Quo vadis administrative law?

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Abstract

The present study aims to analyze the current state of evolution of Romanian administrative law. Although the title presents itself as an interrogation, we do not want- it would be a naivety if we do- to give answers. The study focuses mainly on the following aspects: false modernity of administrative law; the "attacks" from other branches; conserving constants and defining traditional elements; the effect of Europeanisation.

Keywords: *administrative law, tradition, modernity, evolution, constants, principles, values.*

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1. The context of the approach

"The history of mankind is in fact the history of governing and administering peoples," considers one of the coryphaei of post-war administrative law[2]. The administrative law has been and continues to still largely represent the *administration's law.* The administration means meeting social needs through the provision of various public services. Hence, the classic vision of administrative law, the *law of public services.*

The evolution of the states has meant the evolution of the institutions, of the activity carried out by them. The state has begun to *"lose ground"* in relation to individuals in terms of involvement in meeting the needs of larger or smaller collectives. But it *"lost on its hand"*, consciously that has to share some activities and services with individuals. It "encouraged" this phenomenon. It has created the legislative and institutional framework for it to be realized. And it succeeded. In stages, it's true, but no way back.

The problem is *where do we go with this phenomenon?* And *how do we do it?* What *precautions should we keep?* What *principles should we keep unaffected?*

For over two millennia since the two major branches of law have emerged through Ulpian's famous adage, it has been accepted the thesis that *the private law is the right of individuals, and public law is the law of the state, of the city and of the public interest.* Like the state, neither the public interest nor its preemption on the private law will ever disappear. Changing their meaning, losing some attributes and acquiring others is a reality that does not mean that they will cease to exist.

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[2] Antonie Iorgovan, *Tratat de drept administrativ*, vol. 1, ed. 4, ed. All Beck, Bucharest, 2005, p. XIV.

Let's relate to the transformations brought by the European construction into the traditional significance of the states. And, of these, it is relevant to remember the *"sharing of sovereignty"* or the *"joint exercise of sovereignty"*, evoked even by the phrase *"ceding of sovereignty"* in order to realize what mutations still occurred in the configuration of these Members States of the European Union. We can join the fundamental freedoms recognized at European Union level, namely the free movement of goods, services and capital. All this unquestionably influences not only the institutions of law in general and administrative law in particular, but also the administrative law itself, implicitly and explicitly.

They feed the traditional disputes between *"publicists"* and *"privatists*", the intransigence of some and the tendency to throw others out, even if they are basic branches and institutions of public law, in general, and of administrative law in particular.

Which have made societies, states, and the world as a whole go further. Without which it would not have thought of its evolution.

We will focus on these aspects in the next sections of this study. We want, as we said, not to give answers, but to ignite and encourage constructive debates that clarify, "enrich", "build" without "demolishing", but transforming, adapting, capitalizing on constants, principles and values.

2. The role of traditions in Romanian law

Each state, every branch of law, is specific to certain institutions and traditional principles that define its identity and have played a key role in their evolution, as branches of law and the social relations it regulates. One of them is the administrative contentious. It has been found in the Romanian legal system since 1864, with the creation, by the ruler Alexandru Ioan Cuza, of the State Council, according to the French model. Over him, political, democratic or totalitarian regimes have passed, but, in essence, as *an instrument for the protection of individuals against the abuses committed by the state through its authorities,* has continued to exist. Without naming it "administrative contentious", the Constitution of 1965[3] mentions it in two articles[4], and a law develops its legal regime[5].

After 1990, its regulation was a priority, which attracted the adoption, a year before the adoption of the Constitution of 1991, of a framework-law in the

[3] The Constitution of 1965 has been published in the Official Gazette no.1 of 21 august 1965.
[4] We have in mind the articles 35 and 103 of the Constitution of 1965.
[5] Is about the Law no. 1/1967,published in the Official Gazette no.67 of 26 July 1967.

field, the Law no. 29/1990[6], replaced in 2004 by Law no. 554/2004[7], currently in force, with the amendments and additions[8] that were subsequently made to it.

The administrative contentious has generated an important doctrine and jurisprudence, some of the works that were elaborated more than 100 years ago or the solutions that were upheld keeping their topicality in present and, in certain situations, we could even say the *"freshness"*, despite the time that *"passed over"* them.

