THE ADMINISTRATIVE RESPONSIBILITY IN THE LIGHT OF THE NEW LEGISLATIVE CHANGES

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Abstract

The entry into force of the administrative Code in the summer of 2019 enriched the legislation in administrative law with an unitary normative act which contains many disjointed normative acts, from many administrative law branches. Traditionally, the adinistrative responsibility was analized through its three components: administrative-disciplinary responsibility, administrative-contraventional responsibility and administrative-patrimonial responsibility. The purpose for this study is to analize the conception of the administrative Code on the administrative responsibility and to show the novelty on this judicial institution.

Keywords: *administrative responsibility, the administrative Code, public authorities, administrative act, the principle of legality.*

1. Introduction

The thematic of this study was formerly analyzed in another paper dedicated to responsibility in administrative law but at that moment there was no administrative coding[1]. The adopting of the administrative Code[2] through emergency Government ordinance no. 57/2019 was a very important moment for the romanian administrative law, through this coding a real reformation was witnessed. Well, it is not about an accord between the national legislation with the communitary acquis[3], nor about the revision of the Constitution but it represents an adaptation of the law maker's will to the social necessities and the daily struggles in the administrative public authorities' activities[4]. The administrative Code, as it is written in it, "regulates the general frame for the organization and functioning of the authorities and public administration's institutions, the personnel status in these institutions, the administrative responsibility, the public services and some rules regarding the state's and administrative-territorial public and private property". Furthermore, for administrative responsibility, the subject for the current study, the Constitution's lawmaker

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[1] Elena Emilia Stefan, *Judicial responsibility. Special view on administrative law responsibility*, Prouniversitaria Publishing House, Bucharest, 2013.

[2] Government's emergency ordinance regarding the Administrative Code no. 57/2019, published in Official Journal no. 555 from 5th of July 2019, last modified through GEO no. 164/2020 regarding the completion in GEO no. 57/2019, published in Official Journal no. 898 from 2nd of October 2020.

[3] About communitary acquis, see Augustin Fuerea, *European Union study book*, 6th edition, revised and added, Judicial Universe publishing house, Bucharest, 2016, pp. 37-38.

[4] More about this in Roxana Mariana Popescu, *EUCJ jurisprudence regarding the "Ecj Case-Law On The Concept Of „Public Administration" Used In Article 45 Paragraph (4) Tfeu"*, in CKS e-book 2017, pp. 528-532.

consacrated in art. 52[5] with the marginal denomination: "the right of the damaged person by a public authority". The organic law that article 52 of the Constitution refers to is the administrative contentious Law no. 554/2004[6].

2. Content

2.1. The administrative responsibility regulation in the adiminstrative Code

The administrative Code regulates the administrative responsibility in Part VII denominated: "The administrative responsibility", articles 563-579. For the first time in our law system, the administrative and judicial responsibilities are defined in a Code, in administrative law domain. In Title I "General dispositions" 5 articles (563-567) analyze the following problem: the judicial responsibility, the forms of the judicial responsibility in public administration, the administrative responsibility, the forms of the administrative responsibility and the principles of the administrative responsibility.

Thus, according to the article 563, *judicial responsibility* is: a "form of the social responsibility established by the state, following the breach of the given norms through an illicit fact and that determines the bearing of the corresponding consequences by the guilty party, by using constriction force from the state for the purpose of reestablishing the right order, thus harmed". Also, as a novelty, the forms of the judicial responsibility in public administration are regulated, article 564 stating that: "commiting some illicit facts by the personnel mentioned by article 5 letter gg), during their attribution, attracts administrative responsibility, civil or criminal as applicable".

As it is mentioned in special literature: "we must make the distinction between **responsibility that comes to the public administration personnel**, this being civil, disciplinary or criminal, as applicable and the administrative responsibility that evoques the forms of responsibility specific for administrative law. The first one, according to article 564 from the Code is attracted by the *commiting of illicit facts by the personnel mentioned by article 5 letter gg)* – demnitaries, public functionary, contract personnel and other categories of personnel established by law, and is **administrative, civil or criminal** responsibility as applicable[7]". In the same article 564 (line 2) we find a sending note regarding the two forms of responsibility – civil and criminal that employ according to the specific legislation.

