The relation between the substantial law and procedural law in defending subjective rights and legitimate interests

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Abstract: *Taking into account that the Romanian Constitution mentions the "state of law" and "constitutional democracy", concomitantly specifying the essential values- human dignity, citizens' rights and freedoms, the free development of human personality, justice and political pluralism- defended by the domestic legal order, it seems of a real practical interest to notice the concrete means established in order to protect the above mentioned values.*

As it has been mentioned before, the contentious administrative represents one of the most efficient ways under which the values constitutionally affirmed are guaranteed and defended. The contentious administrative basically answers the old question: „Quis custodiet custodes?", question that comprises one of the most difficult obstacles against the state of law actualization: to find the most efficient procedural ways for the state bodies able to use, directly or indirectly, the coercion force in order to make the citizens observe the laws, to be in their turn under the situation to observe the same laws.

As the contentious administrative represents the courts of law activity meant to settle the conflicts whereas at least one of the parties is a public authority, we will try, while evoking procedural aspects, procedural means available for someone prejudiced by a public authority, to stress the weight of the procedural rules in guarantying and defending effectively the citizens' rights and legitimate interests.

Key words: procedural law, administrative acts, civil litigation, Public Ministry.

I. Introductive considerations. The state of law. The state of law premises

At the first look, to define the state of law, or in different terms, the state of legality, seems easy enough. As a matter of fact, it is said that the state of law is characterized by achieving the -rule of law- in its entire activity, either in relation with the citizens either with various social organizations within its territory. Used accordingly, the "state of law" notion is encountered even under some constitutional texts.

Analyzing more deeply, the state of law question appears though to be much more complicated, following the fact that the state, as institutionalized organization, having sovereignty, of the population on a specific territory, never acts as such in its domestic affairs, but by means of its various bodies, this acknowledgment being valid for the so called "direct democracies" as well as for the representative ones.

The state of law is to be understood as a state organized on the state power separation basis, in whose application the justice acquires a real independence and following under its legislation the promoting of rights and freedoms inherent to the human nature, a state which ensures the strict observance of its regulations by the entirety of its bodies in all their activity.

Are considered to be premises (conditions) of the state of law, the following: the accreditation of a new conception regarding the state (especially under the following aspects: the voluntary or consensual nature of the state, the delimitation of the state from the civil society, the state responsibility and of the authorities that compose it, the restraining of the state interference within society to minimal fields and adequate and reasonable forms); the capitalization, under contemporary conditions, given the insurmountable political realities, of the reasons and the mechanism of the powers separation; the instauration and the thoroughness of a real and authentic democracy; the institutionalization and the guarantying of the human and citizen rights; the structuring of the coherent and hierarchical legal order and the guarantee of that order[1]. Far from being incompatible, these conditions or premises complete each other and interact in a convergent way.

With regard to the regulation systems within the state of law these are considered to be the following: the political control over the executive exercised by the parliament, the administrative control, the jurisdictional control over the legality of administrative acts[2], the control of law constitutionality, the reconciling procedure, the free access to justice and the organizing of the judicial activity under several jurisdiction degrees.

The jurisdictional control over the legal-

[1] **I. Deleanu** – *„Instituţii şi proceduri constituţionale – tratat –"*, Ed. Servo-Sat, Arad, 2001, p. 59. See also **T. Draganu** – *„Introducere în teoria si practica statului de drept."*, Ed. Dacia, Cluj-Napoca, 1992, p. 13-75, where the premises of the state of law are considered to be the following: rooting under the civically conscience the conviction that there are rights inherent to the human nature which are opposable to the state, a democratic system to enact the legislation, the state powers separation, the independence of justice".

[2] See as well, accordingly **Sofia Popescu** – *„Statul de drept şi controlul respectării legii de către autorităţile administrative"*, Studii de drept românesc nr. 2/1993, p. 135, **I. Deleanu, M. Enache** – *„Statul de drept"*, Dreptul nr. 7/1993, **I. Deleanu, M. Enache** – *„Premisele şi mecanismele statului de drept"*, Dreptul nr. 12/1993.

ity of administrative acts represents maybe the most effective form of control over the legality of these acts, as it is achieved from the exterior of the system of the state administration bodies, by the judicial authority, independent, and during a procedure grounded among others on the right to defend, the contradiction, the equality of the litigation parties, the active role of the court of law, the possibility of means of attack to non legal or ungrounded decision. It is entrusted either to common law courts of law either to specialized courts of law.

