Government of Romania, as well as the ministries and other authorities of the central public administration, for which this attribution is expressly stipulated by the legislation in force, may conclude treaties at state level, treated at governmental level, respectively treated at departmental level.

**m) directs and controls the activity of the ministries and other central specialized bodies under its subordination.** In exercising the hierarchical control, the Government may request the revocation of the illegal, non-timely or inopportune administrative acts issued by the ministries, the specialized bodies under its subordination, as well as by the prefects, if they have not entered the civil circuit and have not produced legal effects and which may harm public interest (art. 26 of the Administrative Code).

**n) ensures the administration of the public and private property of the state.** The exercise of the public property right is performed by the "general administration" of the public domain by the Government regarding the goods in the public domain of national interest, based on the capacity of administrative law and within the limits of the competences granted by the law.

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<sup>1</sup> Anton Trăilescu, *op. cit. (Drept administrativ)*, 2010, p. 19.

<sup>2</sup> Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 93.

**o) establishes, with the opinion of the Court of Accounts, specialized bodies in its subordination.**

**p) cooperates with the social bodies interested in fulfilling its tasks.** This aspect is underlined by art. 102 (2) of the Constitution. Thus, the Government has the obligation to carry out a transparent activity, in dialogue with trade unions, employers' associations, political parties, religious cults, associations and foundations of civil society about the needs of the society and how they are solved by the Government.

**r) fulfills any other attributions provided by the law or that arise from the role and functions of the Government.**

## Chapter XVII

### The principles of organization and functioning of local public administration

#### 1. General considerations

According to the provisions of art. 75 of the Administrative Code, the public administration in the administrative-territorial units is organized and operates on the basis of the following specific principles: decentralization; local autonomy; consulting citizens in solving problems of particular local interest; the eligibility of local public administration authorities; cooperation; responsibility; budgetary constraints. The application of these principles cannot affect the character of the national, sovereign and independent, unitary and indivisible state of Romania.

#### 2. Administrative decentralization and local autonomy

In the Romanian doctrine, within the administrative decentralization, a distinction is made between territorial decentralization and technical decentralization<sup>1</sup>. **The territorial decentralization** implies the existence of common interests of the inhabitants of a "geographical fraction", which represents a portion of the territory of a state, interests that lead to local business in the most diverse fields of activity, distinct from national business (problems)<sup>2</sup>. **The technical decentralization** presupposes the existence of legal entities of public law, traditionally called local public establishments, which provide certain public services, detached from the mass of services provided by state authorities<sup>3</sup>.

The idea of decentralization implies the idea of local autonomy<sup>4</sup>. *The European Charter of Local Self-Government*<sup>5</sup> adopted by the Council of Europe has created a common framework, which brings together European standards on the allocation and preservation of public affairs management competences to the

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<sup>1</sup> See Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, vol. I, 2005, p. 453; Verginia Vedinaş, *op. cit. (Drept administrativ)*, 2015, p. 436; Ioan Alexandru, *op. cit. (Tratat de administrație publică)*, 2008, p. 361; Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 55,56; Corneliu-Liviu Popescu, *Autonomia locală și integrarea europeană*, All Beck, Bucharest, 1999, p. 58, 59.

<sup>2</sup> Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, vol. I, 2005, p. 453.

<sup>3</sup> *Idem*, p. 453

<sup>4</sup> The doctrine emphasizes that the principle of local autonomy is based on administrative decentralization [Rodica Narcisa Petrescu, *op. cit. (Drept administrativ)*, 2009, p. 56] or that the local autonomy is the modern form of achieving administrative decentralization [Ioan Vida, *op.cit. (Puterea executivă și administrația publică)*, 1994, p. 22].

<sup>5</sup> Adopted in Strasbourg on October 15, 1985 and ratified by Romania by Law no. 199/1997 published in the Official Gazette no. 331 of November 26, 1997.

local authorities closest to the citizens, so that they have the opportunity to participate effectively when making decisions related to their daily environment<sup>1</sup>.

The authorities of the local public administration manage the public affairs in the name and in the interest of the local community they represent. *The local community* represents, according to art. 5 letter p) of the Administrative Code, all the natural persons with their domicile in the respective administrative-territorial unit. The notion of *managing the interests of local community* is defined in the doctrine as having the content determined by the concern of the authorities of the local public administration to obtain what is advantageous, necessary, useful for the communities they represent<sup>2</sup>.

In Romania, according to the provisions of art. 84(3) of the Administrative Code, the local autonomy is only administrative and financial, being exercised on the basis and within the limits provided by law. The local autonomy concerns the organization, functioning, competences and attributions, as well as the management of the resources that, according to the law, belong to the commune, the city, the municipality or the county, as the case may be. Art. 87(1) of the Administrative Code shows that "within the national economic policy, the administrative-territorial units have the right to their own financial resources, which the local public administration authorities establish, administer and use for the exercise of their competence and attributions, according to the law".

Local autonomy gives the authorities of the local public administration the right, within the limits of the law, to have initiatives in all fields, except those that are expressly given to the competence of other public authorities.

Decentralization is the indispensable corollary of democracy, it represents for the administrative organization what representative democracy represents for the institutional organization<sup>3</sup>. In these conditions, the public authorities must exercise a special care in organizing the decentralization process, aiming at maintaining the balance between the competences necessary to satisfy the national public interest and the competences necessary to satisfy the local public interest.

### 3. Administrative deconcentration

Deconcentration is defined by art. 5 letter u) of the Administrative Code as the distribution of administrative and financial attributions by the ministries and other specialized bodies of the central public administration to their own specialized structures in the administrative-territorial units.

In the case of both decentralization and administrative deconcentration, we note that this is a transfer of competences to the authorities in the territory.

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<sup>1</sup> See Ioan Alexandru, *op. cit. (Tratat de administrație publică)*, 2008, p. 362.

