Legal Aspects Regarding the Regulation of the Administrative Process in Romania and Italy

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Abstract
The institution of administrative disputes is a fundamental institution in any State in which the rule of law is a fundamental principle. It represents the means by which the citizens and other interested part can defend themselves against the government abuses.

The aim of the paper is to analyze the way in which the administrative process is regulated in both Italy and Romania and the role which this process is playing in protecting the subjects of law against the abuses of the administration.

This research study attempts to provide an answer to a number of main research questions:

1. *Which are the systems of administrative disputes and in which of them Italy and Romania can include their own system?*
2. *How is regulated the process of administrative disputes in Italy and Romania?*
3. *What are the similarities and differences between the two juridical systems?*

The study will be mainly qualitative and it will try to identify how the institution of administrative disputes works in Italy and Romania.

Trough this paper, academics and practitioners will better understand the way in which the administrative process is working in Italy and Romania and how both analyzed systems adapt their administrative values according to the needs of the citizens and of the rapidly changing environment.

Keywords: *administrative disputes, abuses, control, regulation, juridical system.*

1. Introductory notes

For a better understanding of the issue regarding the administrative process and administrative disputes, it is important to understand that the concept o *public administration* is different from the various countries of Europe.

The concept of public administration in the European countries, presents a dual characterization which can be found everywhere, regarding its material side, respectively, its organization side, but national public administrations in their concrete forms, are not the same (Manda, 2005, p. 13).

Thus, public administration appears as an activity that combines a multitude of means for obtaining a pre-ordered result. In other words, the essential idea of public administration is to organize, aspect which reveals another sense of the term, namely hierarchical organization, according to which the body which orders

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or organizing is superior to the bodies which implement and execute (Apostol Tofan (A), 2009, p. 235)

For these reasons it was established in the European countries a complex system of control on the public administration activity. The role of the control is to prevent errors in applying the decision, to remove them when they exist, to ensure continuous improvement of the activity in order to correspond to better social needs.

2. Types of control on public administration

The European doctrine stands today between internal control over public administration, judicial control of public administration and external control of non-judicial nature on public administration (Ziller, 1993, p. 434).

Application of the principle of separation of powers ensures a balance and control between the three powers: *legislative, executive and judicial*. These three powers mutually collaborate and check each other for proper functioning of the state. The collaboration and control of the judicial authorities (exercising judicial power) to ensure the correct application of the law by public authorities is one of the necessary conditions for strengthening the rule of law.

Control mechanisms of administration are very diverse from one country to another. We find today, a wide range of control, common to all EU countries, but showing different forms from one country to another. Two rules are characterizing in terms of the relationship citizen-administration: 1. the rule of law: legal rules subjecting its entire work to limit the power and 2. the force of the citizens to manage the compliance of the legal norms through judicial appeal (Dragos, 2002, p. 1).

Trough the various types of control we underline the judicial control of the public administration, which is Important for this study.

The judicial control of the public administration is entrusted to an independent body from the political power and administrative power, which has to settle definitively the disputes which arise in the functioning of public administration. The courts have, in this case, to stop the arbitrary administrative role, limiting the public administration action to respect the law, helping in this way to protect the rights and freedoms of citizens (Apostol Tofan (A), 2009, p. 238).

All these administrative disputes are solved by a judicial power around various systems of public administration trough the institution of administrative process.

3. Judicial systems of solving administrative disputes

In some Western European countries (Italy, France, Belgium etc.) the judicial review of administrative acts and the solving of administrative disputes is given to the so-called *administrative tribunals* and in countries such as England, Norway, Denmark, it is given in the common law courts.

There have been developed over time, three great systems of judicial control of public administration (Iorgovan, 2005, p. 487):

- *the system of the administrator judge* (characterized by solving the administrative disputes by the administrative authorities responsible with jurisdictional attributions);
- *the French system* of a separate administrative justice (characterized by resolution of conflicts with the administration of the courts specialized in this type of conflict, which are distinct instances of ordinary justice);
- *the Anglo-Saxon* system of ordinary courts (characterized by conflict resolution with the administration ordinary courts of common law

The Italian system of judicial control of public administration which will be analyzed in the following paragraphs of this paper can be included in the French system.

Romanian legislation has established in 1864 by creating the State Council, the French system, then the Anglo-Saxon system in 1866, with certain features, at a time or another, but maintained over time and administrator judge system and the administrative and jurisdictional authorities (Apostol Tofan (B), 2009, p. 295).

It can be observed that the institution of administrative process was regulated in various modes over time, and there can be done a lot of classification. In these regard, the doctrine of comparative law speaks bout the appeal procedures of the administrative process addressing to a judge and that they are subject to a procedure that involves the essential guarantees of judicial proceedings (Alexandru, Cărăuşan, Bucur, 2009, p. 530).

4. Regulations regarding administrative processes in Romania and Italy

4.1. Romania

The legal basis of the institution's administrative disputes in Romania it is represented by the Article 21: access to justice and Article 48 right of a person violated by a public authority of the Romanian Constitution and especially the organic Law no. 554/2004 of regulation the administrative disputes and administrative process.