Its existence, in the legal system, is a guarantee and an instrument for strengthening the rule of law and democracy. When asked *whether the evolution of the rule of law outside the administrative litigation was possible, along with the constitutional litigation*, the answer is obviously **negative.**

The concern must be, in our opinion, to enrich the legal content of this institution, by maintaining and developing its constants, by adapting to the new realities. This excludes concerns such as those currently on the agenda of Parliament, to *"cut off"* from its competence some of the litigation, partially, such as those concerning the administrative contract. We say "partially" because it is proposed that only litigations regarding the execution of administrative contracts should be transferred to the common law courts and those concerning their conclusion, modification or cancellation to remain within the competence of the administrative courts. Such a possible legal solution leads us to wonder *how this comes about? Which legal reasons justify it? And how is it possible for the same legal institution, i.e. the administrative contract, to generate two category of disputes from the point of view of the resolution competence?* And the whole initiative is dressed, we could even say *"adorned"* with a motivation of an alleged good-faith, *"garnished"* with good intentions, *"shining like stars"*, but *"pricking"* like poisoned needles.

Because, as some voices have already said, behind the good intentions there are real malpractice, to preserve the elegance of language required by the academia.

It is true that in tribunals, courts of appeal and the High Court of Cassation and Justice, the disputes of administrative contentious are 30% - 40% of all litigations. But we do not support the act of justice by "cutting" the jurisdiction of some courts and affecting institutions. It is the same logic of 2009 when, in order to reduce Parliament's spending, qualified, in our opinion questionable, as being burdensome, has been organized a referendum to abolish a Chamber of Parliament. The dangerous question that may sprout, in an atmosphere of misunderstanding of the role of the institutions, associated with a massive manipulation, is *"but why do not we dismantle Parliament in its entirety if it is so costly"?* In over 150 years since the creation of the modern Romanian state, its specific was bicameralism,

[6] Published in the Official Gazette no 122 of 8 November 1990.
[7] Published in the Official Gazette no 1154 of 7 December 2004.
[8] The most important changes were made by Law no. 262/2007, published in the Official Gazette no. 510 of 30 July 2007 and Law no. 76/2012, published in the Official Gazette no. 365 of 30 May 2012.

which is still present in the organization of large European states, with consolidated democracies such as France, Germany or Spain.

The Constitution of Romania through art. 1 paragraph (3) refers to the *"democratic traditions of the Romanian people and the ideals of the Revolution of December 1989"*. It stipulates the existence and evolution of the Romanian state, as *a democratic and social rule of law*, to these *democratic traditions* and to *the ideals of the Revolution of December 1989*, which some have re-baptized as *"a coup d'état"*, forgetting that the lives lost at that time was the price we paid for our freedom.

We believe that the norm for referring to these *democratic traditions* is generously reflected in the institutions of public law, including those of administrative law, and **their compliance is an imperative** that must be respected by both those who draw up and those who apply law.

3. The administrative law between genuine modernization and false modernization

How could we define modernization, in general, and modernization of the law in particular? We believe that modernization is **a process of adapting a domain to new**. But not to any "new", but to that "new" that is represented by valuable solutions, institutions and procedures that either did not exist before, or were "refreshed" in a manner that removes them from the "original" ones. Let's take, for example, **the process of cybernation of the work of the administration and of all public authorities.** In strategic documents adopted at government level, it is treated as the phenomenon of *"E-administration"* or *"I-administration"*. There is no doubt that its appearance and development attracts changes in the content of the administration, such as, for example, the obligation to have its own Internet page to use it for the transparency of its work. It is a consequence and a normal influence that adds value to the administrative and governmental phenomenon in general. The *"false modernization"* is found when we intend to change in any way, whether or not this modernization is founded. Let us take, for example, the legal language, which, in the desire to modernize, becomes difficult to understand, all kind of barbarism[9] or words used incorrectly or incoherently invaded him. In the matter of personnel remuneration, the *wage tire* is used. The term of *management* or *managing* has grounded so loud that we forgot that we have a correspondent in its *administration* or *administrating*, with all the components of planning, organization, execution, control.