<sup>2</sup> Eugen Popa, *Noțiunea de gestionare a intereselor colectivităților pe care le reprezintă autoritățile locale*, „Dreptul” no. 3/1995, p. 53.

<sup>3</sup> Antonie Iorgovan, *op. cit. (Tratat de drept administrativ)*, vol. I, 2005, p. 452.

However, in the case of administrative deconcentration, the transfer of powers is made to state bodies organized in the territory and subordinated to the central administrative authorities, while in the case of administrative decentralization the transfer of competences is made to autonomous bodies chosen by the local communities.

Deconcentrated public services are specialized structures of the ministries and other specialized bodies in the administrative-territorial units of the central public administration, which are responsible for meeting some needs of general/public interest in accordance with the objectives of the Government's sectoral policies and strategies [art. 5 letter II) of the Administrative Code].

The establishment or abolition of the decentralized public services, the object of activity and their competences are established by the act of setting up the ministry, respectively the specialized body of the central public administration, competent in the subordination to which these services carry out their activity [art. 277(2) of the Administrative Code].

#### **4. Eligibility of the local public administration authorities**

As an expression of local autonomy, the public administration authorities representing the local authorities in the administrative-territorial units are chosen by the citizens, under the conditions provided by the Law no. 115/2015 *for the election of the authorities of the local public administration*<sup>1</sup>.

Local councils, county councils and mayors are elected by universal, equal, direct, secret and freely expressed vote [art. 1(2) of the Law no. 115/2015].

Local councils and county councils are elected on electoral constituencies, based on the list vote, according to the principle of proportional representation [art. 1 (3) of the Law no. 115/2015].

The mayors of the communes, the cities and the municipalities are elected on the electoral constituencies, by uninominal voting [art. 1(4) of the Law no. 115/2015].

The presidents and vice-presidents of the county councils, as well as the vice-presidents are elected by indirect vote, by the county councils, respectively the local councils [art. 1(5) of the Law no. 115/2015].

#### **5. The principle of legality**

Legality is a corollary of the entire activity of the public administration. The law is not only the limit of administrative activity, it is also its condition<sup>2</sup>.

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<sup>1</sup> Published in the Official Gazette, Part I no. 349 of May 20, 2015.

<sup>2</sup> Carré de Marlberg, *Contribution à la théorie générale de l'État*, Paris, Ed. Sirey, 1920, vol I, p. 448



The legality of the activity of the local public administration implies the obligation to comply with the acts issued by the local public administration authorities with the provisions contained in the Constitution and in the laws adopted by the Parliament, as well as with the other normative and administrative acts with a legal force superior to the issued act<sup>1</sup>.

## **6. Consultation of the citizens on local issues of particular interest**

The consultation of citizens in local issues of special interest is carried out through a local referendum organized under the conditions provided by the Law no. 3/2000 *regarding the organization and conduct of the referendum*<sup>2</sup>.

The local referendum can be organized in all the villages and component localities of the commune or city or only in some of them. In the case of the referendum at county level, it can be held in all communes and cities in the county or only in some of them, which are directly interested [art. 13(2) of the Law no. 3/2000].

The draft laws or legislative proposals regarding the modification of the territorial limits of the communes, cities and counties shall be submitted to the Parliament for adoption only after the prior consultation of the citizens from the respective administrative-territorial units, by referendum. In this case the organization of the referendum is mandatory [art. 13 (3) of the Law no. 3/2000].

## **7. The right of minorities to use their native language in relations with local public administration authorities**

According to the provisions of art. 120 (2) of the Constitution, in the administrative-territorial units in which the citizens belonging to a national minority have a significant weight, it is ensured the use of the respective national minority language in writing and orally in the relations with the local public administration authorities and with the decentralized public services, under the conditions provided by the organic law.

The authorities of the local public administration have the role to solve the problems of the inhabitants of the administrative-territorial units, for this purpose coming in direct contact with the citizens. *The rule* is that the Romanian language is used in the relations between the citizens and the local public administration authorities

*Exceptionally*, in the administrative-territorial units in which the citizens belonging to a national minority have a share of over 20% of the number of inhabitants, established at the last census, the authorities of the local public admin-

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<sup>1</sup> On the sources of legality of the administrative act see Rozalia-Ana Lazăr, *op. cit. (Legalitatea actului administrativ...)*, 2004, p. 53-59.

<sup>2</sup> Published in the Official Gazette, Part I no. 84 of February 24, 2000, as subsequently amended.

istration, the public institutions that are subordinated to them, as well as the decentralized public services provide the use, in their relations, and the language of the respective national minority, in accordance with the provisions of the Constitution, of the Administrative Code and of the international treaties to which Romania is a party [art. 94(1) of the Administrative Code].

The proceedings of the meetings of the local council are carried out in Romanian. In the local councils where the local councilors belonging to a national minority represent at least 20% of the total number, the language of the respective national minority can be used at the meetings of the local council. In these cases, through the mayor's care, the translation into Romanian is ensured. In all cases, the acts of the local council meetings are prepared and made public in Romanian language [art. 138(3) of the Administrative Code].

In the administrative-territorial units in which the citizens belonging to a national minority have a share of more than 20% of the number of inhabitants, established at the last census, the normative decisions are brought to public notice in both the Romanian language and the language of the respective minority [art.198(3) of the Administrative Code].

*The official documents are compulsory in Romanian language* [art. 195(7) of the Administrative Code].

## **Chapter XVIII**

### **The local council and the mayor**

#### **1. The local council**

The local councils are constituted as deliberative authorities through which the local autonomy is realized in communes, cities and municipalities [art. 121(1) of the Constitution].

Local councils, together with mayors, function, according to the law, as autonomous administrative authorities and solve public affairs in communes, cities and municipalities [art. 106 (3) of the Administrative Code].

The local council is a *collegiate body* of the local public administration, as opposed to the mayor, which is a one-person body.

The local council is elected for a term of 4 years, which can be extended, by organic law, in case of war or catastrophe (art. 128 of the Administrative Code).