Regarding the political control and especially the administrative one, the judicial control features a few peculiar dimensions: a) it is a rather narrow control type, as only the legality of the administrative act is subjected to it, and its opportunity not; b) the jurisdictional control always presumes an intimation from the party injured by the administration prejudicing behavior by issuing the administrative act considered to be illegal; c) this control type is, simultaneously, more concrete and more profound, because it does not target- as the political or administrative one- especially the finality, the effectiveness, the opportunity of the controlled administrative act, but – precisely and considerately- starting from the subjective right alleged, opposite to the administrative body, it makes essential for of the act issued by that body to comply with the law; d) the jurisdictional control is executed within the framework of a pre-established and exigent procedure, grounded mainly on contradiction, the obligation to motivate the solution and the settled authority for the issued decision; e) the jurisdictional control cannot lead to the reforming of the administrative act, but only to its annulment or removal from the litigation settlement. When the administrative act is annulled, the decision issued by the court of law is opposable erga omnes.

II. Procedural legal norms. Practical importance. Relation with material law

A) Civil procedural norms: As it has been said, the civil procedural law represents the entirety of the legal norms that regulate the way of judgment by the courts of law of the causes regarding the civil subjective rights or legitimate interests that can be realized only by means of justice, as well as the enforced execution of the legal decisions or other writs of executions [3]. Therefore, not only the situations under which the capitalization of a subjective right is attempted are taken into account, but also those situation, established by law, under which the actualization or defending of an interest by means of justice are followed.

It results that this distinctive branch of the legal system guarantees the effectiveness of the material law provisions that consecrates subjective rights for the natural or legal persons and which would remain otherwise ineffective. Otherwise said, the relation between the civil material law and the civil procedural law gives expression to the correlation between content and form[4].

[3] **V.M. Ciobanu-** *„Tratat teoretic şi practic de procedură civilă"*, vol. I, Teoria generală, Ed. Naţional, 1997, p. 158.

[4] The connection between the two legal branches was really suggestively stressed in the presenting report of the Civil procedure code by the State Council, back in 1865, that stated *„Procedure is the heart of a state's ... The Civil code, without procedure, is like a body without heart, is like a good and complete machine without its movement power"*.

In order to stress the same connection between the material law and the procedural law, it was said that the material law comprises all the legal norms that regulate the social relations within our country.

The legal character of these norms is given by the possibility of their actualization on judicial way, a form of the state coercion. This does not mean that in the great majority of the social relations, the assumed obligations, as the rules of social conduct, are not executed voluntarily. But there always exists the possibility of their execution by coercion when they are not observed. The procedural law is the other side of the material law, it is the punishing aspect of the material law, as the usual mean under which the reestablishing of a certain transgressed right is the judicial way. The civil material law would be ineffective if the civil litigation does not ensure its execution and vice versa, the civil litigation would be inconceivable without a material law to capitalize[5].

In this mutual bond between the legal relation of substance and its external form, i.e. the procedure to follow for its performance, the material law relation is representing the basis, which means- naturally- that the form always adapts to the content, so that, ultimately, the characteristics of the material law determine the characteristics of the procedural law and any alteration in the substance of the first inevitably entails the alteration of the latter. The indissoluble unity between the material and procedural law, without any of them to be possibly confounded with the other, can be observed analyzing various institutions and procedural principles, nothing more than the reflex of the civil law institutions and principles.

The essence of the civil litigation subsists in protecting rights, in establishing their real and objective existence. The civil litigation does not form new subjective rights, but confirms those already existing, while the guarantying of rights imposes establishment of objective truth in each and every litigation.

The civil litigation, promoted by action, represents the form under which the state ensures the law compliance in particular cases where the legal norm were violated, while the exercise of the legal action exceeds the narrow framework offered by the settled case- where the question of effective settlement of a conflict of interests where two subjective rights clash arises- and can be viewed as a form of actualization of the legality principle, under which the legal protection granted by the state to its citizens is capitalized[6].

In our country there is no „administrative justice", a system organized by administrative courts or tribunals, the contentious administrative being under the competence of the common law courts. As such, no administrative procedure constituted under the same conditions as the civil or penal procedures exists, and the litigations regarding the administrative legal relations are being settled under the rules of the civil procedure. Naturally, some special procedure norms may as well exist within normative acts that regulate the control of legality of the administrative acts, but it cannot be sustained that they form an administrative procedure, because they just introduce some derogatory rules, to be completed with the provisions of the Civil procedure code. Therefore, for instance, art. 28 paragraph 1 under Law no. 554/2004 on the contentious administrative expressly stipulates this solution, as follows: „the pro -

[5] **A. Hilsenrad** – *„Procesul civil în RPR"*, Stiintifica Publishing House, Bucharest, 1957, p. 15.

