Liability for the administrative action

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ABSTRACT

From factual realities, from theory, but also from judicial practice, even though, as I had previously showed, the tradition of Romanian law identified administrative with civil liability, in reality, we rallied to the opinion, according to which, **administrative-patrimonial liability is not to be confused with civil-tort liability, being a stand-alone liability, belonging to administrative law.**

We reached such a conclusion not only as a result of the study of the sciences reported to the Romanian authors, but especially as a result of the comparison between Romanian and foreign literature, an important landmark in this research approach being the French legal literature.

In this order of ideas, the novelty element of this research work is mainly given by the **analysis of liability for the public administration's actions.**

As a preliminary ruling, we note that in our law there is no express regulation of the administration's liability for its illicit acts.

Although, as I have already shown, guilt is a necessary element of the administration's liability for its acts, in parallel to this subjective liability we have also identified an objective administrative responsibility for the actions of the administration.

The many specific features posed by public administration's liability, as well as the fact that all these traits are based on one idea, **that of protecting the public interest,** led us to conclude, once more, that the administration's liability for its acts sand its actions, it is a distinct legal institution, fully autonomous to civil liability.

If private individuals' liability for the mistakes they commit is a constant of legal thinking since very distant times, not the same can be said of the responsibility of the various entities vested with public power.

The modern age did not initially admit the existence of such a liability, based on the idea that the sovereignty of the state is imposed on all and no compensation can be required for it.

Right, perhaps, in its time, when the role of the state in the lives of its citizens was reduced, this principle began soon enough to prove its boundaries, as the power of state penetrated more and more areas, often creating important damage for individuals. Today as a result of the progressive transformation, the mentioned principle has practically been overthrown and the patrimonial responsibility of the state and public authorities became quasi-absolute.

***Keywords**: administrative-patrimonial liability, the public administration's actions, the public interest.*

1. Introduction: What is an Administrative Action?

Excluding administrative actions, the rest of the activities in which public administration is carried out have been classified as:

- Operations and material facts of the public administration bodies, formed in their turn of: technical-administrative operations and technical -material operations (productive);
- Operations to achieve public services (supply of electricity, patients care or administering medical treatment).

The operations and material facts of public administration bodies are not expressly will manifests made in order to produce legal effects. They usually intervene in connection with the issuance and enforcement of legal acts of public administration bodies. Operations and material facts may make the legality of administrative acts conditional or ensure the effectiveness of administrative acts or the proper conduct of the activity of administrative bodies as a whole.

As has been shown in the doctrine, there are also situations where the issuance of a legal act is not conditioned on a simple administrative operation, but by a unilateral administrative act. It is the case of administrative authorisations, in the broad sense of the term.

The overwhelming majority of administrative operations in the activity of public administration are considered as conditions of validity of administrative acts. Thus, the authorisation to build a building is made after the measurements of the land on which the property will be located and the outline of its location are drawn up, the issuing of a medical certificate of exemption from a given activity is done after the examination of the patient in question, the issuance of the driver's licence is done after the natural person has taken the theoretical and practical exam before the competent comission, etc.

In our law, there is no express regulation of the liability of the administration for its illicit actions – we could conclude that such an action makes the dispute leave the scope of administrative law and directs it to civil law, which will solve it as if concerned were two indivivіceduals. In other words, the illicit action "undresses" the administration of its public power – which confers the privilege of jurisdiction in the existence of administrative contentious – and reduce it to a simple private status. Therefore, according to this concept, the public law legal person guilty for its own actions or for the action of its agents will be sued before the common law court, like any private legal person, and the rules applied for such a legal person will apply to it by analogy.

It also needs to be noted that this reasoning has historic roots, practically our law has always left the judgement of the responsibility of the administration to be governed by the provisions of the Civil Code[1)] and also that this conception is widely

[1)] Rarincescu, Constantin. 1936. *Contenciosul administrativ roman*, Bucharest, Romania: Alcalay Universal Publishing House, pp. 83-85.

shared by our doctrine, both civil and administrative. Furthermore, some authors go even further in this sense, considering that including the administration's liability for its acts, if the action in question is introduced after the annulment of that act, would also be a civil tort[2)].

Not without recognising the force of the above arguments which places the responsibility of the administration in the sphere of competence of the common courts, we will nevertheless dare to argue the contrary opinion.

Even though, as we have previously shown, the tradition of Romanian law has identified administrative with civil liability, there have been a number of judgments by the Court of Cassation that have ruled to engage the responsibility of the state even when it could not be found at fault, the damage being caused in the exercise of a normal and legal activity. A great doctrinaire observes in this sense that "*the Court of Cassation shows an instinctive understanding of the fact that the responsibility of the state for damages incurred by the functioning of public services should not be judged by exclusive principles of civil law, being a special matter, which has to be resolved [...] by its own special rules and needs*"[3)].