In the exercise of the mandate, the local councilors are at the service of the local community. Local councilors are required to carry out regular meetings with citizens in order to fulfill their mandate and to grant hearings.

##### **1.1. Election of local councilors**

Local councils and mayors are elected under the conditions provided by the Law no. 115/2015 *for the election of the authorities of the local public administration*.

Local councils are elected by universal, equal, direct, secret and freely expressed vote, on electoral constituencies, on the basis of the list vote, according to the principle of proportional representation [art. 1(2) and (3) of the Law no. 115/2015].

According to the provisions by art. 3 of the Law no. 115/2015 have the right to choose the Romanian citizens who have reached the age of 18, including those who reach this age on the day of the elections, following that the right to vote will be exercised only in the commune, the city, the municipality or the administrative-territorial subdivision of the municipality. where the voter has his domicile or residence, as the case may be. Also, according to the provisions by art. 5 of the Law no. 115/2015 the citizens of the European Union who have their domicile or residence in Romania have the right to choose and to be elected under the same conditions as the Romanian citizens, with the fulfillment of the provisions of this law. The citizens of the European Union have the right to be elected as mayor, local councilor and county councilor.

## 1.2. Duties of the local councils

The local council has initiative and decides, according to the law, on all the issues of local interest, except those that are given by law in the competence of other authorities of the local or central public administration [art. 129 (1) of the Administrative Code].

The local council exercises the following categories of attributions provided by art. 129 (2) of the Administrative Code:

a) attributions regarding the administrative-territorial unit, its own organization, as well as the organization and functioning of the specialized apparatus of the mayor, of the public institutions of local interest and of the companies and autonomous regions of local interest;

b) attributions regarding the economic-social and environmental development of the commune, city or municipality;

c) attributions regarding the administration of the public and private domain of the commune, city or municipality;

d) attributions regarding the management of services of local interest;

e) attributions regarding the interinstitutional cooperation internally and externally.

The local council fulfills any other duties established by law.

## 2. The mayor

The elected mayors, according to the law, are executive authorities of the public administration through which the local autonomy is realized in communes, cities and municipalities [art. 121 (1) of the Constitution].

The mayor is a *one-person body* of the local public administration, as opposed to the local council, which is a collegiate body.

The mayors, together with the local councils, function, according to the law, as autonomous administrative authorities and solve public affairs in communes, cities and municipalities [art. 106 (3) of the Administrative Code].

Each commune, city and municipality has a mayor elected for a term of 4 years [art.151(1) of the Administrative Code].

The mayor fulfills a public authority function.

### 2.1. Election of the mayor

The mayors are elected by universal, equal, direct, secret and freely expressed vote (art. 1 (2) of the Law no. 115/2015 *for the election of the local public administration authorities*).

The mayors of the communes, cities and municipalities are elected on electoral constituencies, by uninominal polling [art. 1 (4) of the Law no. 115/2015].

The conditions that people must fulfill in order to have the status of voters are the same as those provided by the Law no. 115/2015 for the election of local councilors. The conditions that a person must fulfill in order to apply for the public dignity of mayor are the same as those provided by the Law no. 115/2015 for persons applying for public dignity as a local councilor.

## **2.2. Duties of the mayor**

According to the provisions of art. 155 of the Administrative Code the mayor fulfills the following main categories of attributions:

a) attributions exercised as representative of the state, according to the law. Thus, the mayor fulfills the function of civil status officer and guardian authority and ensures the functioning of the local public services of profile, responsibilities regarding the organization and conduct of elections, referendum and census;

b) attributions regarding the relationship with the local council. Thus, the mayor elaborates the draft strategies regarding the economic, social and environmental status of the administrative-territorial unit and submits them to the approval of the local council;

c) attributions regarding the local budget, respectively the mayor exercises the function of principal authorizing officer of credits;

d) attributions regarding the public services provided to citizens. The mayor directs the local public services, having in this area the tasks of organizing the execution and the concrete execution of the activities of providing the public services of local interest.

For the proper exercise of his duties, the mayor collaborates with the decentralized public services of the ministries and other specialized bodies of the central public administration in the administrative-territorial units, as well as with the county council.

In exercising his duties, the mayor has the right to propose draft decisions in the local council.

According to the provisions of art. 154 (6) of the Administrative Code the mayor represents the administrative-territorial unit in relations with other public authorities, with Romanian or foreign natural or legal persons, as well as in justice.

**Delegation of duties.** According to the provisions of art. 157(1) of the Administrative Code the mayor may delegate, by disposition, the attributions conferred by law and other normative acts to the deputy mayor, the general secretary of the administrative-territorial unit, the managers of the functional compartments or the personnel of the specialized apparatus, the public administrator, as well as the leaders of the public institutions and services of interest local, according to the competences that are in their respective fields.

## **Chapter XIX**

### **The county council**

The county council is the authority of the local public administration, set up at the county level to coordinate the activity of the communal, city and municipal councils, in order to perform the public services of county interest [art. 122 (1) of the Constitution].

The county council is constituted as a deliberative authority by which the local autonomy is exercised at the county level.

The county council is elected for a term of 4 years, which can be extended, by organic law, in case of war or catastrophe (art. 177 of the Administrative Code).

#### **1. Election of county councilors**

The county council is composed of county councilors, elected by universal, equal, direct, secret and freely expressed vote, according to the law.

The county councils are elected under the conditions provided by the Law no. 115/2015 *for the election of the authorities of the local public administration*.

The county councils are elected on electoral constituencies, based on the list vote, according to the principle of proportional representation [art. 1(3) of the Law no. 115/2015].

The conditions that people must fulfill in order to have the status of voters are the same as those provided by the Law no. 115/2015 for the election of local councilors. The conditions that a person must fulfill in order to apply for the public dignity of mayor are the same as those provided by the Law no. 115/2015 for persons applying for public dignity as a local councilor.