[6] **Ibidem**, p. 230.

visions of the hereby law are completed with the provisions of the Civil procedure code, at the extent they are not incompatible with the specific of the authority relation between the public authorities, on one hand, and the persons injured in their rights or legitimate interests, on the other hand, and also with the procedure regulated under the hereby law. The compatibility of the execution of some Civil procedure code norms is established by the court of law, when ruling over the exceptions".

B) Procedural aspects in the Law of contentious administrative: In the absence of an Administrative procedure code, one of the objectives taken into account at the enactment of the Law no. 554/2004 was to confer a procedural framework special for litigation between the injured private person on one side and the public authority on the other side, procedural framework adapted to the present legal realities. Nevertheless, the above mentioned law does not strictly comprise procedural provisions, many of its provisions being substantial law provisions. Examples can be made accordingly, the entire definitions catalogue within the second article of the law, as well as those norms that regulate on that which doctrine has identified as the admissibility conditions of the direct action in contentious administrative. We take into account only some of these conditions, respectively: the infringement to be produced under an administrative act; the act to injure either a subjective right, either a legitimate interest, private or public; the injuring administrative act to be issued by a public authority, because the other conditions, mainly related to the execution of the prior administrative procedure and filing the legal action in a certain period of time, are regulated under provisions with procedural character.

The substantial law provisions, especially those referring to the concepts of "subjective law", "private or public legitimate interest", "public authority", "administrative act", represent of course, problems that concern the substance of a contentious administrative legal action. Exactly as any other civil litigation- notion used here under its most extended meaning, opposite to the notion of penal litigation- , problems that imply the substance of the cause will be inquired after the observance of certain procedural conditions.

We will limit within the hereby study, to analyze those procedural aspects regarding which the Law of contentious administrative comprises derogatory regulations from the common law. The procedure in the contentious administrative field is usually demarcated within the administrative doctrine, the substantial judgment and the possible solutions; the recourse and the decision execution.

1. The notification of the court of law: It must be stated again that, grounded on the previous regulation on the contentious administrative, Law no. 29/1990, the court of law could be notified by: the legal or natural person virtually injured (typical situation); prefect (administrative tutelage control); they who consider themselves injured or any interested person grounded on a special regulation (cases stipulated, for instance, under Law no. 67/2004 on the election of the local public administration authorities); the one who challenges a jurisdictional- administrative act.

The present regulation has extended

considerably the area of referral to court subjects (subjects that can notify the contentious administrative court of law).

a. Therefore, the concept of **prejudiced person** has been defined as including, among legal and natural persons, and "the group of natural persons, entitled to subjective rights or legitimate private interests injured by administrative acts", as well as the "social bodies that invoke the infringement of a public interest under the challenged administrative act".

In a critical opinion, the possibility to file the legal action by groups of persons- a collective action, grounded on the community of injured rights and interests, exercised mutually by several natural persons- is unconstitutional related to article 52 under the Constitution which refers exclusively to persons. Altogether it is sustained that if the text is construed for the separate filing of the action by the natural persons, it would double uselessly the provisions of article 47 under the Civil procedure code ("several persons may be together plaintiff and defendant if the object of the litigation is a common right or obligation or if their rights or obligations have the same cause")[7].

b. Regarding the administrative trusteeship, we notice that its area has expanded, the text of art 3 under the law providing the such trusteeship control being exercised by the **prefect**, on one hand, the said having the right to challenge *any act of a local public authority, deemed illegal* and by the **National Agency of Civil Servants**, on the other hand, the said having the right to challenge *any act of a central or local public authority which infringes the legislation regarding the public office.*

Art. 1, paragraph 8 of the law, also provides, additionally to the two subjects already mentioned – the prefect and the National Agency of Civil Servants – and **any other person of public law** affected in one of their right, when a legitimate interest has been infringed. The active trial legitimacy of the people of public law may be concluded from the general wording of paragraph 1 under art 1 regarding the persons because the persons may be natural or legal, private or public.

The legal persons of public law are the Romanian state, represented by the Ministry of Public Finances, the Government (the Chancery of the Prime-Minister is the one with legal personality), ministries, county, city, locality and other entities stated as such by means of laws or government decisions.

The legal persons of public law cannot be mistaken for public authorities because some of the latter do not have personal budget, others do not have personal patrimony, but only manage the state's patrimony. The legal personality is acquired only expressly by law or government decision. The mere competence of issuing administrative acts does not equal to the acquirement of the personality of public law. Therefore, the Ombudsman, even though it has a personal budget within the state budget, it is not a public law person as it does not have public property assets. Also, the prefect is not a public law person as it does not have a personal budget or personal assets[8].