The current study does not analyze the administrative jurisdictions problem, seen as a jurisdictional control over the administration although we do not exclude that in a future research this subject could also be followed. Also, we notice in recent

[5] Article 52 states: *"The harmed person in his right or a legitimate interest, by a public authority, through an administrative act or by not solving a request in legal term, has the right to obtain the recognition of the right or the legitimate interest, the annulment of the act and the reparation of the damage.*
The conditions and limits of this right are established by organic law.
The state answers patrimonially for the prejudices caused through judicial errors. The state's responsibility is established by law and does not remove the responsibility of the magistrates that did their job maliciously or grave negligence".

[6] Administrative contentious law no. 554/2004 published in Official Journal no. 1154 from 7th of December 2014, last modified through GEO no. 57/2019 regarding the administrative Code.

[7] Verginia Vedinas, *Noted Administrative Code. Novelties, comparative examination, explanation notes*, Universul Juridic Publishing House, Bucharest, 2019, p. 347.

special literature the point of view according to which: "the judicial instances are the ones that, normally, achieve justice, without a special abilitation law being requiered, *special jurisdictions* are allowed to be formed to solve, in the limits and conditions of the law, some categories of litigations, context in which we can speak of "common law jurisdictions" and "exceptional jurisdictions" (...)[8].

The administrative responsibility definition is found in two places in the administrative Code: in article 5 "*general definitions*", (line 1) letter ii) and another article whose marginal denomination is "*administrative responsibility*" – article 565 (line 1):

- Article 5 (line 1) letter ii): "form of judicial responsibility that consists of an ensamble of rights and obligations of administrative nature that, according to the law, are born following the commiting of an illicit fact through which, normally, norms of administrative law are breached";
- Article 5 (line 1): "administrative responsibility is that form of judicial responsibility that consists of an ensamble of connected rights and obligations of administrative nature that, according to the law are born following an illicit act by which, normally administrative law norms are breached".

Also, in Title I on one hand it is mentioned that the responsibility is established according to the form of guilt and the effective responsibility at breaching the law and on the other hand the fact that administrative responsibility can be completed with other forms of judicial responsibility.

2.2. The principles of the administrative responsibility according to the administrative Code

The lawmaker established in article 567 three principles of the administrative responsibility: the principle of legal responsibility; the principle of justice or proportionality responsibility and the celerity principle.

Regarding the *legality principle*, this is not a specific principle for the administrative law, it being found in all branches of law and also being mentioned in the Constitution. In this aspect, article 5 (line 1) mentions: "*In Romania, respecting the Constitution, its supremacy and of laws, is mandatory*" and article 16 denominated "*rights equality*" that in (line 2) mentions: "*Nobody is above the law*".

As it has been shown in special literature, "the fundamental law regulates the legality principle as one of the essential elements of public administration that finally signifies the administration's submission to the Constitution and the law and it represents a warranty of the administrated ones against abuses or mistakes resulted following the authorities' actions"[9]. Moreover, the Romanian Constitutional Court, in its jurisprudence stated that: "The obligation to abide the laws, mentioned in article 1 (line 5) from the Constitution, does not presume, by its content, the insurance of an inflexible frame.

[8] Ioan Lazar, *Financial-fiscal measures and the European Union policy in the states helping domain*, Hamangiu Publishing House, Bucharest, 2018, p. 18

[9] Ioan Lazar, *Administrative jurisdictions in financial matter*, Universul Juridic Publishing House, Bucharest, 2011, p.84.

The legislative intervention is necessary to adapt the normative acts to the economic, social and politic existing realities and to ensure a unitary legislative frame, that contribute to a better applicability of the law and alienation of any equivocal situations or inequities in law applicability[10]" or: "article 1 (line 5) from the Constituion institutes the obligativity of respecting the laws without distinguishing between romanian citizens and foreign or persons without citizenship[11]".

The principle of legality responsibility establishes that: "administrative responsibility can only operate in the conditions and cases mentioned by law, in the limits established by it, according to a procedure conducted by the authorities vested in this purpose". Moreover, the principle of legality responsibility must be regarded in correlation with the *principle of legality* mentioned in article 6 from Title III "*General principle applicable to public administration*". According to this, "*authorities and public administrations' institutions and also their personnel have the obligation to act according to the applicable legal specifications and treaties and international conventions to which Romania is part"*.