#### **2. The attributions of the county councils**

The county council fulfills the following main categories of attributions provided by art. 173 (1) of the Administrative Code:

- a) attributions regarding the establishment, organization and functioning of the specialized apparatus of the county council, of the public institutions of county interest and of the companies and autonomous regions of county interest;
- b) attributions regarding the economic-social development of the county;
- c) attributions regarding the administration of the public and private domain of the county;
- d) attributions regarding the management of public services of county interest;
- e) attributions regarding the interinstitutional cooperation internally and externally;

f) other attributions provided by law.

### **3. The president of the county council**

The county council is headed by a president who represents the county in relations with other public authorities, with Romanian and foreign natural and legal persons, as well as in justice.

The administrative code qualifies the president of the county council as an *executive authority*, while the county council is qualified as a *deliberative authority* [art. 5 letters m) and n) of the Administrative Code].

The president of the county council responds in front of the voters of the good functioning of the county administration [art. 190(2) of the Administrative Code].

#### **3.1. The duties of the president of the county council**

The president of the county council is responsible for the proper functioning of the specialized apparatus of the county council, which he manages.

The president of the county council ensures compliance with the provisions of the Constitution, the implementation of laws, the decrees of the President of Romania, the decisions and ordinances of the Government, the decisions of the county council, as well as other normative acts.

The president of the county council fulfills, according to the law, the following main categories of attributions provided by art. 191 of the Administrative Code:

a) attributions regarding the functioning of the specialized apparatus of the county council, of the public institutions and services of county interest and of the commercial companies and the autonomous regions of county interest. In exercising these powers, the president of the county council shall appoint, sanction and order the suspension, modification and termination of the service relations or, as the case may be, the employment relationships, according to the law, for the personnel within the specialized apparatus of the county council;

b) attributions regarding the relationship with the county council. In the exercise of these powers, the president of the county council conducts the meetings of the county council and arranges the necessary measures for their preparation and unfolding in good conditions;

c) attributions regarding the own budget of the county. In the exercise of these powers, the president of the county council exercises the function of principal authorizing officer of credits;

d) attributions regarding the relationship with other authorities of the local public administration and public services. In the exercise of these powers, the president of the county council may grant, through the specialized apparatus of

the county council, technical, legal and any other assistance to local councils or mayors, at their express request;

e) attributions regarding the public services of county interest. In exercising these powers, the president of the county council coordinates the realization of the public services and of public utility of county interest provided through the specialized apparatus of the county council or through the bodies providing public services and of public utility of county interest;

f) other attributions provided by law or tasks given by the county council.

**Delegation of duties.** The president of the county council can delegate, by disposition, the attributions stipulated in letter e) to the vice-presidents, the managers of the functional compartments or the personnel of the specialized apparatus, as well as to the leaders of the public institutions and services of county interest.



## Chapter XX

### The prefect

#### 1. Introductory considerations

**Notion.** The prefect is a decentralized authority of the Government at the county level, which ensures the observance of the legality of the acts of the local public administration authorities and conducts the decentralized public services of the ministries and of the other central public administration bodies in the administrative-territorial units.

**Regulation.** The institution of the prefect is currently regulated by art. 123 of the Constitution and art. 249-276 of the Administrative Code.

#### 2. Duties of the prefect

The activity of the prefect is based on the principles:

- a) legality, impartiality and objectivity;
- b) transparency and free access to information of public interest;
- c) efficiency;
- d) responsibility;
- e) professionalization;
- f) orientation towards the citizen.

As a representative of the Government, the prefect fulfills, according to the provisions of art. 252 of the Administrative Code, the following main attributions:

a) ensures, at the county level, the application and observance of the Constitution, the laws, ordinances and decisions of the Government, the other normative acts, as well as the public order. Thus, the prefect is the guarantor of respecting the law and public order at local level.

b) acts for the achievement in the county of the objectives included in the Governance Program and has the necessary measures for their fulfillment, in accordance with the competences and attributions that they have, according to the law. As a representative of the Government at the local level, the prefect is responsible for applying the Government's policy in the administrative-territorial units, having the obligation to ensure the execution of the acts of the Government, as well as those of the ministries and other specialized bodies subordinated to the Government or the ministries.

c) acts for maintaining the climate of social peace and permanent communication with all the institutional and social levels, paying constant attention to the prevention of social tensions;

d) collaborates with the authorities of the local public administration to determine the priorities of territorial development;

e) verifies the legality of the administrative acts of the county council, the local council or the mayor;

f) it ensures, together with the authorities and bodies empowered, the accomplishment, under the conditions established by law, of the measures of preparation and intervention for emergencies;

g) disposes, as the president of the County Committee for emergency situations, the measures required for their prevention and management and uses in this respect the amounts specifically provided for in their own budget for this purpose;

h) uses, as the head of civil protection, the funds specially allocated from the state budget and the logistical base of intervention in crisis situations, in order to carry out this activity in good conditions;

i) has the appropriate measures for the prevention of crimes and the defense of the rights and safety of citizens, through the legally authorized bodies;

j) ensures the implementation of the measures for European integration;

k) it has measures to implement the national policies decided by the Government and the European integration policies;

l) decides, under the conditions of the law, the cooperation or association with similar institutions in the country and abroad, in order to promote the common interests;

m) ensures the use, in accordance with the law, of the mother tongue in the relations between the citizens belonging to the national minorities and the public services decentralized in the administrative-territorial units in which they have a weight of over 20%.

The prefect also fulfills other duties provided by law and other normative acts, as well as the tasks established by the Government.

## **2.1. The legality control exercised by the prefect on the administrative acts of the local public administration authorities**

Art. 123 paragraph (5) of the Constitution refers to the possibility of the prefect to attack "before the administrative contentious court an act of the county council, of the local council or of the mayor, if he considers the act illegal", having in view therefore any type of public management act (both unilateral and bilateral administrative acts - administrative contracts). The acts of private management (civil law, commercial law, labor law, etc.) are not covered by art. 123 paragraph (5) of the Constitution because the constitutional provision refers to the possibility of the prefect to attack the respective acts, "before the administrative litigation court", or in the matter of disputes regarding the acts of private management, the courts of common law are competent.