To the same extent, relatively recently, a decision of the Court of Appeals of Cluj[4)] seems to be giving us justice. Namely, the applicants brought an action for compensation for the bad operation of public services against the Romanian state, on the grounds that the state judicial public service is not functioning properly because, although they are the owners of three apartments located in Cluj-Napoca, they cannot use them because they are occupied by foreign persons and the state, through its bodies, fails to take action against such persons in order to ensure compliance with the right of property of claimants. Although the action was rejected by an exception (it was considered that the state is not an administrative authority and therefore it cannot be a defendant in an administrative dispute), **nowhere in the text of the quoted sentence does it deny that the administrative court has jurisdiction in the cause**. Moreover, the fact that this dispute is an administrative litigation which has to be judged by the provisions of Law No. 554/2004 is expressly recognised by the court, as it rules that **the stamp duty is not due to the value**

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2) In this respect, see Ilie, Iovănaș. 1997. *Drept administrativ*, Arad, Romania: Servo-Sat Publishing House, p. 173; Deleanu, Ion. 2007. *Tratat de procedură civilă*, Vol. II, Bucharest, Romania: C.H. Beck Publishing House, p. 396; Tarhon, V. Gh. *Răspunderea patrimonială și regresul organelor administrației de stat pentru pagubele cauzate prin acte administrative ilegale* in the *Romanian Law Magazine*, no. 5/1968, p. 55. In any case, the question of whether or not this liability is a civil tort one cannot have any influence on the jurisdiction of the Court that will judge the claim for damages, as this is expressly governed by the law. 19, para. 2 of law 554/2004 establishing that if an administrative act has been cancelled without any claim and compensation, they may be requested later, but also to the Administrative court.

3) Ibidem.

4) Civil sentence No. 707/2005 of the Court of Appeals Cluj, unpublished. This sentence was maintained by Decision No. 3268/2005 of the High Court of Cassation and Justice, un published, the appeal being rejected with the same reasoning as it had been rejected and the action.

of immovable property, since the law on a dministrative litigation expressly establishes the amount by which the shares promoted under it are stamped, thus derogating from the common law. We believe that this decision, even if it rejects the applicants' claims due to a questionable exception, is a step forward in recognising the jurisdiction of the Administrative Court to prosecute the cases which call into question the administrative tort liability.

This solution could be explained by the fact that always "c*ivil law has presented superiority to contain a general solution*"[5] as opposed to administrative law which confines itself to particular solutions for various cases in which the administration is held to respond.

We also do not understand why, in so far as the liability of the administration for its unlawful acts was considered by our doctrine to be an autonomous liability, distinct from tort civil liability, in the light of the fact that, on one hand, the administrative law is a branch of autonomous law and, on the other hand, that this liability presents specific features[6], we could not extend this conclusion to the responsibility of the administration for its illicit acts on the basis of the same considerations.

2. Facts of the administration generated by the bad operation of the public service

The public administration's liability should be divided from the outset into two large categories of[7]: on the one hand its liability for the **administrative** acts it edicts (we also refer to the administrative contracts) and, on the other hand, the liability for the malfunctioning of the public service (sometimes found in the literature as liability for **its illicit acts or for the limits of the public service)**[8].

If the first one was extensively analyzed in our doctrine, the problem being discussed practically in almost any work of general administrative law, the second is most often not even remembered or, at best, is treated briefly.

We believe that we are in such a situation, on the one hand because the liability for the defective functioning of the public service is often confused with tort civil liability, and on the other hand because the jurisprudence in this matter is extremely poor.

5) Teodoresco, Anibal. *Le fondement juridique de la responsabilité dans le droit administratif* in *Mélanges Paul Negulesco*, Bucharest, Romania: Imprimeria Națională Publishing House, 1935, p. 758.

6) Iovănaș, Ilie. *op. cit.*, pp. 178-180; Lepădătescu, Mircea. *Natura juridică a răspunderii patrimoniale a organelor administrației de stat pentru pagubele pricinuite prin actele lor ilegale,* in the *Anals of the University of Bucharest*, 1968, pp. 9-14.

7) For a similar division, see Teodoresco, Anibal. *Le fondement juridique de la responsabilité dans le droit administratif* în *Mélanges Paul Negulesco*, Bucharest, Romania: Imprimeria Națională Publishing House, 1935, pp. 755-756.

8) It would therefore operate a separation of administrative liability similar to that which works in the case of civil liability, also divided into a liability based on a legal act (contractual civil liability) and one based on a legal fact (Civil liability tort).

