“LUCIAN BLAGA” UNIVERSITY OF SIBIU

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PROCEDURE OF SOLVING ADMINISTRATIVE LITIGATIONS

SUMMARY OF DOCTORAL DISSERTATION

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Plan of dissertation

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General considerations

In a democratic society, functioning of the three state powers in a way which leads to the existence of equilibrium among them and implicitly to a good functioning of society, besides an extremely clear cut delimitation of the attributions of these powers there must be a permanent collaboration among them alongside with the existence of a reciprocal control.

The three principles, namely, equilibrium, collaboration and reciprocal control among the powers of the state are unanimously accepted values as being the very foundation on which the entire existence of any lawful state is based.

The reciprocal control exerted among the three powers of the state has two basic components: one being of a non-contentious nature, having a political origin consisting in the control of the legislative power upon the executive power and the second component of a contentious nature, reflected in the control performed by the judicial power upon the acts issued or adopted by the authorities of the central and local public administrations.

The judicial control exerted by the judicial power upon the executive power traditionally is named administrative contention, which at the same time constitutes the finality of accomplishing the act of administrative justice.

The judicial system of each state looked upon as an ensemble of organizational structures which lead to the accomplishment of the act of justice constitutes one of the essential components of civilization and social progress in any democracy.

Subject of the dissertation

Herein doctorial dissertation is treating the theme "PROCEDURE OF SOLVING ADMINIS-TRATIVE LITIGATIONS" as a component part of the institution of administrative contention within the system of Romanian law.

The necessity of approaching this theme was determined by an ever greater number of litigations arisen due to damages caused to legitimate rights and interests of persons by administrative acts, where in most of the cases the battles in the field of law are being fought between two apparently unequal parts, the public administration and the administered ones.

The theme proposed by herein dissertation is extremely generous and ambitious at the same time, with multidisciplinary connotations, situated at the limits of interference between the administrative law and the civil procedural law.

By means of this dissertation my intention is to suggest an analysis and insight both into the evolution in time of the matter, starting from its origins to the present day and the current mechanisms of functioning within the institution of the administrative contention in Romania, dealing mostly with special ways and proceedings in solving litigations arisen between the administration on one hand and the administered ones on the other.

The evolution in time of the institution of administrative contention in our national legal system has been distinctly analyzed in each chapter both as envisaged by the current legislation and under the incidence of old provisions in the matter of administrative contention.

Without claiming to exhaust actually the problems of complexity in the matter of administrative contention, herein dissertation intends to bring a personal contribution to the analysis of one of the most important components of the institution, namely the procedure of solving administrative litigations, a procedure looked upon as being an ensemble of juridical

norms which provisioned by the Law of administrative contention, the Code of civil procedure or other corresponding laws are regulating the way in which justice is being done in causes produced by litigations given to the competence of administrative contention courts, as well as enforcement procedures pronounced in decisions of such courts.

Recent legislative modifications in the matter of procedures in solving administrative litigations caused by coming into force of our new Code of civil procedure intervened between the date of choosing the theme and the date of finishing herein dissertation. Modifications and amendments to the normative acts which had as direct consequence the existence of an extremely reduced number of essays in the field to deal with the subject matter means that by inditing this dissertation, elements of novelty and originality were brought into the theoretical analysis of all factors having a decisive impact upon the procedure of solving litigations of administrative contention.

Structure of dissertation

This dissertation is rigorously worded and structured into eight distinct chapters, through which you find analyses both on notions pertaining the intrinsic structure of the institution of administrative contention and aspects through which an elaborate analysis is done on the special rulings of solving administrative contentious litigations.

The chapters of the study are structured in sections and subsections, which together are making up an extensive material of analysis of the juridical rulings governing procedures in solving this type of litigations, all of them being extended to an appropriate length as required by problems approached therein. The first seven chapters were dedicated to a concrete analysis of the problems suggested by the title of the dissertation, underlining the level of knowledge attained so far in the field, while the last chapter contains personal conclusions along with suggestions of laws formulated and envisaging future possible legislative adjustments.

The chapters of the essay and implicitly its sections and subsections do follow, in a way, the marginal titles of articles composing Law nr. 554/2004 referring to administrative contention, thus permitting to make a systemized analysis of procedures in solving litigations of administrative contention.