## **2.2. The prefect's exercise of the management of public services decentralized in the administrative-territorial units**

According to the provisions of art. 123 (2) of the Constitution the prefect is the representative of the Government at local level and conducts the decentralized public services of the ministries and of the other central public administration bodies in the administrative-territorial units. Thus, through the prefects, the unit of action of the state throughout the country is ensured.

As a representative of the Government at the local level, the prefect ensures the operative connection between each minister, respectively leader of the central public administration body subordinated to the Government and the leader of the decentralized public service subordinated to it.

Ministers and leaders of the other central public administration bodies subordinated to the Government may delegate to the prefect some of their duties of management and control regarding the activity of the decentralized public services subordinated.

The heads of the decentralized public services are appointed and released by the minister, with the advisory opinion of the prefect.

## Chapter XXI

### The development regions

In Romania, the institutional framework for the creation of the development regions was regulated by Law no. 151/1998 *regarding the regional development in Romania*<sup>1</sup>, which was subsequently repealed and currently replaced by Law no. 315/2004 *regarding the regional development in Romania*<sup>2</sup>.

The development regions represented in the process of accession negotiations with the European Union, both premised for estimating the financial allocations for Romania in a system focused on objectives and geographical areas, as well as indicators for evaluating the absorption capacity of EU funds and monitoring and evaluation benchmarks. of the results and the impact on the socio-economic development on the whole of Romania<sup>3</sup>. In 2007, when Romania joined the EU, the development regions became members of the Committee of the Regions, a consultative body of the European Union.

At the level of the European Union, the main investment policy is currently represented by the regional development policy. The regional policy is addressed to all regions and cities in the European Union, supporting job creation, business competitiveness, economic growth, sustainable development and improving the quality of life. In the period 2014-2020, € 351.8 billion - about one third of the total EU budget - was allocated for cohesion policy, in order to reach these objectives and to meet the various needs existing in all regions of the EU. The objectives of the regional policy are achieved through three main funds: the European Regional Development Fund (ERDF), the Cohesion Fund (FC) and the European Social Fund (ESF). Most of the cohesion policy funds are earmarked for less developed European countries and regions, in order to support them in order to recover and reduce the existing economic, social and territorial disparities at EU level<sup>4</sup>.

In Romania, the regional development policy is defined by art. 2(1) of the Law no. 315/2004 as the whole of the policies developed by the Government, through the central public administration bodies, the local public administration authorities and the specialized regional bodies, with the consultation of the socio-economic partners involved, in order to ensure the economic growth and the balanced and sustainable social development of some geographical areas established in development regions, to improve the international competitiveness of Romania

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<sup>1</sup> Published in the Official Gazette, Part I no. 265 of July 16, 1998, as subsequently amended.

<sup>2</sup> Published in the Official Gazette, Part I no. 577 of June 29, 2004, as subsequently amended.

<sup>3</sup> For an analysis of the provisions of the first post-December law on regional development in Romania (Law no. 151/1998) see Dana Apostol Tofan, *Considerații în legătură cu Legea privind dezvoltarea regională în România*, „Dreptul” no. 5/1999, p. 3-9.

<sup>4</sup> For the presentation of the regional policy of the European Union see [http://ec.europa.eu/regional\\_policy/ro/policy/what/investment-policy/](http://ec.europa.eu/regional_policy/ro/policy/what/investment-policy/)

and to reduce the economic and social gaps between Romania and the Member States of the European Union.

The implementation of regional development policies is carried out in accordance with the general development objectives and priorities of Romania, as well as with the objectives of the European Union in the field of economic and social cohesion.

The basic objectives of the regional development policy in Romania are according to art. 3 of the Law no. 315/2004:

a) the diminution of the existing regional imbalances by stimulating the balanced development, the accelerated recovery of the delays in the economic and social field of the less developed areas, as a result of historical, geographical, economic, social, political conditions, as well as the prevention of producing new imbalances;

b) correlating the governmental sectoral policies at the level of the regions by stimulating the initiatives and by capitalizing on the local and regional resources, for the purpose of sustainable economic and social development and their cultural development;

c) stimulation of inter-regional, internal and international, cross-border cooperation, including within the Euroregions, as well as the participation of the development regions in the European structures and organizations that promote their economic-social and institutional development, in order to carry out projects of common interest, according to with the international agreements to which Romania is a party.

In accordance with the objectives of economic and social cohesion of Romania, as well as of the European Union in the field of regional development policies, eight development regions set out in the Annex to the Law no. 315/2004:

1. North-East Development Region - which groups the counties of Bacau, Botosani, Iasi, Neamt, Suceava and Vaslui.

2. South-East Development Region - which groups the counties of Braila, Buzau, Constanta, Galați, Vrancea and Tulcea.

3. The South-Muntenia Development Region - which groups the counties of Argeș, Călărași, Dâmbovița, Giurgiu, Ialomița, Prahova and Teleorman.

4. South-West Oltenia Development Region - which groups Dolj, Gorj, Mehedinți, Olt and Valcea counties.

5. West Development Region - which groups the counties of Arad, Caraș-Severin, Hunedoara and Timiș.

6. North-West Development Region - which groups the counties of Bihor, Bistrița-Năsăud, Cluj, Sălaj, Satu Mare and Maramureș.

7. Center Development Region - which groups the counties of Alba, Brasov, Covasna, Harghita, Mures and Sibiu.

8. Bucharest-Ilfov Development Region - which groups Bucharest and Ilfov County.

The Law no. 315/2004 specifies in art. 5 (2) the fact that the development regions are not administrative-territorial units and do not have legal personality.