Another form of manifestation of *false*, in our opinion, *modernization*, is the assumption of terms from other domains and their transposition into the legal language, where they give birth to all sorts of *"legal oddities"* that those who use them are very proud. Let's exemplify a term that is fervently used by constitutional colleagues, namely *constitutional transplant*, a component of *legal transplant* in

[9] Barbarism are the words that have penetrated into a language and have become earthy, although there is a correspondent of them in that language.

general. It is obvious its provenance from medicine, where it signifies the taking of an organ from a body and its integration into another body in order to save the latter one. But we do not believe that its name is suitable in the sense in which it is used and we are not the followers of the solution that in the Romanian legal system to be "transplanted" tale-quale, terms from other domains and, together with them, institutions, principles, and procedures outside the law of a state. The latter ones can influence it, they can integrate into the normative system in Romania, but not in the form of *transplant*, but adapted to its specificity.

A *false modernity* also occurs in the writings or, rather, in the "writings" that appear, where you need to read the dictionary to understand the meaning of the approach. Typically, the young or very young generation is tempted to do so.

We will not give examples, because we do not intend to enter into a direct dispute with anyone. We just want to report the phenomenon and we hope that those who feel "biting on the hat", as the Romanian says, will reflect on our sayings.

4. Administrative law and its Europeanization

We evoke by the *Europeanization* term the impact on the law, in general and on the administrative law, in particular, the Romanian state's membership of the European Union and the legal normative system established by it. We allow us to reiterate the idea that the administrative law is hard to conceive, as any other branch of law, in fact, broken by the context of the European legal and institutional construction. In administrative law, it must *"reverberate"* the spirit of the great European principles and institutions, the fundamental rights and freedoms derived from Union law or the jurisprudence of European courts. Take, for example, *the right to good administration* and to a *good governance*. What would be the *"life"* of the Romanian state and its authorities if we did not refer to these rights? Such fundamental rights should be reflected in the status or legal status of public law institutions. As far as the administrative act is concerned, we find **the principle of the revocation of the legal acts of the European institutions**[10]. Its acknowledgment took place, inter alia, in the process of adopting the new law on administrative contentious, by maintaining the binding nature of the prior administrative procedure despite proposals to renounce it[11]. What caused this obligation to be retained was the invocation by our late professor Antonie Iorgovan and his colleagues, rather, the judges from the High Court of Cassation and Justice, on the one hand, of the right to good administration, and, on the other, the European principle of the revocation of administrative acts. Let us recognize, in other terms, the public authorities' possibility of analyzing, rethinking the harmful

[10] See, on this issue, Verginia Vedinaş, *Drept administrativ,* X[th] edition, Ed. Universul Juridic, Bucharest, 2017, pp. 355-361.

[11] Antonie Iorgovan, Lilian Vişan, Alexandru-Sorin Ciobanu, Diana Iuliana Pasăre, *Legea contenciosului administrativ (Legea nr. 554/2004) cu modificările şi completările ulterioare. Comentariu şi jurisprudenţă,* Ed. Universul Juridic, Bucharest, 2008, pp. 167-170.

act and revoking it, if they realize they are wrong. And to prevent in this way the imminence of processes that mean time investment, resources of all kinds, which could be channeled to destinations that better serve the public and private interests alike, because **the public interest is a harmonious source of private legitimate interests.**

As a rule, we believe that European Union law must influence administrative law in Romania, as in other states, more in spirit than in its letter. We do not necessarily have to *"transplant*" some institutions and principles. The experience and history have taught us that there can be expressive regulations of an exceptional quality, without being observed in practice. That is why we believe that efficiency is gained by the influence it produces, through the *"impregnation"* of their spirits of national legal institutions.

One of the principles that have been recently discussed at the level of the public debate in our country was that of the *interinstitutional loyal cooperation*, consecrated as such by the two European Courts in Strasbourg and Luxembourg. It requires public authorities to show *"loyalty"* in functioning and how the activity of one is related to the other, in their collaboration. This was also contemplated by Montesquieu, the "father" of the principle of separation of powers in the state, who understood that never and nowhere the powers in the state cannot be completely separated from each other, that they must collaborate, in order to achieve the necessary equilibrium for any genuine democracies within the limits of their own powers. It is reflected in par. (4) of the first article of the Romanian Constitution, in the form resulting from the revision[12] and republishing[13].

This principle has not been sufficiently understood in practice, and we are referring to the two chiefs of the executive, institutions that belong to administrative and constitutional law, equally. The disputes between them have been evoked, metaphorically speaking, by the term *"conflict"*, which also gave the title of an interesting, indeed, specialized work[14].