Besides its 8 chapters, the dissertation has a content, and its final section mentions the whole bibliography used in conceiving the essay, mention being made both on Romanian and foreign authors.

The first chapter of the study entitled "General considerations" contains two distinct sections in which we analyzed the notion, definition and main forms of administrative contention along with the historical evolution of administrative contention as an institution, starting from its beginnings up to the present day. Notions have been approached from their historical perspective also achieving a short review of the main definitions, forms and systems of administrative contention.

We may notice here that by Law nr. 554/2004, the Romanian law makers chose to synthesize for the first time a definition of the notion of administrative contention by which they meant "an activity of solving by competent administrative contention courts, according to organic laws, of litigations in which at least one of the parties is a public authority, and the conflict had arisen either by issuing or agreeing upon an administrative act, or by not solving within legal terms or by inexcusably refusing to solve a claim pertaining a right or legitimate cause".

Analyzing the forms of administrative contention and starting from the various definitions given to the meaning of this notion, depending on the character of the right to be capitalized this way, in the administrative specialty doctrine and implicitly within the content of herein dissertation, distinction is being made between the subjective administrative contention and the objective administrative contention, separation between the two forms of

contention is given by the strict defence of legitimate personal cause or the defence of legitimate public cause.

In this first chapter the study also deals with the analysis of different systems of administrative contention in the context of their historical evolution, distinctly being analyzed both by looking at the evolution of this institution in Romanian law and its evolution in other systems of law, such as the Anglo-Saxon, French or German-Roman juridical systems, resources that largely constitute the basis of development in worldwide administrative justice.

The Romanian judiciary system has got a unitary structure, administrative justice being done by means of common law courts, within which we find a system of specialized sections on administrative contention.

The second chapter of the work, named "general norms concerning the solving of administrative contention causes" is presenting in its first section a minute analysis of parties in administrative contention causes.

According to current legal provisions on administrative contention, closely obeying the constitutional norms, active procedural legitimacy in administrative contention refers to all damaged persons, without making any distinction between an individual and a juristic person or corporate body and further more in the case of the latter between a public law juristic person and a private law one. The legislator assimilates to damaged persons even a group of individual persons without juridical personality but still holder of subjective rights and legitimate private interests along with interested social organisms claiming a damage inflicted upon the public interest, or damages inflicted upon legal rights and interests of strictly determined individuals.

Within the sphere of incidence of persons to whom the law recognizes their active procedural quality we will find both the damaged person in one of his/her rights or in one of his/her legitimate interests inflicted by an administrative act having an individual character

and forwarded to another subject of law and the issuing public authority of an administrative act entered in the civil circuit which has the possibility to ask the court to annul its own illegal act.

In this chapter assigned to analyze the parties of an administrative contention we also distinctly treated the active legitimacy of the People's Lawyer and the participation of the prosecutor in litigations of administrative contention as a guaranty of general interests on behalf of society, the defence of law and order as well as of the rights and liberties of citizens.

A particular role within this chapter was assigned to the notion of administrative tutela where the tutelary body respectively the Prefect or the National Agency of Public Servants is supervising the activity of several other public authorities, thus lawfully gaining its active procedural quality to notify the court of law in order to annul a law breaking administrative act issued beforehand.

Our analysis in the second section of chapter two is highlighting several exceptions in cases of exerting the control of legality through administrative contention – the so called "fine of non-acceptance" during the interwar period – exceptions according to which the legislator understood that several administrative acts due to their juridical nature be excepted from under the exertion of legality control done by the judiciary.

While writing this work a special attention has been assigned to the competences of courts of law in matters of solving administrative contention causes, the institution being analyzed from a double perspective, one being namely its material competence, an attribute of law courts by which their sphere of activity is delimited vertically to fall into different categories of courts belonging to our judiciary system, the other regarding their territorial competence by which delimiting attributions is achieved on a horizontal line among different courts of law of the same rank.

The first classification - the one referring to material competence - is distinctively

dealing both with the competence of the courts of law in solving administrative contention causes on first trial and their competence in solving on appeal such litigations, depending on the location of issuing public institutions in the hierarchy of public administration offices. The analysis of material competence had been done taking into account the delimitation of this type of competence depending on the value criterion in the case of the causes dealing with payment of taxes and fees or in the case o administrative contracts.