The principle of justice or proportionality responsability presumes: "the correlation of the applied sanction with the social danger degree of the illict fact and the extinction of the damage, in case a damage was produced, with the established form of guilt, by a correct individualisation".

The principle of celerity shows that: the "moment of the applicability of the sanction must be as close as possible to the moment of the manifestation of the illicit fact, without any useless delays for the social resonance of the applied sanction has to be maximum encreasing its prevention effect".

2.3. The forms of administrative responsibility

The administrative Code establishes that the administrative resposibility can be disciplinary, contraventional or patrimonial. Moreover, our entire doctrine analyzes the three forms of administrative responsibility, in fact being a normative recognaissance under the dome of a sole normative act. The administrative Code's lawmaker vision does not want to surprise because it takes after the doctrine that for years in a row, without an administrative codification, mentioned this thing[12]. Not least, of the three forms of forementioned responsibility, only administrative - contraventional responsibility benefitted before entry into force of the administrative Code as regulation, qualified in common law in contraventions matter, as an example Government ordinance no. 2/2001 regarding the judicial regime of contraventions[13].

[10] The Romanian Constitutional Court decision no. 1237 published in the Official Journal no. 785 from 24th of November 2010.

[11] The Romanian Constitutional Court decision no. 1228 published in the Official Journal no. 783 from 23rd of November 2010.

[12] Antonie Iorgovan, *Administrative law treaty*, Volume II, AllBeck publishing house, Bucharest, 2005; Verginia Vedinas, *Administrative law*, XII edition, Judicial Universe publishing house, Bucharest, 2020; Dana Apostol Tofan, *Administrative law*, volume II, edition 4, CH Beck publishing house, Bucharest, 2017; Catalin Silviu Sararu, *Administrative law. Current problems of the public law*, CH Beck Publishing House, Bucharest, 2016; Rodica Narcisa Petrescu, *Administrative law*, Hamangiu Publishing House, Bucharest, 2009 etc.

[13] Government ordinance no 2/2001 regarding the judicial regime of contraventions, published in the Official Journal no 410 from 35th July 2001, last modified through Law no. 2013/2018 regarding measures of efficiency of acquitting contraventional measures, published in Official Journal no. 647 from 25th July 2018.

2.3.1. Administrative - disciplinary responsibility

As the special literature also mentions, "prior to the Code there was no regulation regarding the general regime for responsibility denominated administrative-disciplinary responsibility – other than article 566 that mentions the disciplinary responsibility. Dispared dispositions applicable in the matter were found in Law no. 188/199 or in Law no. 393/2004, in the parts that were consacrated for administrative-disciplinary responsibility for the public functionaries and the local elected officials[14] (...)".

The administrative-disciplinary responsibility[15] is defined in article 568 (line 1) as: a "form of the administrative responsibility that occurs in case of a disciplinary misconduct, in the sense of a breach from demnitaries, public functionaries and ones assimilated to them of service duties and of conduct norms mentioned by law". Also, in the administrative Code there is mentioned that the administrative-disciplinary responsibility is established with respecting the contradictoriality principle and the right to defend oneself and is subjected to the administrative contentious instances in conditions given by the law.

The disciplinary misconduct in the administrative Code represents: "*the fact done with guilt by public functionaries, demnitaries and their assimilates that consists of an action or inaction through which the obligations that come to them from the service report, respectively from the exercise of their mandate about this and that affects their socio-professional and moral status*". About the subjects of the administrative - disciplinary responsibility, according to article 570 from the Code they are: active subject and passive subject. The active subject of the administrative-disciplinary responsibility is: "public administration authority or any other entity assimilated to this towards which the consequences of a disciplinary misconduct are turned over and in whose competence the doer's responsibility enters" and the passive subject of the administrative-disciplinary responsibility is: the "person that did a disciplinary misconduct".

About the individualisation of the administrative-disciplinary sanction (article 571), the following rules are mentioned: "The causes and the gravity of the disciplinary misconduct will be accountable and also the surroundings in which this was done, by the author's form of guilt and the consequences of the misconduct, by general behaviour in the exercise of service atributions and, if necessary, by the existence in his history of other administrative-disciplinary sanctions that were radiated by law (...)".