Thus, Article 21 of the Romanian Constitution recognizes the free access of individuals to justice, stating that: "Every person may go to Court to protect the rights, freedoms and legitimate interests (...) Administrative special jurisdictions are optional and free". Article 48 of the Constitution provides that: "Any person violated in his own right or a legitimate interest of a public authority through an administrative act or failure of an application of the provisions of an administrative act within the statutory period, is entitled to the recognition of the right claimed or legitimate interest, annulment and repair the damage."

The article 123 paragraph (5) of the Constitution stipulates the right of the Prefect to impugn, in the court, the acts of local authorities, and especially, Article 126 paragraph (6) of the Constitution provides that judicial control of public administration is guaranteed with two exceptions expressly provided, and that is determined by the competence of the administrative courts to solve the claims of the persons who's rights were violated by ordinance or by the provisions of the unconstitutional Government ordinance.

The Law no. 29/1990 was the first legal regulation in administrative matters after the events of 1989 and the introduction of a democratic regime in Romania. Currently the administrative disputes have the legal basis on the Constitution, revised by referendum on 19 October 2003 and on the Law no 554/2004, adopted by the Parliament in 2 December 2004 and published in the Romanian Official Gazette Part I, no. 1154/7 December 2004 (the law suffered many revisions and armaments until today, last one on 29 October 2014[2]).

Article 1 of the Law No 554/2004 provides that "any person violated on a right or a legitimate interest by a public authority through an administrative act or failure within an application of an administrative act which is legal may appeal to the administrative court competent for the recognition of the claimed right or legitimate

[2] A major change was realized trough the Law no. 262/2007 amending and supplementing the Law of Administrative Disputes no. 554/2004

interest and repair the damage that was caused. Legitimate interest can be both private and public. "

It can be seen therefore that the current regulation is extremely open about intervention in matters of justice and freedom of a citizen guarantee the rights of the legitimate interests of the people and the legislature has filled an empty space in the field, resulting from the difference of democratic regulation of these institutions in the Romanian Constitution and the formalist legislation, oriented to guarantee the subjective right of persons

The first Law no. 29/1990, provided for the establishment of special sections and specialized on administrative disputes, created initially in the courts and the Supreme Court, then, as a result of changes from 1993 regarding the organization of the justice, there were created special sections in newly 15 Courts of Appeal[3].

Current, the Administrative disputes law no.554/2004 refers to the administrative tribunals, called “tribunal”, as represented by: the Section of administrative and fiscal disputes of the High Court of Cassation and Justice, the administrative and fiscal section of the Courts of appeal and the administrative and fiscal tribunals. Regarding the tribunals, as distinct and specialized institution, they are still not functioning today, although legislation provides their creation. According to article 30 of the Law no.554/2004 regarding transitional arrangements: "until the establishment of administrative and fiscal tribunals, disputes shall be solved by the administrative sections of the courts.

4.2. Italy

Like in Romania, in Italy, the Constitution stipulates clear in the Article 113 that: “The judicial safeguarding of rights and legitimate interests before the bodies of ordinary or administrative justice is always permitted against acts of the public administration. Such judicial protection may not be excluded or limited to particular kinds of appeal or for particular categories of acts. The law determines which judicial bodies are empowered to annul acts of public administration in the cases and with the consequences provided for by the law itself.”

In Italy, appeals of administrative decisions are brought before the administrative judge whose competence differs from that of the common law judge. According to the Article 103 of the Italian Constitution, the administrative judge has jurisdiction over legally protected interests in matters regarding the administration, and individual rights in the specific areas specified in the law (areas of exclusive jurisdiction). Legally protected interests may be defined as the advantages granted to an individual through property subject to the administration’s power. Legally protected interests involve attributing to this legal individual the possibility of influencing the proper exercise of administrative power.

Originally, there was only one level of instance before the litigation sections of the Council of State, which also includes advisory sections (the fourth section, which was the first litigation section, was created in 1889). In 1971, the regional administrative tribunals were created and the Council of State was vested with the power of appeal.

Until the enactment of *Law No. 241/1990 New rules regarding the administrative procedure and the right to access to administrative documents,* no specific provision of law regulated administrative procedure in a general way. Therefore,

[3] An exhaustive presentation of the Romanian judicial system, is available on the website of the Superior Council of Magistracy at the link: http://www.csm1909.ro/csm/index.php?cmd=9401&lb=en , accessed: 5.01.2015

the legal protection of private individuals was quite difficult when public powers omitted to act (Parisio, 2013, p. 4).

Until 2010, the administrative process, unlike the civil and criminal process, had not its own code. The existing procedural rules, well and now introduced in a systematic way (Consolidated Law on the Council of State, the Royal Decree of June 26, 1924, no.1054) now occasionally (by many special laws), not allowed to grasp the system as a whole, since this had been created by the 'wise slowness' of the judges, who, by making a summary and interpretation of the rules available, had, from time to time and gradually building a set basically administrative procedure principles (Raiola, 2010, p. 12).