The analysis we made on territorial competence in solving administrative litigations is remarking both the existence of an alternative competence in the case of actions actuated by the damaged person, plaintiff having in this case the possibility of claiming his rights both from the court seated in the area of the defendant and from the one seated in his own area of residence, besides which an exclusive territorial competence exists and operates in the cases initiated by the People's Lawyer who will always claim rights from courts located in the petitioner's area.

Exclusive territorial competence is also available in procedures of solving certain administrative litigations based on particular special laws which expressly regulate competences in finding solutions for such litigations.

In order to underline the importance of procedures in solving litigations of administrative contention we dedicated one whole, distinct central chapter, organized in 6 sections mainly focused on the rules defining on one hand the preliminary administrative procedures and on the other hand on afferent contentious procedures taking place in front of an administrative contention court of law.

Within the situations of juridical litigations borne between individual persons and public administration authorities, in most of the cases a preliminary claim is presented by which an intermediary way is found between the internal preventive control of the authority and the judiciary control by way of administrative contention, through which the damaged

persons have a much faster possibility, without costs, to obtain recognition of their interests or reparation of impingement of their rights, or even reparation of suffered prejudice.

Starting from this reason and examining current legal provisions, the section dedicated to this institution is analyzing both the juridical fundaments and their compulsory character, along with those cases in which, by exception, this procedure is not necessary to take place. Here we have in mind actions initiated by the Prefect, the People's Lawyer, the Public Ministry or the National Agency of Public Servants as well as the claims of damaged persons by ordinances or provisions of ordinances or any other situations strictly determined by the law. We also distinctly treated in this section the formal conditions a preliminary administrative procedure must comply with and also terms within which it must take place.

As for legislative changes intervened connected to administrative contention we may find one clarification of legislation pertaining terms under which the damaged person is called to perform the preliminary procedure. The legislator is setting a compulsory term for preliminary procedure to take place within 30 days since communication in the case of individual unilateral administrative acts and non-existence of any term for proceeding to the administrative appeal in the case of normative unilateral administrative acts, a case in which preliminary complaint may be done any time.

This legislative solution seems to be salutary since the initial version of administrative contention laws did not make any distinction between individual unilateral administrative acts and unilateral administrative acts having a normative character neither from the point of view of their compulsory preliminary procedure nor from the point of view of set terms for running through the procedure.

Referring to the sanction provided in case of not running a preliminary administrative procedure, lacking of such procedure constitutes a fine of non-acceptance for the action in administrative contention followed by a sanctioning from the part of the court of

law by declining the action as being inadmissible, without performing any investigation into the matter.

Contentious procedures afferent to the sphere of regulations concerning administrative contentions, not provided in special norms, still summarily treated are contained by Law nr. 554/2004, being completed inasmuch as they do not become incompatible with the specific power relationships between public authorities, on one hand, and the damaged persons in their lawful rights and interests, on the other hand, with the provisions of the civil procedure Code.

Solving causes in administrative contentions is largely being done by respecting the rules and procedural principles afferent to common law inasmuch the special law does not contain derogatory dispositions from this procedure.

Without entering the field of analyzing norms of procedure afferent to civil procedural law, our essay distinctly tries to treat the incidence of these norms in the case of administrative contentions; and this is because rulings concerning trials performed by first instances, upon which the special law has no dispositions are however common in a large extent with this last type of litigation.

So, provisions concerning the place of trying the cause, the order of trying the petitions, the chairman's attributions in the panel of judges, policing the trial session, verifying the presence of parties, observation of postponement cases, the way of solving exceptions of procedure and administration of evidences alongside with all the other procedural dispositions for running the trial will be properly applied in litigations of administrative contentions too.

As a main characteristic of administrative contentions, according to the dispositions included in art. 17, respectively art. 20 paragraph 2 of Law nr. 554/2004, procedures of solving administrative contentious litigations both on first trial and on appeal

are characterized by urgency, priority, publicity and last but not least accessibility from the point of view of taxation. In this respect, petitions claimed in courts of contention are to be tried urgently and primarily in public sessions, by a panel of judges as established by law, and for actions based and formulated according to administrative contention laws stamp duties will be charged as provisioned by current laws; cases not evaluable in amounts of money, excepting the ones pertaining as an object administrative contracts will be taxed according to value.

Special attention had been granted to the section dealing with the object of a judiciary action in cases of administrative contentions, our analysis being focused on the different types of actions afferent to administrative contention, administrative contracts as acts assimilated by legislator to administrative acts and last but not least on actions that may attack Government Ordinances.