[7] **D.C. Dragoş** – *„Legea contenciosului administrativ. Comentarii şi explicaţii"*, All Beck Publishing House, Bucharest, 2005, p. 67-68.

[8] **D.C. Dragoş** – *„Legea contenciosului administrativ. Comentarii şi explicaţii"*, supracit., pp. 59. The author shows that there are public authorities, which are at the same time civil legal persons (a ministry) or the legal representatives of a civil legal person (the mayor represents the locality or the city before the law), but there are cases when a public authority is vested with public power prerogatives, but it does not have civil legal personality and does not represent such person before the law (the local or county council).

The public authorities can take legal action in the contentious administrative, based on art 1, paragraph 8 only as representatives of legal persons of public law when there has been infringed a subjective right provided by the law for the said person or when a public interest has been infringed. These actions shall be rejected if it is not proved the subjective right or the affected legitimate public interest or if the public authority acts on its own name[9].

Under a different construal, the law's initiator shows that, according to the text's internal logics, each public authority may act based in art 1, paragraph 8 under the law, grounded on a legitimate public interest, within an objective contentious administrative and that the action's object is represented only by the cancellation of the normative administrative acts[10].

c. The implementation of the **Ombudsman** institution among the topics which have special active trail legitimacy in the contentious administrative field comes after a debated begun when the Law no. 29/1990 was still applied, but through the enactment process of the law, the Ombudsman in office, has criticized the bill, deeming that the respective institution could not replace the citizens in the exercise of their trial rights, it could not assume the citizens' interests as it would be against the institution's spirit, whose origins reside in the Northern Ombudsman, which in its activity approaches a non-contentious ethic regarding the claims' settlement, using for such purpose the mediation procedure, without initiating a trial.

By means of the decision no. 507/2004[11], the Constitutional Court rejected the unconstitutionality objection submitted by the Ombudsman, according to which the institution would replace the affected natural person in one of their rights, by exercising the notification duty of the contentious administrative court of law. Exercising the duty stipulated under the criticized legal text, the Ombudsman does not replace the trial rights of the citizen, but supports the citizen, inclusively by submitting the action to the contentious administrative court of law, the said being the only one who decides to continue or not the trial against the abusive public authority.

d. The dispute regarding the active trial legitimacy of the **prosecutor** in the contentious administrative litigation started more than 30 years ago, when the Law no. 1/1967 was applied, which law stipulated the mandatory presence of the prosecutor in the judgment of contentious administrative litigation and it has been deepened throughout this period by new studies[12]. Thus, in an opinion, it has been mentioned that the prosecutor can take legal action against an administrative act, acting as state representative in order to monitor the law observance when a state interest is at stake, when an imperative legal norm is infringed or the interest of other parties in the trial, except for the holder of the infringed right if the said has not challenged the administrative act in question[13].

[9] **Ibidem**, p. 60.

[10] **A. Iorgovan** – *„Noua lege a contenciosului administrativ. Geneză şi explicaţii"*, Ed. Roata, Bucureşti, 2004, pp. 275.

[11] Published in the Official Gazette of Romania no. 1154/07.12.2004

[12] **Dana Apostol Tofan** – *„Modificări esenţiale aduse instituţiei contenciosului administrativ prin noua lege cadru în materie (partea a II-a)"*, Curierul Judiciar no. 4/2005, p. 80.

[13] **D. Brezoianu** *apud.* **Dana Apostol Tofan** – *„Modificări esenţiale aduse instituţiei contenciosului ... "*, supracit., pp. 80. Regarding the opinions expressed in this respect, based on the Law no. 1/1967 and on the Law no. 29/1990, see **D.C. Dragoş**, *op.cit.*, p. 33-35.

According to the current regulation, the Public Ministry, subsequently exercising the duties stipulated under its organic law, deems that the infringement of the rights, liberties and legitimate interest of the people are due to the existence of unilateral individual administrative acts issued by the public authorities by exceeding the powers granted[14], it notifies the contentious administrative court of law at the domicile of the natural person or at the headquarters of the affected legal person. The plaintiff rightfully acquires the plaintiff capacity, following to be cited according to such capacity.

Moreover, when the Public Ministry deems that, due to such excessive power resulted in the issuance of a normative administrative act, it is affected a public interest, there shall be notified the contentious administrative court of law competent at the headquarters of the issuing public authority.

These provisions assign purposefulness to the principle stipulated under art 131, paragraph 1 of the republished Constitution, which principles clearly states the role of the Public Ministry as representative of the society's general interests and protector of the rightful order and, also, of the citizens' rights and liberties during the legal activity[15].