The abovementioned liability shall intervene in the event that a public service, by the faulty manner in which it is organised, produces certain damage to individuals. This form of liability is not expressly consecrated in our country, but we believe that it can be deducted from the following constitutional principles:

- "*The principle of equality of all before the law and public authorities in conjunction with no one is above the law*" – Art. 16 of the Constitution of Romania, para. 1 and 2;
- "*Guaranteeing the right to life, as well as physical and mental integrity, a right which can be harmed by the limits of a public service*"– Art. 22 of the Constitution of Romania.

A particular significance is found in the following:

- Article 21 para. 1 "*Any person may address justice for the defense of rights, freedoms and his/her legitimate interests and no law can impede the exercise of this right*";
- Article 52 "*The person injured in a right of or or in an interest by a public authority, by an administrative act or by failing to resolve an application within the legal term, shall be entitled to obtain recognition of the alleged right or the legitimate interest, cancellation of the act and repair of damage".*

From the aforementioned legal texts we can believe that the current constitution recognises the fundamental right of the Romanian citizen to be compensated for the damages caused by the administrative acts of the public authorities.

This kind of liability also intervenes irrespective of the guilt of the public authority called upon to respond.

In practice, it was found that this creates an optional condition of the state power organ, to formulate recourse action, even more so as it does not draw any penalties for the Minister of resort or the public servant concerned, under the conditions of non-exercise of the recourse action. The one who has suffered the damage is not to prove a fault of the administration or the official but must convince the court that the damage is an inherent defect, a public service structure boundary.

In relation to the above issues, we ask ourselves if whenever the operation of a public service will cause injury to the administration, will we be speaking of administrative responsibility? To answer this question, we must make the classical distinction between **public administrative services** and **industrial and commercial public services**. The difference between these two types of public services is the extent to which they are influenced by public law: there is a maximum influence on public administrative services and a minimum in the case of industrial and commercial[9]. We believe that the involvement of administrative responsibility must be linked precisely to this intervention of public law in the operation of various services. It goes without saying that in the case of administrative public services the administrative liability regime will apply. But this does not automatically mean that

[9] Morand-Deviller, Jacqueline. 2001. *Cours de droit administratif*, Paris, France: Montchrestien Publishing House, p. 459.

the rest of the public, industrial and commercial services must be subject, without any differentiation, to a regime of private law liability.

Another issue that liability for public service limits raises is that of the **competent court** for engaging it. There are practically two possibilities: hiring the responsibility of the administration is the competence of civil departments, as courts that hold common jurisdiction in matters of civil tort liability or jurisdiction that belongs to the courts of law authorities, as specialised courts to prosecute disputes between administration and private.

It would seem that the current constitution, as well as Law No. 554/2004 of administrative contentious, consecrates the settlement of disputes risen from the unlawful actions of the administration by the folowing courts: the special administrative and fiscal contentious departments of the courts, the courts of Appeal and the High Court of Cassation and justice. The administrative contentious judge is the one who can rule both on the legality of the Act and on its opportunity. However, neither the Constitution of Romania nor the Law No. 554/2004, which represents the common law on the prosecution of administrative proceedings and to various special normative acts governing the organisation and functioning of public services[10], nowhere will we find provisions which confer on the courts of administrative law jurisdiction to prosecute disputes treat illicit acts of administration that have caused harm to individuals. Moreover, both the Constitution and the Law No. 554/2004 refers to damage caused by an administrative act or an unjustified refusal to resolve an application. In addition, art. 2, letter f of Law No. 554/2004 on the administrative contentious brings to the knowledge that "*the activity of settlement by the competent administrative court under the organic law of disputes in which at least one of the parties is a public authority, and the conflict was born either from issuing or concluding, where appropriate, an act administrative, for the purposes of this law, either from non-settlement within the legal period or refusal to resolve an application relating to a right or a legitimate interest*". Although it seems that, again, we are hitting the foregoing limitations – which reduce the administrative contentious to disputes born from acts, and not from actions – we believe that this article could receive an extensive interpretation.

3. Liability for the administrative action in the french state

A famous decision, the road opener in terms of establishing the autonomy of administrative responsibility to the common liability, was the one given by the French State Council in the business *Couitéas*[11].

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[10] This is the case, for example, of Law No. 218/2002 on the organisation and functioning of the Romanian Police (published in the *Official Gazette* No. 305/2002), Law No. 129/1996 on the Romanian Railway Transport (published in the the *Official Gazette* No. 268/1996).

[11] Long, Marceau; Weil, Prosper; Braibant, Guy; Dévolvé, Pierre; Genevois, Bruno. 2001. *Les grands arrets de la jurisprudence administrative*, Paris, France: Dalloz Pubishing House, pp. 260-26.

The case is particularly interesting as it can find its correspondent in many current situations in our country, particularly publicized, on the unjust occupation of private property.