The application for summons, contestations and counterclaim applications in administrative contention cases, documents which must be attached to applications for summons have been treated in their own subsections in which the special procedural aspects afferent to procedures regulated by the law of administrative contentions are thoroughly analyzed.

In the context of analyzing procedures in first trials of administrative contentions, contained in a distinct subsection of this chapter we treated the issue of introducing the servant involved in adopting a criticized act when the plaintiff is asking for compensation to be paid for his damage, alongside with the introduction of other lawful subjects or even requiring a hierarchically superior servant as guarantor.

Starting from the formulation in the doctrine of a proposal of a lege ferenda in favour of forcibly introducing the servant into the cause, in the essay we launched an argument of negative opinion relative to the proposal, rallying unreservedly to the solution

expressed by the doctrine according to which this obligation should not be commissioned to courts of law dealing in administrative contentions.

Related to the legality of an administrative act having an individual character, contained in a section dedicated to the exception of non-legality we drew the conclusion that this issue may be any time investigated in a law suit, irrelevant of the date of its issue, by way of non-legality exception, this meaning that legality of administrative acts having a normative character be pronounced in courts of administrative contention only through an action in annulment.

Chapter V of our dissertation was consecrated to analyzing decisions that may be pronounced in courts of law, these being largely identical with the ones we find in common law. The differences between court decisions pronounced in matters of administrative contentions and the ones pronounced in common law are to be found especially in the case of solutions that may be pronounced by the courts of law. In matters of administrative contentions, court decisions must be drafted and motivated within at most 30 days since pronouncement.

While analyzing in chapter VI various appeals against decisions pronounced by administrative contention courts we may see that legal provisions referring to administrative contention are in this matter exceptions from the rule of double degree of jurisdiction as it is present in common law, thus an appeal may be the only way to attack first trial decisions pronounced in courts of administrative contention.

The solution adopted by the legislator in ways of formulating an attack in administrative contentious litigations is different from the rules applied in common law and even the term of forwarding one is established to be within 15 days since communicating the first decision to the parties. Adopting another such term in declaring appeals by the legislator as against the 30 days stipulated in common law is aimed at the necessity of promptly solving

these types of litigations by the courts of law having in mind the singularity of such litigations.

In a derogatory way as against provisions in common law appeals against decisions pronounced by administrative contention courts are suspensive in execution.

Although the special law does not regulate a certain filtering procedure we do consider that a filtering procedure in the case of appeals should be applicable even in those administrative contentious litigations by which the High Court of Cassation and Justice is solving appeals formulated against decisions pronounced on first trials by the courts of appeal.

The new Code of civil procedure is also providing as extraordinary ways of attack, besides appeals, the revisions and challenges in annulment. Besides the provisions of art. 28 of the law concerning administrative contentions, against definitive solutions pronounced by administrative contention courts the extraordinary ways of attack will be possible to be formulated, respectively revisions and challenges in annulment under the stipulations and terms provisioned by the new Code of civil procedure.

In chapter VII of herein dissertation we analyzed the way in which decisions pronounced by administrative contention courts are to be executed.

In the field of administrative contention, enforced execution of several court decisions pronounced by courts of justice in the matter is to be performed according to special rules provisioned by the law through derogatory procedure from dispositions concerning court decisions to be executed according to common law. Specificity in the field of enforced execution in administrative contentions is based on enforcement or obligation imposed by the court of justice against public authorities entitled to issue administrative acts.

Our analysis on executing decisions pronounced in administrative contention courts was made having in mind the latest modifications intervened in the New Code of Civil

Procedure and the new Law nr. 138/2014 on administrative contention.

In the same way as in common law, as provisioned by the last legislative modifications, definitive court decisions pronounced in administrative contentions are titles of enforcement, to be executed as such, without being necessary to invest them with other execution formulae.

This chapter also contains distinct treatment on procedure rules concerning communication of decisions by courts of law, modalities of enforced execution of therein decisions alongside with the consequences that may be encountered in case of not executing decisions pronounced in matters of administrative contention.

As for the enforced execution of obligations imposed by courts of law in the matter of administrative contention it is necessary to make a distinction between the obligation of payments in amounts of money, established as titles of compensation for suffered moral or material damages or as established court costs, situation in which the common law provisions on enforced executions should be applied.