The development regions are areas that encompass the territories of the counties in question, respectively of the municipality of Bucharest, constituted on the basis of agreements concluded between the representatives of the county councils and, as the case may be, of the General Council of the Municipality of Bucharest, and operate according to the provisions of the Law no. 315/2004. The development regions are the framework for the development, implementation and evaluation of regional development policies, as well as the collection of specific statistical data, in accordance with the European regulations issued by EURO-STAT for the second NUTS 2 territorial classification level, existing in the European Union<sup>1</sup> [art. 6(1) and (2) of the Law no. 315/2004].

We consider that in the future a serious analysis of comparative law should clarify under what conditions the eight Development Regions created by Law no. 315/2004 *regarding the regional development in Romania* could become administrative-territorial units and, if not, the reform of the administrative regionalization should be accompanied by a reform of the Parliament by which the regions will be represented at the level of one of the Houses of Parliament.

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<sup>1</sup> See Regulation (EC) no. 1059/2003 of the European Parliament and of the Council of 26 May 2003 *on the establishment of a common classification of territorial units of statistics (NUTS)* published in OJ L 154, 21.6.2003. By this Regulation the appropriate level of NUTS in which a certain class of administrative units from a Member State must be registered was determined on the basis of demographic thresholds. Thus, art. 3 of the Regulation provides: NUTS level 1 comprising between 3 and 7 million inhabitants (eg German lands), NUTS level 2 comprising between 800,000 and 3 million inhabitants (eg French regions) and NUTS level 3 comprising a number of inhabitants between 150,000- 800,000 (eg. French departments).

## Bibliography

1. A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan and Co., Londra, 1885.
2. A. W. Bradley, R. D. Ewing, *Constitutional and Administrative Law*, 12<sup>th</sup> ed., Londra, 1998.
3. Alexandrina Șerban, *Puterile Președintelui Republicii în cadrul executivului*, „Revista de Drept Public” no. 4/2008.
4. Alexandru Negoită, *Drept administrativ*, Sylvi, Bucharest, 1996.
5. Ana Rozalia Lazăr, *Din nou despre inexistența actului administrativ*, „Revista de Drept Public” no. 4/2007.
6. Anton Trăilescu, Alin Trăilescu, *Legea contenciosului administrativ. Comentarii și explicații*, 4<sup>th</sup> ed., C.H. Beck, Bucharest, 2018.
7. Anton Trăilescu, *Drept administrativ*, 4<sup>th</sup> ed., C.H. Beck, Bucharest, 2010.
8. Anton Trăilescu, *Excepția de ilegalitate în contextul legislației actuale*, „Dreptul” no. 4/1998.
9. Antonie Iorgovan, Liliana Vișan, Alexandru Sorin Ciobanu, Diana Iuliana Pasăre, *Legea contenciosului administrativ cu modificările și completările la zi*, Universul Juridic, Bucharest, 2008.
10. Antonie Iorgovan, *Tratat de drept administrativ*, vol. I and II, 4<sup>th</sup> ed., All Beck, Bucharest, 2005.
11. Carré de Marlberg, *Contribution à la théorie générale de l'État*, Paris, Ed. Sirey, 1920, vol I.
12. Cătălin-Silviu Săraru, *Cartea de contracte administrative. Modele. Comentarii. Explicații*, C.H. Beck, Bucharest, 2013.
13. Cătălin-Silviu Săraru, *Considérations sur les accords de coopération transfrontalières entre les unités administratives-territoriales limitrophes des zones frontalières de la Roumanie et les structures similaires dans les pays voisins*, „Curentul Juridic” no. 2 (45)/2011.
14. Cătălin-Silviu Săraru, *Considerații cu privire la principiile Spațiului administrativ european și la necesitatea includerii lor în proiectul Codului administrativ român*, „Caietul Științific” ISAR no. 7/2005, Section for Legal and Administrative Sciences.
15. Cătălin-Silviu Săraru, *Contractele administrative. Reglementare. Doctrină. Jurisprudență*, C.H. Beck, Bucharest, 2009;
16. Cătălin-Silviu Săraru, *Discuții referitoare la reglementarea proprietății publice în noul Cod civil*, „Dreptul” no. 11/2010.
17. Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck, Bucharest, 2016.
18. Constantin G. Rarincescu, *Contenciosul administrativ român*, 2<sup>nd</sup> ed., „Universala” Alcalay & Co., Bucharest, 1936.
19. Constantin Stătescu, Corneliu Bîrsan, *Drept civil. Teoria generală a obligațiilor*, 3<sup>rd</sup> ed., All Beck, Bucharest, 2000.
20. Corneliu Bîrsan, *Drept civil. Drepturile reale principale*, Hamangiu, 3<sup>rd</sup> ed., Bucharest, 2008.