The state of the matter was as follows:

– a private was in possession of a definitive and irrevocable court ruling that stipulated the expulsion of some tribes from its land in Tunisia, which was then under the sovereignty of France. The French authorities, namely the prefect, however, refused to implement this judgment, due to the serious repercussions that this would have had for public order.

The State Council has held that the refusal to enforce the judgment in question is a legal administrative act, helping to maintain public order, but the injured party will have to be compensated because there has been a break in the equality of citizens for public duties to be repaired[12)].

Although, I have already shown, guilt is a necessary element of the administration's liability for its acts, in parallel with this subjective liability we may also find objective administrative responsibility for risk[13)].

The French doctrine considers that the main hypothesis of this responsibility are the following: damages caused by public works, accidents suffered by the employees of the administration (employed or voluntary), the damage caused by an exceptional risk created by public administration or where such liability arises as a counterweight of the exorbitant prerogatives of the administration (for example, damage caused by compulsory vaccinations, unilaterally imposed by public power)[14)]. It has been said that this theory is the main originality of the administration's liability, reported to civil law[15)].

Administrative risk theory was born in the 19th century, on the occasion of the famous business *Cames[16)]*, the administrative court stating that "a*nd if the state is not linked to the texts of civil law and the interpretation that is given to them by judicial courts, the direct examining belongs to the administrative judge, by his/her own light, in his/her conscience and according to the principle of equity, rights and reciprocal obligations of the state and its workers in the execution of public services"*.

It is precisely this equity that will substantiate, beyond any guilt, the objective responsibility of the administration in certain assumptions. Interesting to note is that only one year after cutting the business *Cames,* the French Court of Cassation

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12) The same reasoning can be sustained at any time in our law as well, being grounded on the provisions of art. 16, para. 1 of the Romanian Constitution which states that *Citizens are equal before the law and public authorities*.

13) The situation is similar to civil law where, although responsibility for its own action – a liability based on guilt-remains the rule, exceptions may also be met, where liability is objective.

14) De Laubadére, André. 1973. *Traité de droit administratif*, Vol.1, Paris, France: LGDJ Publishing House, pp. 688-693.

15) Ibidem, p. 687.

16) Long, Marceau; Weil, Prosper; Braibant, Guy; Dévolvé, Pierre; Genevois, Bruno. *op. cit.,* pp.44-49.

introduced the principle of objective responsibility for things, inaugurating the theory of civil risk, which is clear evidence that administrative risk is not a loan from civil law[17].

The liability for administrative risk is based on the idea of *public service that creates a special risk*. For example, in the case of juvenile delinquents, educated by special methods involving a semi-freedom, the state was condemned to respond even though those minors were given to another person, due to the fact that this education can be considered a public service[18]. This proves once again that liability for risk in administrative law is not the same as liability for the action of another from civil law.

4. The liability of the administration for the actions of the civil servants

The aspects concerning the office and the public servant which are characteristic of other European law systems constitute true models for the process of reform and modernisation of the office and the civil servant in the Romanian system. In the Romanian system, the main measures of reform in terms of public office and public servant and more, after 1989, were mainly focused on the creation of the legal framework (adoption of Acts 133 normative), given the lack of regulations to capture the new realities in this area, and complete it, where it was the case.

The legal regime of the public office also includes the question of its responsibility, the purpose of which is to repress the mistakes committed by public agencies. But it only presents one of the purposes of liability.

We follow the thesis expressed by the current doctrine of public law, that in any branch of law we place ourselves, the liability has two outcomes:

- To restore the order of infringed law, resulting in a return to a state of equality, disrupted as a result of committing a form of illicit;
- To express a negative reaction from the authority to the perpetrator of the illicit action, in order to determine him/her to realize the significance of the action, to regret it and in the future not to repeat it, to remove it from his/her behavior.

The status of public servants does not expressly stipulate the rights and duties incumbent upon the public office, starting from the premise that they are highlighted by their own statutes and regulations, being detailed by the job description.

They differ, both in relation to the authority or institution of which they belong, and in relation to the category of the office, namely, management or execution.

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17) Plessix, Benoît. 2003. *L'utilisation du droit civil dans l'élaboration du droit administratif*, Paris, France: Panthéon-Assas Publishing House, p.509.

18) *Ibid., p. 699.*

Furthermore, the rights and obligations of officials may vary according to the level of public service, respectively, central, territorial or local.

Following a detailed analysis of the duties of Romanian officials, I retained the conclusion that the duties deriving from the public office have largely onerativ, prohibitive or passive character for their holder, in relation to the conduct prescribed to it.

The rights and obligations of the official who relate to his/her personal situation are subjective and governed by the status, unable to form the subject of a collective or individual contract of employment, because the law provides this only for the benefit of auxiliary administrative staff, who is not a public servant.