The Public Ministry may file, based on the contentious administrative, three types of actions: legal action in the subjective contentious administrative, legal action in the objective contentious administrative and the legal action filed by the Public Ministry according to art 1, paragraph 8, in order to defend its own rights, namely to defend the public interest, in its capacity as public entity.

Given that the law speaks about the Public Ministry and not about prosecutors, it has been stated that the actions before the contentious administrative may be filed only by the general prosecutor of Romania because, according to art 68 of the Law no. 304/2004 *"The General Prosecutor of the near the High Court of Cassation and Justice represents the Public Ministry in its relations with the other public authorities and with any other legal or natural persons from Romania or abroad".* The General Prosecutor of Romania may, however, delegate such duty to other prosecutors, respectively the general prosecutors near the appeal courts of law[16].

The subjective contentious administrative action, for and in the name of the natural or legal person, is a legal action similar with the one filed by the Ombudsman, except of the case that the Ombudsman may take action only in the name of natural persons. In such case, the competent court of law is the one at the natural person's domicile or at the legal person's headquarters and the natural or legal person is rightful party under the trial, undertaking it entirely.

The object of the legal action is represented by an administrative act, issued by exceeding the assigned powers and not the unjustified refusal to solve a request or the

[14] For the analysis of the concept of excessive power in the Romanian law and compared law, see **Dana Apostol Tofan**, *„Puterea discreţionară şi excesul de putere al autorităţilor publice"*, Ed. All Beck, Bucureşti, 1999.

[15] **A. Iorgovan** – *„Noua lege a contenciosului administrativ ..."*, supracit., pp. 270. See, for a wide approach of the referral to court topics, **Verginia Vedinaş** – *„Unele consideraţii teoretice şi implicaţii practice privind noua lege a contenciosului administrativ no. 554/2004"*, Dreptul no. 5/2005, p. 9-18.

[16] **D.C. Dragoş**, *op.cit.*, p. 37. Contrary, see **A. Iorgovan** – *„Noua lege a contenciosului administrativ ..."*, supracit., pp. 270, where it is mentioned that "the legislator grants the Public Ministry the possibility, and particularly to the prosecutors associated in offices, where they fulfill their duties, to file actions in the contentious administrative".

administrative silence, which means that the challenged act is illegal from a subjective perspective given that the assessment right of the public authority, assigned by a certain law or arising from the law's silence, has been exercised by infringing the fundamental rights and liberties of the citizens, as stipulated under the Constitution or law, namely by exceeding the assigned powers, as defined under the law.

A special provision, which we find only for actions in the objective contentious of the Public Ministry, provides that the court of law, *ex officio* or on request may bring before the court the interested social entities with legal personality. This is a personal and voluntary intervention – if it is performed upon the request of the interested entity or forced – if it is made *ex officio* by the court of law.

Regarding such sort of "forced intervention", it has been said that it represents an objectionable legal solution because "one cannot force someone to benefit from a trial", the respective entities being the sole which "may appreciate the best if they are interested in intervening in the trial". The forced intervention (if other people are brought before the court, as regulated under art 57-59 of the Code of civil procedure) is meant to bring in the trial people to be compelled, by means of legal decision, or who are subject to the respective decision, and not people who would profit from such decision, the intervention occurring only subsequently the parties' initiative.

e. A novelty element regarding the referral to court topics is represented by the distinct provision of the possibility that the action is filed by the public authority which has issued the illegal administrative act, which authority may request the court of law to cancel the act if it cannot be cancelled as it has entered in the civil circuit and has produced legal effects; the court of law may rule, on request, upon the legality of the civil documents concluded based on the illegal administrative act and upon its civil effects.

The first necessary statement regarding the wording of art 1, paragraph 6 of the law, it is the one taking into account the name of the action available for the issuing public authority. Therefore, the law mentions *an action for the nullity acknowledgement*, which may create confusion between such action, in fact an absolute nullity action[17], and what the civil trial doctrine understands by means of an acknowledging action. Seen as opposed to the action for accomplishment, the acknowledging action (the acknowledgment or confirmation of a right) has as object the compliant filed by the plaintiff requesting the court of law to acknowledge the existence of a right or the inexistence of a right of the defendant against the plaintiff. The decisions ruled under such action do not represent writs of execution and, on the other hand, there cannot be filed acknowledging actions as long as the party has the way open to file an action for the accomplishment of a right.