In the case of public authorities which were obliged "to make", obligation that due to its specific character cannot be executed but only by the authority itself through its representatives, the legislator understands to regulate a procedure of executing these decisions, derogatory from rulings of civil procedure, according to the specificity of the activity performed by public authorities, respectively issuing administrative acts.

The last chapter of the dissertation was assigned for several personal conclusions related to the subject, completed by a synthesis of suggested ferenda laws formulated for cases in which we saw that legislative norms should be completed or modified.

Suggestions of modifications to administrative contention laws were largely analyzed all through the dissertation, so we will resume just a few of them: modification of provisions on which the People's Lawyer activity is exerted in matters of administrative

contention, for establishing the necessity of preliminary agreement of notifying courts of justice, identically to the way in which action is formulated in subjective administrative contention by the Public Ministry, the petitioner being the only one to appreciate the necessity of introducing an action in administrative contention against a criticized act; modification of the text in article 3 paragraph 1 of administrative contention Law nr. 554/2004 for establishing the obligation of prefects to take action in re-establishing the legality of an illegal administrative act; modification of art. 3 paragraph 3 of the law, in the sense of eliminating the measure of rightful suspension in case of an administrative act being attacked by the prefect in an administrative contention court, respectively to apply in this case the same provisions concerning the suspension of executing administrative acts provided by art. 14 of the administrative contention law; modification of art. 123 paragraph 5 of text in fundamental law as well as provisions stipulated in art. 115 paragraph 7 of Law nr. 215/2001 referring to local public administration republished, which should comprise rulings issued by the Chairman of the County Council in the sphere of regulating the legality control done by the prefect; completion of art. 3 paragraph 2 of Law nr. 554/2004 which should expressly except the National Agency of Public Servants from paying stamp dues in the case of actions belonging to the sphere of incidence of administrative tutela exerted by this institution; modification of art. 193 paragraph 2 of the new Code of civil procedure, to grant the possibility of renouncing to the exception of lack of preliminary procedure, this being permitted to be lifted on the occasion of analysis performed while admitting in principle of petitions for intervention in one's own name in the case of litigations afferent to the sphere of regulating administrative contentions and not only by demurrer; modification of the text in article 16 of the law of administrative contention, in the sense of correlating it to its marginal name, by using in both cases the term servant, the notion covering entirely the sphere of regulation of this article both as regarding the quality of employee and the quality of public

servant or dignitary; modification of the text in art. 16 paragraph 2 of the law, in the sense that it should include in its sphere of settlement also the cases in which a written order has led to elaborating, issuing or drafting the act, as appropriate, the refusal of solving a petition in a subjective right or in a legitimate interest; modification of art. 23 of the administrative contention law, in the sense that first trial instances should be obliged to record by court of law concluding act, on the date of elapsing of the term of attack by appeal, acquiring the definitive character of a court of law decision by which totally or partially an administrative act of normative character, and at the same time, to order the ways of public acknowledgement of the decision within the term imposed by the law.

The nine modifications and completions brought to Law nr. 544/2004 of administrative contentions since its coming into force in its initial form, alongside with the twelve positive decisions pronounced by the Constitutional Court in the process of verifying the constitutionality of this law, constitute an ample process of adaptation and improvement of a legal framework of utmost importance, being placed in the sphere of interference between adopted administrative acts or issued by the authorities of public administration and damaged individual persons or corporate bodies in one of their rights or in one of their legitimate interests.

Thus we may appreciate that the adoption of the new legal framework with all its possible imperfections and needs of being modified and completed is circumscribing into the general activity of consolidation of the lawful state, in which the fundamental rights and liberties of man are respected and guaranteed, and the social economic reality of Romania, which undergoes a continuous process of change, will always impose corrections and internal adaptations of the ways in which our legislative system is responding to the needs of guaranteeing and respecting the citizens' rights.

The bibliography used for documentation in order to write this work is highlighted

at the end of the dissertation. Naturally, the footnotes are incorporated into the content of the work and both the cited text and its source are to be found on the same page in which they were inserted.

Herein dissertation is meant to be an interdisciplinary approach of procedures used in solving administrative litigations, overlooking both elements of administrative legislature and preponderantly elements of civil procedural law, which, within the current reforms in administration and justice define them in the national system of law as being special procedures, derogatory from the principles of common law.