Currently Law No. 188/1999 devotes the principle that **the civil servant shall be jointly responsible with the public authority or institution.**

From the economy of the texts of the law, we note that the legal liability of the civil servant cannot be employed if he/she has complied with the legal provisions and administrative procedures applicable to the public authority or institution in which he/she pursues activity.

Therefore, even if the civil servant has committed certain damages, he/she is not responding if acted legally and the damage was caused by the limits of the public service.

The public official shall be responsible for the damage caused, only in so far as it has acted illegally.

For the legal liability of civil servants in Romania, the current seat of the matter is in articles 70-79 of Law No. 188/1999, with amendments and additions brought by Law no. 161/2003 on some measures to ensure transparency in exercising public capacities, public offices and in the business environment, preventing and punishing corruption.

The specificity of the legal liability of civil servants is given by the circumstances of the place, time and manner of commiting the illicit action, but also by the qualification of the subject – active in terms of comminting the action and passive from the point of view of the legal liability – who is required to be a civil servant. Thus, actions which entail the legal liability of civil servants, only those illicit actions which fulfil the following conditions will be considered:

- are facts entering the sphere of illicit: disciplinary, regulatory, criminal or civil, provided in specific legislation;
- are committed with guilt (intent or guilt);
- are generating damage;
- there is a causal connection between the action and the damage;
- the active subject of the illicit action, the passive subject of legal liability, must be a public servant, so a qualified subject;
- the illicit action, source of legal liability, is committed during the work or in connection with the work duties.

To that circumstance, we appreciate that in order to train the liability of the official, we must distinguish between the general conditions, the admission of an

administrative action, which are laid down in Law No. 554/2004 and the special conditions for the admissibility of such an action, in cases where its object is the application for material or moral compensation. In the latter case, four requirements should be met, namely:

- The attacked act to be illegal;
- The attacked act to have caused material or moral damage;
- The existance of a causal connection between the illegal administrative act and damage;
- The existance of the public authority's fault.

Regarding the fault of the public authority, this constitutes a certain psychological conduct of the author towards the illegal action, which may be represented by the issuing of the illegal act, the refusal to resolve an application, to disregard a legitimate right or interest.

The aggrieved party does not need to prove the fault of the public authority. We can be both in the situation of the public servant's personal fault and before the work fault of the administration, generated by its bad operation[19)].

We appreciate that in the matter of the public servant's liability, in situations where he/she acts with guilt, things are sufficiently clear, **a problem often encountered in practice being that of the responsibility of the administration for the actions of civil servants.**

We will continue to treat the only form, from our point of view, of the civil liability which might, to some extent, also be in administrative law, excluding, of course, the responsibility for the action that we have examined until this moment.

It is about the liability of institutions for their agents, similar-even identical, some authors say – with the responsibility of the administration for the official responsible for issuing the illegal act[20)].

We believe that the two types of liability have few things in common, administrative law – mainly through the theory of detachable action and the work action – far away from the civil conception. We will further analyse the main element of difference between the two liabilities, **which refers to the condition of committing the illicit action during the exercise of the office by the principal or the public official**, but also certain peculiarities at the level of the report between some officials and administration, peculiarities that distinguish it from a real principal-agent report.

If in the civil law at the basis of this liability is the fact that the person ordering, even in the absence of the necessary technical knowledge, must be responsible – the

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19) Tănase, Raluca; Cirlan, Marcel. *Răspunderea administrativ-patrimonială*, in ProExcelsior Magazine, No. 1 May 2011, http://www.aafdutm.ro/revista/nr-1-mai-2011/revista-nr-1-mai-2011/raspunderea-administrativ-patrimoniala/.

20) Pop, Liviu. 2000. *Teoria generală a obligațiilor*, Bucharest, Romania: Lumina Lex Publishing House, p.65.

liability based on the idea of guarantee[21)], in administrative law we find the same idea of administrative risk that we spoke of above.

The situations that led to the creation of the institution liability for agents in civil law had to appear – sooner or later – in administrative law as well. The real armies of officials used in the administration have quickly raised the issue of responsibility for the illegal acts and harmfuls they issue.

The question of whether the person who has to respond in one situation or another is the administration, or its clerk has led to the creation, especially in the case of French jurisprudence and doctrine, of *The theory of the act detachable from the public office*. Reduced to essence, the theory of detachable act can be presented in the following way: whenever guilty of creating the damage is the official who has committed an act detachable of the public office, thus lacking connection with this office, he/she will personally respond before the agrrieved party. On the contrary, whenever the clerk's action is a work-related action, which is closely connected with his/her office, the administration will be the one responsible. Citing an already classical definition of Laférriere, we can say that a *work action is* "*when the damaging act is impersonal, if it reveals an administrator more or less subject to error*". Detachable work action appears when through it transappears the individual with his/her weaknesses, passions and imprudences.