It is obvious that from such a *"conflict"* that often evokes the idea of *"war"* between state authorities, there is no one to win. It also lose the *"belligerent parties"* to keep the language, but, most seriously, it also lose the citizens, the beneficiaries of the activity of the public authorities.

In the final part, we will refer, as we anticipated by summary, to the "attacks" on administrative law coming from representatives of other legal disciplines. As a rule, from private law. That throws away or definitely denies the "administrative" identity of some legal institutions. Reference has been made to and continues to be maintained to the *civil servant*, whom most of the labor law authors have endeavored to transfer to the labor law, considering it to be part of the large category of personnel. This happened in the post-war period, when the

[12] The review was made by Law no. 429/2003, published in the Official Gazette No. 669 of 22 September 2003.

[13] The re-publishing was made in the Official Gazette no. 767 of 31 October 2003.

[14] We have in mind the work of Bogdan Dima, *Conflictul între palate. Raporturile de putere dintre Parlament, Guvern și Președinte în România postcomunistă,* Ed. Hamangiu, Bucharest, 2014.

specificity of the totalitarian regime could justify, within certain limits, such a vision[15], as well as after 1990, when the perpetuation of such approaches is difficult to accept[16], which is why we strived to counter them argued[17]. As we have expressed in a relatively recent study[18], we consider that we are facing the tendencies *of forced privatization of the administrative law* that is generated, we believe, also by the unified, monistic vision, promoted by the new Civil Code, which has attracted a sort of *"two-step doctrinal movement. Firstly, civil law »swallowed« up its sub-branches, which had revealed and concealed their identity in decades, and we refer to family law, succession law or commercial law. Secondly, a forced »privatization« of administrative law is attempted, by cutting out from its regulation subject matter of traditional institutions and their transfer to private law[19]"*. I quoted in that article, along with public function, the public property, the public domain or the administrative contract.

5. Conclusions

The present study goes on continuation and development of our recent concerns about the destiny of administrative law in the context of transformations in evolution of the Romanian state, the change of its status, which has occurred expressly in the last 11 years, by joining the European Union. The Romanian public administration must integrate into the European Union's system of values, and this supposes *"a structural and functional reform of the public administration, in order to increase the ease, efficiency and consistency of the administrative act, reduce the bureaucracy, eliminate the dysfunctions and overlapping of competences and increase the degree of compatibility with the administration in the other states of the European Union* [20]". In such a context, the administrative law will also increase its role as a right of administration, as I said at the beginning of this study, without representing the *only applicable law to the administration*. We recognize that to the public administration also applies provisions from other

[15] We are referring to the promotion of the thesis of the uniqueness of the legal labor relationship by labor law authors, which encompasses in the phrase "working people" all those who perform socially useful work from the simplest job to the highest dignity in the state.

[16] As an example we invoke articles like: Șerban Beligrădeanu, *Considerații asupra raportului juridic de muncă al funcționarilor publici, precum și în legătură cu tipologia raporturilor juridice de muncă și o nouă viziune monistă asupra dreptului muncii,* „Dreptul" no. 8/2010, pp. 87-112; Șerban Beligrădeanu, *Considerații critice asupra unei viziuni administrative învechite în legătură cu natura juridică a raportului de serviciu al funcționarilor publici,* „Revista de drept privat" no. 6/2010, pp. 64-81.

[17] See Verginia Vedinaș, *Despre natura juridică a raportului de serviciu al funcționarilor publici,* „Revista de drept privat" no. 5/2010, pp. 190-207; Verginia Vedinaș, *Funcționarul public - instituție a dreptului administrativ,* „Pandectele române" no. 5/2011, pp. 82-95.

[18] Verginia Vedinaș, *Dreptul administrativ. Abordări contemporane sau despre "privatizarea" sa forțată,* „Revista de Drept public" no. 4/2017, pp. 15-20.

[19] *Idem*, p. 19.

[20] Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public,* Ed. Universul Juridic, Bucharest, 2016, p. 781.

branches of law, public or private, without thereby eliminating, as the doctrine of specialty constantly expresses, the *leading role of administrative law or its prerogative in the function of regulating the administration.* Equally, some internal doctrinal struggles must be considered, in which we consider that we should not remain unresponsive. We believe that by assuming, as a specialist, of a discipline, we also assume the role of pursuing its course, being a kind of "*seismograph"* of its evolution, and expressing ourselves in the necessary way to preserve and develop its identity.

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