2.3.2. The administrative - contraventional responsibility

About the administrative - contraventional responsibility, the administrative Code only has one article, article 572, in which we find the definition: "the administrative - contraventional responsibility represents a form of administrative responsibility that occurs in case of an identified contravention according to the specific legislation in the contraventions domain". Thus, the new administrative Code does not bring many novelty elements regarding this form of responsibility but it has a sending note to the common law, and that is GO no. 2/2001

[14] Verginia Vedinas, *op.cit.*,2019, p.349.

[15] The administrative Code abrogated Law no. 188/1999 regarding the Status of the public functionaries, normative act appliable to this form of responsibility.

regarding the judicial contraventions regime. Moreover, the special literature also stated: "the prior regulation, but also the new one that refers to these aspects is represented by GO no. 2/2001 regarding the judicial regime of the contraventions that represent the common law in this type of administrative responsibility matter, the only one that benefitted of a frame law by now[16]".

2.3.3. The administrative-patrimonial responsibility

The definition for the administrative-patrimonial responsibility is found in article 573: "*a form of administrative responsibility that consists of the state's obligation or, if necessary, the administrative-territorial units to repair the damages caused to a private or judicial person for any judicial error, through an illegal administrative act or by an unjustified refuse of the public administration to solve a request regarding a right admitted by law or a legitimate interest*".

Also, the administrative Code in article 577 states the four cumulative conditions that must be met to engage the administrative-patrimonial responsibility: "the administrative act is illegal; the illegal administrative act causes material or moral prejudices; the existence of causality report between the illegal act and the prejudice; the existence of public authority guilt and/or of its personnel".

The administrative Code refers to the forms in which the administrative-patrimonial responsibility is engaged: "the authorities exclusive responsibility and that of the public institutions for the prejudices of material or moral nature done following organizational or functional deficits of some public services; the solidary administrative-patrimonial responsibility for prejudices caused about the highlighting public goods and services; patrimonial responsibility of authorities' personnel or public institutions about delegated attributions".

In article 574 the conditions of authorities' and public institutions' are mentioned for the prejudices of material or moral nature done following the organizational or functional deficits of some public services: "the existence of a public service that by its nature contains the risk of producing some prejudices for the beneficiaries; the existence of a material or moral prejudice, as requiered, of a private or judicial person; the existence of causality between using a public service that by its nature contains the risk of producing some prejudices and the damage done to the private or judicial person by case".

In article 575 the conditions that attract administrative-patrimonial responsibility for prejudices caused by administrative acts are mentioned. "Public authorities and institutions respond patrimonially, from their own budget for moral or material damages caused in three situations: through administrative acts; by unjustified refuse to solve a request; by not solving a request in due time". Also, "if the payment of some damages for the prejudice or for delaying is requested, in the situations in which the intentional guilt of the demnitary, the public functioner or contractual personnel is proven, it responds patrimonially in solidarity with the public authority or institution if it did not respect the legal provisions specific for the attributions established in the job description".

Article 567 mentions how the judicial regime of the solidary administrative-patrimonial responsibility works for prejudices caused about highlighting public goods and services. Thus, the administrative Code states that "public authorities and

[16] Verginia Vedinaș, *op.cit.*, 2019, p.350.

institutions and their personnel, whose guilt has been proven, respond patrimonially in solidarity for the damages done to the public or private domain following the public service organization or functionning by not respecting the law".

Also, article 578 mentions that "the public authorities and institutions personnel who has written delegations responds for prejudices caused following the exercise of their delegated attributions and the delegation act must contain the limits" but: "the delegation act that is emitted without respecting the law is null and exonerates the delegated person".

3. Conclusion

As it was shown in this study, the unification of the administrative law legislation under one dome is undoubtedly a win for the public administration activity. Furthermore, strictly under the aspect of administrative responsibility regulation in a distinct part of the administrative Code is a first step towards creating a new unitary normative frame and confirming the traditional administrative law literature that analysed in all the administrative law courses the administrative responsibility. Concluding, the administrative Code comes and confirms what the traditional literature analysed and presented, the three forms of responsibility in the administrative law: the administrative-disciplinary responsibility, the administrative - contraventional responsibility and the administrative - patrimonial responsibility.

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