As soon as the theory was born, however, the practical insufficiencies it presented were observed. Rarely, in the case of an act detachable of its office, the official would be sufficiently solvent to ensure a full repair for the caused damage. Conversely, the administration can only always be solvent, guaranteeing the victim an effective coverage of the damage. These findings, together with the willingness to protect the victim of an unlawful administrative act, have basically led to a "*doubling" of the concept of detachable action*, speaking of a detachable action from the victim's point of view, but also of a detachable act from the point of view of public administration, when they intend to turn against the guilty official with a recourse action.

Looking from the point of view of v*ictim*, the care to ensure that the damage is fully repaired – guaranteed by the virtually unlimited solvency of the administration – has led to an extraordinary decentralisation of the idea of detachable action: basically, the only such thing we can imagine occurs when the clerk creates a damage lacking any connection with his/her office. Therefore, there is no longer the question of the discussion in the civil law doctrine, as to how much the agent can deviate from the office: in any situation where a public official causes damage in a link, even quite vaguely, with the occupied office, the victim will choose to sue the administration in order to ensure a full repair.

From the point of view of the administration, however, after repairing the damage caused to the victim, a possible recourse court action against the guilty clerk will be considered. There will be a new relevance to the detachable action,

21) Terré, François; Simler, Philippe; Lequette, Yves. 1996. *Droit civil. Les obligations*, Paris, France: Dalloz Publishing House, p. 640.

which is no longer appreciated as strictly as when the victim's interests were being put in question.

It basically draws distinction between three types of such detachable actions[22]:

- The first type are *actions committed in the exercise of the office, but which are detached from it due to their severity,* which reveal a man's customary behavior. It is the case of situations where the official has been animated by personal concerns, in which he has been guilty of a certain excess in behavior which cannot be motivated by his/her office or in which he/she has committed actions of exceptional gravity. It may be the case, for example, of a public servant who being on duty – hurts a person who wanted to ask for something.
- The second type is the action *committed outside the exercise of the office but keeping a certain link thereto*. It's about the actions committed during the provision of a service, but also those committed outside work, but with the means made available to the official by the administration. **An example would be the act of a policeman who, outside of working hours, accidentally kills someone with the provided weapon he/she is carrying.**
- Finally, the third type is the *purely personal action*, therefore detachable, which has nothing to do with work such as, for example, **the case of a public servant who crashes someone with a personal car outside of work hours.**

In the last of these assumptions the detachable action is the same both from the perspective of the victim, as well from that of the administration, without being the case of a recourse action – due precisely to this action – the administration has not paid anyone anything. In the first two cases, however, that ambivalence of the detachable action we were talking about appears. From the victim's point of view, they will represent simple work actions, for which the administration must respond patrimonially. From the point of view of the administration, however, they remain detachable actions which allow it, after it will compensate the individual, to subroge in his/her right, turning against the guilty official to recover the amount it paid.

Finally, an action that does not apply to any of the above hypothesis will be considered a work action. Even if this notion can also be found in civil law, applicable when the mistake of the agent was strictly determined by the fault of the service organized by the principal, again we will notice a difference in administrative law, consisting of a much easier qualification of an action as work. This assertion may seem paradoxical because, after all, the public interest would rather be to use money in a completely different way than to cover the mistakes of one or another official. But as it was correctly noted in our older doctrine, *"being obligated to a too high diligence, officials will have the fear of fulfilling quickly the work needs"*[23]. The tasks that the administration must meet are most often more difficult than the tasks

[22] Chapus, René. 2000. *Droit administratif général*, Vol. I, Paris, France: Montchrestien Publishing House, pp. 1331-1337.

[23] Negulescu, Paul. 1906. *Tratat de drept administrativ român*, Vol. I, Bucharest, Romania: Gutenberg Typography Publishing House, p. 183.

of any particular private enterprise. Therefore, in these circumstances, asking the officials for a maximum diligence even under very heavy conditions would mean, on the one hand, encouraging their passivity – for it is harder to make a mistake when you abstain, and, on the other hand, to discourage anyone who would like to work in such a framework that can become very risky for its patrimony. Any of these consequences would be more detrimental to the public interest than the administration's obligation to provide compensation for the actions of its officials.

The above classification does not exclude the situation in which the damage arises from the merging between a detachable action and a work action, in which case the liability will be joint, being divided between the official and the administration[24)].

Can this theory of detachable action be applied to Romanian law? We believe that yes, this coming from the main regulation which relates to the accountability of an official guilty of issuing an unlawful administrative act that we find in article 16 of the administrative contentious law, which states that *legal claims provided for in this law may also be formulated against the person who contributed to the drafting, issuing or concluding of the act or, where appropriate, who is guilty of refusing to resolve the application relating to a subjective right or legitimate interest, if it is required to pay compensation for the damage caused or delayed. If the action is accepted, the concerned person may be required to pay compensation, jointly with the defendant authority.*

We believe that the hypothesis regulated by our law excludes, from the start, the situation in which the official would be guilty of an action completely detachable from the office she/he occupies. In this situation, the victim could not, in any case, call the person before an administrative court, together with the defendant authority, being left only with the possibility to act against it by civil means.