21. Corneliu Manda, Doina Banciu, Cezar Manda, *Administrația Publică și Cetățeanul. Structuri. Autorități. Informație publică*, Technical Publishing House, Bucharest, 1997.
22. Corneliu-Liviu Popescu, *Autonomia locală și integrarea europeană*, All Beck, Bucharest, 1999.
23. Corneliu-Liviu Popescu, *Contenciosul administrativ potrivit dispozițiilor constituționale revizuite*, „Dreptul” no. 2/2004.
24. Cristian Clipa, *Caracterul obligatoriu al actului administrativ de numire într-o funcție publică și stabilitatea pe post a funcționarului public – corelații necesare*, „Revista de Drept Public” no. 4/2010.
25. Dacian Cosmin Dragoș, *Contractul de achiziție publică*, „Curierul Judiciar” no. 2/2002.
26. Dacian Cosmin Dragoș, *Legea contenciosului administrativ. Comentarii și explicații*, 2<sup>nd</sup> ed., C.H. Beck, Bucharest, 2009.
27. Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *Teoria generală a dreptului*, 2<sup>nd</sup> ed., C.H. Beck, Bucharest, 2008.
28. Dana Apostol Tofan, *Considerații în legătură cu Legea privind dezvoltarea regională în România*, „Dreptul” no. 5/1999.
29. Dana Apostol Tofan, *Puterea discreționară și excesul de putere al autorităților publice*, All Beck, Bucharest, 1999.
30. Dinu Ștefănescu, *Contribuții la elaborarea unei noi definiții a dreptului subiectiv*, „Dreptul” no. 7-8/1991.
31. Dumitru Brezoianu, *Contenciosul administrativ*, Metropol, Bucharest, 1995.
32. Dumitru Brezoianu, *Drept administrativ român*, Lucrețius, Bucharest, 1997.
33. Emanuel Albu, *Dreptul contenciosului administrativ*, Universul Juridic, Bucharest, 2008.
34. Emanuel Albu, *Motivarea actelor administrative – garanție a dreptului la o bună administrație (administrare)*, „Revista de Drept Public” no. 4/2010.
35. Emil Bălan, *Dreptul administrativ al bunurilor*, C.H. Beck, Bucharest, 2007.
36. Emil Bălan, *Instituția prefectului în sistemul administrației publice din România*, „Dreptul” no. 8/1997.
37. Eugen Chelaru, *Administrarea domeniului public și a domeniului privat*, 2<sup>nd</sup> ed., C.H. Beck, Bucharest, 2008.
38. Eugen Popa, *Noțiunea de gestionare a intereselor colectivităților pe care le reprezintă autoritățile locale*, „Dreptul” no. 3/1995.
39. Florian Coman, *Drept internațional public*, vol. II, Sylvi, Bucharest, 1999.
40. Gabriel Boroș, *Drept civil. Partea generală. Persoanele*, 3<sup>rd</sup> ed., Hamangiu, Bucharest, 2008.
41. Gabriela Bogasiu, *Legea contenciosului administrativ comentată și adnotată*, 4<sup>th</sup> ed., Universul Juridic, Bucharest, 2018.
42. Gabriela-Victoria Bîrsan, Bogdan Georgescu, *Legea contenciosului administrativ nr. 554/2004 adnotată*, 2<sup>nd</sup> ed., Hamangiu, Bucharest, 2008.
43. Gheorghe Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, 5<sup>th</sup> ed., „Șansa” SRL, Bucharest, 1998.
44. Gilles J. Guglielmi, *Vu par ses pères fondateurs, le droit administratif*, in *Le droit administratif en mutation*, PUF, 1993.
45. Giorgio del Vecchio, *Lecții de filozofie juridică*, Europa Nova, Bucharest, 1994.



46. Henri Lévy-Bruhl, *Sociologie du droit*, Presses Universitaires de France, Paris, 1964.
47. Ilie Iovănaș, *Dreptul administrativ și elemente ale științei administrației*, Didactic and Pedagogical Publishing House, Bucharest, 1977.
48. Ioan Alexandru (coord.), *Drept administrativ*, Omnia, Brașov, 1999.
49. Ioan Alexandru, *Administrația publică. Teorii. Realități. Perspective*, Lumina Lex, Bucharest, 1999.
50. Ioan Alexandru, *Drept administrativ comparat*, Lumina Lex, Bucharest, 2000.
51. Ioan Alexandru, Mihaela Căraușan, Ion Popescu, Dragoș Dincă, *Drept administrativ*, Economica, Bucharest, 2002.
52. Ioan Alexandru, Mihaela Căraușan, Sorin Bucur, *Drept administrativ*, Lumina Lex, Bucharest, 2005.
53. Ioan Alexandru, *Tratat de administrație publică*, Universul Juridic, Bucharest, 2008.
54. Ioan Muraru, Elena Simina Tănăsescu, (coord.), *Constituția României. Comentariu pe articole*, C.H. Beck, Bucharest, 2008.
55. Ioan Santai, *Căi procedurale de desființare a actelor de drept administrativ stabile*, „Revista română de drept” no. 3/1985.
56. Ioan Santai, *Condițiile controlului judecătoresc direct asupra actelor administrative în temeiul Legii contenciosului administrativ*, „Dreptul” no. 6/1991.
57. Ioan Santai, *Rolul avizelor în cadrul litigiilor având ca obiect controlul judecătoresc al legalității actelor și faptelor administrative*, „Revista română de drept” no. 7/1983.
58. Ioan Vida, *Puterea executivă și administrația publică*, Regia autonomă Monitorul Oficial, Bucharest, 1994.
59. Ion Brad, *Revocarea actelor administrative*, Universul Juridic, Bucharest, 2009.
60. Ion Corbeanu, *Drept administrativ*, 2<sup>nd</sup> ed., Lumina Lex, Bucharest, 2010.
61. Ion Corbeanu, Maria Corbeanu, *Teoria generală a dreptului*, Lumina Lex, Bucharest, 2008.
62. Ion Dogaru (coord.), *Drept civil. Contractele speciale*, All Beck, Bucharest, 2004.
63. Ion P. Filipescu, Andrei I. Filipescu, *Drept civil. Dreptul de proprietate și alte drepturi reale*, Universul Juridic, Bucharest, 2006.
64. Ion Popescu Slăniceanu, *Funcția publică*, Infodial, Bucharest, 2000.
65. Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, 3<sup>rd</sup> ed., Universul Juridic, Bucharest, 2014.
66. Iordan Nicola, *Drept administrativ*, "Lucian Blaga" University Publishing House, Sibiu, 2007.
67. Iulian M. Nedelcu, *Considerații privind necesitatea adoptării unui Cod de procedură administrativă cu trimiteri la instituții juridice civile*, „Revista de Științe Juridice” no. 2/2006.
68. Iulian Poenaru, Ioan Santai, *Noul regim al contravențiilor. Ordonanța nr. 2/2001*, „Dreptul” no. 12/2001.
69. Jean Fougerouse, *Le droit administratif en schémas*, Ellipses Édition Marketing S.A., 2008.
70. Jean Rivero, Jean Waline, *Droit administratif*, 15<sup>e</sup> édition, Dalloz, Paris, 1994.