A second statement concerns the filing term for such an action. There must be reminded, on one hand, that neither art 1, paragraph 6 nor art 11, regarding the filing terms of the actions in the contentious administra-

[17] In lack of other provisions seen as principles, a distinction of the nullity of the administrative acts in absolute nullities and relative nullities can be made only for the fields which contain clear provisions of the law, such as art. 17 of the GD no 2/2001. Beyond such express provisions, the distinction between the absolute nullity and the relative nullity has no practical relevance; therefore "the theory of the nullity's uniqueness" can be supported.

tive, have not considered such sort of action. On the other hand, the action for nullity stipulated under the common law is an action with no write-off term and the common law becomes applicable in lack of a special, derogative provision. Taking into account such aspects, the legal practice has faced a real problem regarding the term available for the issuing public authority to request the court of law to cancel its own illegal act.

By means of decisions ruled in 2006, the High Court of Cassation and Justice stated that the new legal provision cannot provide the issuing public authority with an action for the cancellation of the administrative act, which could be exercised whenever because the said would severely infringe the general principle of stability and safety with regard to the civil legal rapport and, additionally, it would create a favorable situation for the issuing authority, detrimental to other law issues, which authority saw itself needed to claim and acknowledge its own fault of issuing an illegal act, which had not cancelled, therefore it entered the civil circuit and had effects[18].

Therefore, the High Court of Cassation and Justice mentioned that, while art 11 of the Law no. 554/2004 regulated the terms for the filing of an action in the contentious administrative and paragraph 4 of the same article clearly stated which were the situations that the action might be filed whenever and such situations did not provide the one stipulated under art 1, paragraph 6 of the law, the actions of the issuing authority based on text might not be filed but in compliance of the terms stipulated under art 11 of the law, representing the law for the contentious administrative.

There was also deemed that the applicability of the common law would mean the annihilation of the special regulation, the ignorance of the principle according to which the special rule derogates from the general rule. Finally, the court of law deemed that the issue in question presented similarities with the jurisprudence of the European Court of the Human Rights, which in the trial Brumarescu vs. Romania decided that such construal was similar to the general principles, namely the non-existence of a term within which an action might be filed infringed the principle of security of the legal rapports, the possibility to "cancel" without a limit of time, for instance a definitive individual administrative act entered in the civil circuit, representing even in the opinion of the CEDO members a defeat of the right to justice, as guaranteed by art 6 of the Convention.

The 6 month term granted to the issuer starts flowing on the issuance date of the administrative act. This term-rule may be exceeded, according to art 11, paragraph 2, only for grounded "reasons", but the action may not be filed over the incapacity term of 1 year, which flows on the issuance date as well.

2. Trial on merits. Special perspective upon the possibility to suspend the effects of the challenged act: the current law of the contentious administrative addresses the suspension of the administrative act from the already two known extent, namely the rightful suspension, if the referral to court topics are the prefect and the National Agency of Civil Servants and the legal suspension of the challenged act.

[18] **L. Girgiu** – *„Câteva considerații referitoare la acțiunea introdusă de autoritatea publică emitentă a actului administrativ, în temeiul dispozițiilor art. 1 alin. 2 din Legea contenciosului administrativ nr. 554/2004"*, Curierul Judiciar nr. 3/2007, pp. 63.

The issue of the legal suspension of the administrative act is approached under art 14-15 of the law, the first addressing the suspension of the act's enforcement after the submission of the prior administrative claim, but until informing the contentious court of law and the second analyzes the suspension of the challenged act after registering the main legal action.

At the same time, art 3, paragraph 3 regulates the rightful suspension which operates when the action is filed in the contentious administrative by the prefect or by the National Agency of Civil Servants, public authorities which have an administrative trusteeship right regarding the activity of the local autonomous public administration, on one hand, respectively the issuance (passing) by the central or local public authorities of certain acts related to the public office, on the other hand. It may be noticed that, although the Public Ministry is among the public authorizes which are not compelled to fulfill the prior administrative procedure, an action filed by the said does not entail the suspension *ope legis* of the act in question.

With regard to another referral to court topic, the Ombudsman, although the law grants it active trial capacity, thus being able to take legal action in the contentious administrative, upon the request of a natural person (but only against documents issued by administrative authorities and not by any public authority), we notice that the law does not clearly stipulate the law to request the suspension of the challenged act. However, such suspension may be requested by the Ombudsman and, clearly, by the natural person – the initial plaintiff – who rightfully acquires the plaintiff capacity in such litigation, but according to art 15 under the law.

A) The suspension of the administrative act based on art 14 under the Law no 554/2004: As previously mentioned, the suspension solution prior filing the action for cancellation, reconsidered by art 14 of the Law no 554/2004 was not agreed by the legislator in 1990 although, paradoxically, it had been stipulated under a regulation prior 1989.