We therefore must conclude that art. 16 of Law No. 554/2004 will apply to those facts that are removable from the administration's perspective, but not from the victim's perspective. The same is apparent from the accuracy of the legal text, which says that the official will be held to compensate the victim jointly with the administrative authority[25)]. Therefore, we are in the classical assumption in which the administration will fully cover the damage incurred by the victim, and then return with a recourse action against the guilty official. Besides, we believe that the administration also retains this possibility when the victim did not sue the guilty official, but only the administrative authority.

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24) Of course, in this case the administration will fully compensate the victim for the damage, but it will not be able to turn against the official for the full amount, but only for a portion of it, proportionate to his/her guilt in the production of the damage.

25) Although the regulation expressly refers to a joint liability, in my opinion it should be made clear that it is either a joint liability-in cases where the fault is partly of the administration, partly of the official, or one *in soliduum* -When the fault is exclusively of the official.

In conclusion, we believe that, in its very essence, the civil construction of responsibility for the action of another with the distinction between personal action and work action are deeply different.

If the first is based on the idea of protecting the victim, the second one is based on the protection of both the victim and the public agent.

Furthermore, where civil law has sought to justify that an individual can answer for the action of another, administrative law has built a liability for a special personal action, founded on the idea that a legal person can be considered the direct author of an anonymous guilt.

5. Conclusions and proposals

The state cannot exist outside the law as nothing can exist beyond the state and no one is above the law. The state must obey its own rules, as it is self-limiting[26)].

The birth of the administrative phenomenon is closely linked to the birth of the state and the separation of powers in the state. Result of the development process of society, the state appears as a social-economic, political, legal and historical phenomenon alike.

The public administration (as a whole) fulfils, as appropriate, both executive and administrative activities. If executive activities are usually performed exclusively through the subsystem of state public administration authorities, administrative activities shall be found throughout the system of public administration[27)].

If the relation between individuals is based on legal equality, those between the administration and the administrated assume legal inequality, for the purposes of the overordered character of those administering.

By harnessing the elements used in defining the administrative act, it can be assessed that it is the main legal form of public administration activity, which consists of a manifestation of express, unilateral will and subject to a regime of public power as well as the control of legality of the courts, emanating from administrative authorities or private persons authorized by them, by which they are born, they amend or extinguish rights and corelative obligations.

The issue of the administrative act is extensively analysed in the specialized doctrine, which is natural in the context in which it represents the essential form of materiality of the entire public administration activity.

However, there are manifestations of the public administration's will[28)] which do not come into administrative acts in their classical form, but in contracts or explicit

[26)] Mihai, Gheorghe. 2002. *Inevitabilul drept*, Bucharest, Romania: Lumina Lex Publishing House, pp. 116-118; Gilia, Claudia. 2007. *Teoria statului de drept*, Bucharest, Romania: C. H. Beck Publishing House, pp. 2-4.

[27)] Munteanu, Codrin-Dumitru. *Administrația ca putere publică,* in Transylvanian Review of Administrative Sciences, 20/2007, pp.85-95.

[28)] Cătana, Emilia Lucia. 2017. *Contenciosul actelor administrative asimilate,* Bucharest, Romania:

refusals to apply to requests and sometimes the manifestation of explicit will is missing, the administration showing passivity and inaction.

The public administration's liability should be divided from the outset into two large categories[29]: on the one hand its liability for the a**dministrative acts** it edicts (we refer to the administrative contracts as well) and, on the other hand, the liability for the malfunctioning of the public service (sometimes found in the literature as liability for **its illicit sections or for the limits of the public service)**[30].

If the first one was extensively analyzed in our doctrine, the problem being discussed practically in almost any work of general administrative law, the second most often is not even reminded or, at best, is considered quickly.

The abovementioned liability intervenes in the event that a public service, by the faulty manner in which it is organised, produces certain damage to individuals.

One of the most important consequences of the public interest, which customizes, we believe, the obligation report which apears after a deleterious unlawful administrative act is the inequality of the parties of this report resulting from the very fact that one of them does not act in its own interests, but in the interests of all. It is an inequality that the civil law, specifically built to regulate the relations between individuals on legal positions of equality, cannot "process" it through its specific mechanisms.

As it has been observed, *"from the moment the public law reports begin, those linking the individual to the public authority, the whole situation changes because the latter does not present itself and does not operate as a simple individual but is most often known with that imperium that characterizes it and distinguishes it from the individual*"[31]. In this case, it is necessary that the rules governing the matter of its liability be adapted to the situation, a mere analogy with civil law being no longer sufficient.