71. Jean-Marie Auby, *Droit administratif*, Universite Bordeaux, Librairie Montaigne, 1975-1976.
72. Aladar Sebeni, *Noțiunea contractului de concesiune și încheierea acestuia*, „Dreptul” no. 8/1999.
73. Jean-Philippe Colson, *Droit public économique*, 3e édition, L.G.D.J., Paris, 2001.
74. Laura Maria Crăciunean, *Câteva considerații privind exproprierea pentru cauză de utilitate publică în dreptul comparat și în jurisprudența Curții Europene a Drepturilor Omului*, „Revista de Drept Public” no. 2/2006.
75. Liliana Vișan, *Necesitatea codificării normelor de procedură administrativă*, „Revista de Drept Public” no. 2/2005.
76. Liviu Giurgiu, *Considerații în legătură cu domeniul public*, „Dreptul” no. 8/1995.
77. Liviu Pop, *Dreptul de proprietate și dezmembrămintele sale*, Lumina Lex, Bucharest, 1996.
78. Liviu Pop, *Teoria generală a obligațiilor*, Lumina Lex, Bucharest, 1998.
79. Lucica Matei, *Management public*, Economica, Bucharest, 2001.
80. M. Văraru, *Tratat de drept administrativ român*, Publisher of the Socec & Co. Library, Bucharest, 1928.
81. Marian Nicolae, *Considerații asupra Legii nr. 213/1998 privind proprietatea publică și regimul juridic al acesteia*, „Dreptul” no. 6/1999.
82. Mădălin Irinel Niculeasa, *Legislația achizițiilor publice. Comentarii și explicații*, C.H. Beck, Bucharest, 2007.
83. Mihai Adrian Hotca, *Regimul juridic al contravențiilor*, C.H. Beck, Bucharest, 2006.
84. Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituția României revizuită. Comentarii și explicații*, All Beck, Bucharest, 2004.
85. Mihai T. Oroveanu, *Concesiunea serviciului public*, „Studii de drept românesc”, April-June 1995.
86. Mircea Anghene, *Necesitatea codificării normelor de procedură administrativă*, „Revista Română de Drept” no. 11/1973.
87. Mircea Djuvara, *Teoria generală a dreptului. Drept rațional, izvoare și drept pozitiv*, All Beck, Bucharest, 1999.
88. Mircea N. Costin, Călin M. Costin, *Dicționar de drept civil de la A la Z*, 2<sup>nd</sup> ed., Hamangiu, Bucharest, 2007.
89. Mircea N. Costin, *Răspunderea juridică în dreptul R.S.R.*, Dacia, Cluj, 1974.
90. Mircea Preda, *Drept administrativ. Partea generală*, 4<sup>th</sup> ed., Lumina Lex, Bucharest, 2006.
91. Mona-Lisa Belu Magdo, *Proprietatea publică și regimul juridic al acesteia*, „Revista de Drept Comercial” no. 11/1999.
92. Nicolae Popa, *Teoria generală a dreptului*, 5<sup>th</sup> ed., C.H. Beck, Bucharest, 2014.
93. O. H. Phillips, P. Jackson, *Constitutional and Administrative Law*, 6<sup>th</sup> ed., Sweet-Maxwell, Londra, 1978;
94. Oliviu Puie, *Contenciosul administrativ*, Universul Juridic, Bucharest, 2009.
95. Ovidiu Ungureanu, Cornelia Munteanu, *Tratat de drept civil. Bunurile. Drepturile reale principale*, Hamangiu, Bucharest, 2008.

96. Pavel Perju, *Sinteză teoretică de practică a instanțelor judecătorești din circumscripția Curții de Apel Suceava în materia dreptului procesual civil*, „Dreptul” no. 1/1995.
97. Prosper Weil, *Le droit administratif*, 15<sup>e</sup> édition, Presses Universitaires de France, Paris, 1992.
98. Rodica Narcisa Petrescu, *Drept administrativ*, Hamangiu, Bucharest, 2009.
99. Rodica-Narcisa Petrescu, *Criterii de distingere între actele administrative de autoritate și actele de gestiune ale statului – implicații pe planul contenciosului administrativ*, „Dreptul” no. 10/1992.
100. Rozalia-Ana Lazăr, *Legalitatea actului administrativ. Drept românesc și drept comparat*, All Beck, Bucharest, 2004.
101. Sandrine Biagini-Girard, *L'inexistence en droit administrative*, L'Harmattan, Paris, 2010.
102. Sorin David, *Contractul de concesiune*, Dreptul no. 9/1991.
103. Tudor Drăganu, *Actele administrative și faptele asimilate lor supuse controlului judecătoresc potrivit Legii nr. 1/1967*, Dacia, Cluj-Napoca, 1970.
104. Tudor Drăganu, *Actele de drept administrativ*, The Scientific Publishing House, Bucharest, 1959.
105. Valeriu Stoica, *Drept civil. Drepturile reale principale*, C.H. Beck, Bucharest, 2009.
106. Vasile Pătulea, Corneliu Turianu, *Dreptul de proprietate și alte drepturi reale*, vol. II, Wolters Kluwer, Bucharest, 2008.
107. Verginia Vedinaș, *Drept administrativ*, 9<sup>th</sup> ed., Universul Juridic, Bucharest, 2015.
108. Verginia Vedinaș, Liliana Vișan, Diana Iuliana Pasăre, *Argumentare juridică europeană în favoarea necesității modificării Legii contenciosului administrativ. Succintă prezentare a Legii nr. 262/2007*, „Revista de Drept Public” no. 3/2007.
109. Verginia Vedinaș, *Tratat teoretic și practic de drept administrativ*, vol. II, Universul Juridic, Bucharest, 2018.
110. Viorel Mihai Ciobanu, *Tratat teoretic și practic de procedură civilă*, vol. I, Național, Bucharest, 1997.