Besides the fact that such newly implemented procedure represents an additional guarantee of the protection of the rights and legitimate interests of the plaintiffs, it is also responsible for ending the controversies regarding the possibility to use a presidential ordinance for the prior suspension of the registration of the action for cancellation.

Regarding the referral to court topics, the rule is stipulated under art 14, paragraph 1, namely that the suspension of the administrative act may be requested by the person, whose right or legitimate interest has been affected. The exception addresses the possibility for the suspension to be requested by the Public Ministry, according to the terms under art 14, paragraph 3, and only for administrative acts having a normative nature, which generate a series of effects detrimental to the public national interest.

Therefore, according to art 14, only the person, whose right or legitimate interest has been affected, namely the Public Ministry, may request, based on the said article, the suspension of the administrative act, before filing the main legal action, the admissibility terms for such request being different.

a. For the suspension regulated under art 14, paragraph 1 [19], the affected person must prove before the contentious administrative court of law that two cumulative con-

[19] According to the recent doctrine, in this case we have a classical form of suspension, unlike the hypothesis under paragraph 3 of art 14. Also see **A. Iorgovan** – *„Noua lege a contenciosului...", op.cit.*, pp. 334.

ditions are met, the same as in the case of the former wording of the Law no. 29/1990: the existence of well-justified case, respectively the imminence of a prejudice which may be prevented by means of the suspension of the administrative act's enforcement.

The actual significance of the two conditions required by the law result, on one hand, from the content of art 2 of the law and, on the other hand, it may be concluded from the previous practice of the contentious administrative court of law, especially the one of the Supreme Court.

We notice that art 2, letter s) defines the imminent prejudice as *"the future material prejudice, but predictable or, as the case may be, the predictable severe disturbance of the functioning of a public authority of a public service"*.

Obviously, the severity of the prejudice or of the disturbance of the activity of a public authority/service is a rightful issue, which will make the object of the analysis of each individual court of law.

At the same, such request is admissible in procedural terms if the plaintiff proves that he has informed the issuing authority previously, therefore if the plaintiff files the evidence for the registration of the administrative claim, as stipulated under art 7 of the law.

b. If an administrative normative act is involved, the suspension request may be filed, upon the notification of a rightful third party or ex officio by the Public Ministry as well, but only in compliance with certain restrictive and cumulative requirements: the case involves a major public interest, respectively the severe disturbance of the functioning of an administrative public service of national significance.

Obviously, they must be correlated with the provisions of art 1, paragraphs 4 and 5 under the law, which stipulate that the Public Ministry may challenge only the individual administrative or normative acts issued by "exceeding the granted powers"[20]. Therefore, the Public Ministry may request only the suspension of the normative administrative acts which it may challenge for cancelation purpose, namely only those normative acts issued by exceeding the granted powers and which affect or may affect the public interest.

We notice that art 14, paragraph 3, exclusively addresses the normative administrative acts, which due to a restrictive construal may conclude that, although the Public Ministry may also challenge individual administrative acts issued by exceeding the powers granted, it may request the temporary suspension only for the normative administrative acts which severely affect a major public interest, related to the activity of an administrative service of national significance.

B) The suspension of the administrative act based on art 15 under the Law no. 554/2004: Art 15 under the Law no. 554/2004 stipulates the possibility of the plaintiff to request the suspension of the administrative act by means of the request submitted to the contentious court of law regarding the act's cancellation.

Therefore, the person who may request the suspension of the challenged act, together with the submission of the main legal action, is the person who can act as plaintiff in a contentious administrative litigation: the natural or legal person, whose rights or legitimate interest have been infringed by means of the act

[20] This collocation is defined under art. 2 paragraph 1 letter m) as representing "the exercise of the rights of assessment, belonging to the public administration authorities, by infringing the rights and fundamental liberties of the citizens, stipulated under the law and Constitution".

who receiver the person is, regardless of the type of the administrative act in question; the third party affected by an individual administrative act destined to another person; the Public Ministry, but only with regard to the normative administrative acts which affect public interests or individual administrative acts which it may challenge for power execs; the Ombudsman, who has active trial capacity according to the terms stipulated under art 1, paragraph 3 of the law[21].

Although art 15 does not clearly stipulates it, it is self understood that the plaintiff must prove that there are met the same conditions justifying the admissibility of the suspension request based on art 14, paragraph 1.