Precisely from those above, it can be also be deduced that not whenever the administration is the one who produces damage, the liability will be an administrative one.

It is known that a legal person of public law is ambivalent: it may act using its prerogatives of public power but also may choose not to use them, acting as a person of private law. It is the case of the hypothesis in which the administration carries out private management acts which, as has been said, differ from the public management acts as that person *"does not invoke its benefits as a public person*

C.H. Beck Publishing House, p. 27.

29) For a similar division, see Teodoresco, Anibal. *Le fondement juridique de la responsabilité dans le droit administrative*, in *Mélanges Paul Negulesco*, Bucharest, Romania: National Printer Publishing House, 1935, pp. 755-756.

30) It would therefore operate a separation of administrative liability similar to that which works in the case of civil liability, also divided into a liability based on a legal act (contractual civil liability) and one based on a legal action (tort civil liability).

31) Teodoresco, Anibal. *Le fondement juridique de la responsabilité dans le droit administrative,* In *Mélanges Paul Negulesco*, Bucharest, Romania: National Printer Publishing House, 1935, p. 49.

and is voluntarily placed in the condition of a particular. Its acts, even if of interest in the community, lend the form of private management and remain exclusively on the ground of private to private relations, under the condition of private law "[32]. In this case, the liability brought by any injurious acts to individuals shall be that of the common law and not the administrative liability. However, we appreciate the assertion that public administration is subject to private law is different from saying that administrative law is identical to private law[33].

Regarding administrative-patrimonial liability, it also applicable in the event that the civil servant acts with exceeding the limits of the state of legality in the exercise of work duties.

The specificity of the legal liability of civil servants is given by the circumstantial evidence of the place, time and manner of commiting the illicit action, but also by the qualification of the subject – active in terms of the commiting the action and passive from the point of view of the legal liability – who is required to have the capacity of civil servant.

This form of liability does not only have an express legal recognition, but also a developed legal regime, a framework law, Law 554/2004.

In the case of applications made in contencious administrative proceedings by persons aggrieved by orders or provisions of ordinances declared to be unconstitutional, their application is conditioned by the declaration of the ordinance as unconstitutional, in whole or in part, by the Constitutional Court.

– The courts competent to rule on the remedies required are the same ruling on the illegality of the administrative act, typical or assimilated, i.e. courts of contencious administrative.

In France, the authorities come to respond, both for damages caused by public service limits and for the damage caused to individuals by its public agents, following that in the event of a fault of their own, the state should proceed against its agents in order to recover the damage caused by such actions.

Principle of responsibility of the public employee[34] is first established by art. 28 of the Constitution of the Italian Republic, which states: "*Officials and employees of the state and public bodies shall be directly responsible, in accordance with the criminal, civil and administrative laws, for actions committed in violation of rights. In such cases, civil liability shall extend to the State and public bodies*".

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[32] Morand-Deviller, Jacqueline. 2001. *Cours de droit administratif*, Paris, France: Montchrestien Publishing House, p. 729.

[33] Amol, Benoît. 2003. *L'utilisation du droit civil dans l'élaboration du droit administratif*, Paris, France: Panthéon-Assas Publishing House, p.689.

[34] *Tenore, Vito. La responsabilita' civile, amministrativo-contabile e penale dei pubblici dipendenti, the work is an excerpt from the Tenore volume, The privatized public service manual, which was launched at the Conference of the National School of Administration in Rome, from November 2015, p. 1, https://www.unicas.it/media/570414/dispensa_responsabilit_x _ Corsi_V_T. pdf.*

We believe that following the drafting of this work, it appears as appropriate and necessary to place in the code all normative acts with applicability in the area of administration's liability. The types of liability are inextricably linked and must be contained in a single system of rules, ensuring consistency, safety in implementation and, in particular, a unitary practice at the level of all areas of competence, that is because on the one hand, it is hard for the individual to study all the relevant rules in order to be able to defend itself from the illegal acts and actions of the administration, but on the other hand, because the courts do not have uniform solutions to situations of factual and similar law, deducted to judgment.

We are aware that pending unified solutions in cases that concern the administration's responsibility for its acts, it is a hard and difficult road to travel, encumbered by the frequent legislative amendments and completions, but also the various opinions of doctrine authors.

It can be assessed that the adoption of an administrative code with all possible imperfections and needs to amend or complement it, is circumscribed in the general activity of consolidation of the rule of law, in which the rights and freedoms are respected and guaranteed and the economic-social reality in Romania, which is in a continuous process of change, will always impose inherent corrections and adaptations of how the legislative system responds to the need to guarantee and respect the rights of citizens.

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