Thus, in 2010 was adopted the *Code of the Administrative Process*, by the promulgation of the Legislative Decree no. 104/2010, published in the Italian Official Gazette, Part I, No. 148/ 7 July 2010.

In the first article the Code stated that:"The administrative jurisdiction ensures protection full and effective according to the principles of the Constitution and European law". The second article of the code states the principles which can be applied: "The administrative process implements the principles of equality of the parties, the adversarial and due process provided for in Article 111[4], first paragraph, of the Constitution.

The Code stipulates the organization and the administrative justice in Italy which is composed by various judicial bodies and competences. The supreme judicial body is the Council of State, which judges in appeals and the other courts of first instance of the administrative order (regional administrative courts) have jurisdiction over legally protected interests in matters involving the administration, and over individual rights in the specific fields mentioned in the law.

In Sicily[5] instead of the Council of state is functioning the Council of administrative justice, which has a litigation section having the power to appeal decisions reached by the regional administrative tribunals in this region (in addition to an advisory section with a jurisdiction limited to the regional territory).

There are also 21 regional administrative courts, operating in the regional capitals, and eight special assignment sections.

5. Final remarks and conclusions

The organization of administrative justice in a State depends on the conception and structure of the administrative system. Both analyzed countries present numerous differences in their systems of public administration, many of them due to the historical legacies.

Legal aspects regarding administrative disputes	**Administrative systems**	
	Romania	***Italy***
Principles regarding administrative disputes	Art. 21; 48; 52; 123 (5); 126 (6) of the Constitution	Art. 100; 103; 111; 113 of the Constitution
Regulation of the administrative process	Law no 554/2004 on administrative disputes;	Law No. 241/1990 New rules regarding the

[4] Jurisdiction is implemented through due process regulated by law. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials (Article 111, first paragraph, of the Italian Republic Constitution).

[5] It is a region with special statute according to the Article 116 of the Italian Constitution

Legal aspects regarding administrative disputes	Administrative systems	
	Romania	***Italy***
and disputes	competed with the provisions of the: New Civil Code (Law 287/2009) New Code of Civil Procedure (Law no. 134/2010)	administrative procedure and the right to access to administrative documents Legislative Decree no. 104/2010 of the Code of the Administrative Process
Common Judicial bodies	15 Courts of Appeal with the Section of Administrative and Fiscal litigation; 42 Tribunals, with Section of Administrative and Fiscal litigation (de facto) First instance courts (they have some attributions in solving some administrative disputes)	21 Regional Administrative Courts; 29 Regional Administrative Tribunals The special Administrative Tribunal of the Trentino Alto Adige Region
Supreme Judicial bodies	High Court of Cassation and Justice – The Section of Administrative and Fiscal Litigation	Council of State Council of administrative justice in the Sicily Region High Court of Cassation and Justice (only in exceptional cases according to the Constitution and provision of law)
Type of Jurisdiction	Unitary jurisdiction	Dualistic jurisdiction

Table 1: Comparison on administrative justice regulations in Romania in Italy
Source: Author

From the Table 1, it can be observed the conception regarding both analyzed administrative systems. In one case the administration it was put on the same level with individuals and thus considered equal status jurisdictions attract a single common intervention, in which we have the establishment of unitary jurisdiction or monism. On the second case, specificity of the public administration is pointed out in order to justify the competence of a different judge, and we refer in this case, as the duality or dualism jurisdictions (see also, Chaloyard, 2001, p. 430) .

In Romania, it remains today, to some extent, the Spanish system[6], as we can find the administrative and fiscal sections, at the Tribunals, the Courts of Appeal and the High Court of Cassation and Justice**.** We can also speak about a type of specialization of judges of the administrative and fiscal sections, given by the fact that they are judging a different type of litigation than the traditional one, which is subject to the common law.

In comparison with Romania, in Italy, we can speak about a duality of jurisdiction: the Supreme Court has no jurisdiction to review decisions of certain courts with special jurisdiction in administrative matters (the exceptions are few are strictly regulated). This is the Italian case which created a special jurisdiction in charge with solving the administrative process, by creating in 1971 the Regional Administrative Tribunals and by giving to Council of State not only the state of

[6] Spain combines the principle of unity of jurisdiction to that of specialization of judges. In Spain there are at all levels of jurisdictions administrative sections within the ordinary courts (Apostol Tofan (A), 2009, p. 259).

court responsible for advising the Government, but also the competence in solving administrative litigations.

Even if apparently we can observe a lot of differences and few similarities between the two systems of administrative process, it has to be underlined that in both states, the regulations of these procedures have the same main objectives: the protection of the citizen in front of the discretionary power of the administration and also the contribution to the realization of a right promoted by the European Union: *the right to a good administration*[7].

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[7] The Right to good administration is stipulated in the Article 41 of the Charter of Fundamental Rights of the European Union, adopted in 18 December 2000, and published in Official Journal of the European Community (C 364) No.18/2000.

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