Regarding the active trial capacity of the Ombudsman, we deem that this public authority also has the right to request the suspension of the administrative act it has challenged, even though the law does not clearly stipulates such right. However, construing *a fortiori,* it may be claimed that, given that this public authority can even request the cancellation of an administrative act, it can moreover request its suspension, as temporary measure [22]. Regarding the admissibility conditions of such request, we may say that there are not applicable the legal provisions analyzed above for the case of the request submitted by the Public Ministry, therefore a suspension action formulated by the Ombudsman must relate to the admissibility reasons stipulated under art 14, paragraph 1.

If the action's object is represented by an individual administrative act, which affects a natural person, there shall be taken into account arguments endorsing that the cumulative conditions stipulated under paragraph 1 are met, related to the case of the plaintiff by enforcing the act in question. If, however, a normative act is challenged, whose effects infringe the public interests the argumentation of the suspension request shall be focused on the public order aspects, not being necessary to prove the imminent prejudice to be suffered by the person who has initially made the claim. Nevertheless, the imminent prejudice of a public interest shall always represent, beyond doubt, a well-justified case.

The request must concern an unilateral administrative act, being thus excluded the "administrative contracts" which are assimilated, according to art 2, letter c), to the administrative acts; this condition also stands for the suspension prior to the main legal action, given that art 14 addresses the authority "which has issued the act", therefore an unilateral will of the public power. At the same time, as long as the law does not distinguish, it may be claimed that there can be requested the suspension of both a normative and an individual act.

The suspension may be requested, regardless of the situation, only when the action for the total or partial cancellation of the administrative act is registered, based on two possibilities: to submit the request as se-

[21] According to this text, the Ombudsman can notify the contentious administrative court of law if after the control performed upon the notification of a natural person, according to its organic law, it deems that the illegality of a normative administrative or individual act or the excessive power of the administrative authority may be removed only by legal means. The competent court of law shall be the one at the domicile of the plaintiff, who shall acquire the plaintiff capacity, being cited accordingly.

[22] As mentioned by the Constitutional Court under the decision no. 507/2004 (Official Gazette no. 1154/07.12.2004) *„the assignment for the Ombudsman of the duty regarding the possibility to notify the contentious administrative court of law /.../ assures both the protection of the public interest and the compliance with the private interest of the natural person, whose rights or legitimate interests have been affected".*

condary request within the main request or to submit the suspension request distinctly, subsequently to the main action. In the first case, the court of law shall have to settle only one file, having distinct requests regarding the cancellation of the challenged act, respectively the suspension of the act in question, until the final and irrevocable judgment of the case. In the second case, there shall be drafted a distinct file, having as object the suspension request of the administrative act and the plaintiff must prove the existence of the action for cancellation on the roll of the contentious administrative court of law.

III. Conclusions

The current regulation of the contentious administrative is represented by an acute procedural regulation, tending to create a special frame for such litigations. However, the law does not lack, obviously, the material law provisions, most of them being highly significant. We take into account, firstly, as abovementioned, the notions defined by the organic legislator under art 2 of the law, which notions represent, basically, the essence of the contentious administrative court of law, its substance.

Procedurits have rightfully asserted that there cannot be imagined the existence of procedural norms without the prior existence of material law norms, which would protect. The two classes of norms are, no doubt, closely related and the possibility to enforce the sanction by lastly appealing to the coercive force of the state is the one which grants uniqueness, specificity to the legal norm in the entirety of the norms which function within a society at a certain moment.

According to the abovementioned, there is necessary to redraft several key-provisions of the Contentious administrative law, the jurisprudence presenting, within a short period of time, significant problems, generated by the insufficient correlation of the procedural normative provisions with the existing material law provisions.

Thus, we mainly address the famous distinction between the subjective contentious and the objective contentious, which distinction has been blurred by the current regulation in certain situations. It is the case of the action grounded in the private legitimate interest which, unlike the French recourse for excessive power, does not mention among the admissibility conditions the one regarding the act's objective illegality and, on the other hand, entitles the holder of the affected interest to request and obtain damages just as in the case of an action grounded in an infringed subjective right.

The widening of the protection granted to the natural and legal persons, mainly by means of the possibility granted to them to claim a potential infringement of legitimate interest, make absolutely necessary a re-wording of the legal definition of the legitimate interest.

Another lack we have tired to present and which must be taken into account upon amending the Contentious administrative law is the one regarding the possibility of the issuing authority to request the court of law to cancel its own act, after it can no longer be cancelled as it has entered the civil circuit and produced legal effects.

On short, there can be said that in order to bestow the contentious administrative with real significance, respectively regulating system within the mechanisms of the state of law, it is necessary a "settlement" of the ma-

terial law provisions, followed by the discovery of the specific and proper procedural means, which would trigger the appropriate fructification of the material law provisions.

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