ABSTRACT

DOCTORAL DISSERTATION

THE PATRIMONIAL LIABILITY FOR DAMAGES CAUSED BY ILLEGAL ADMINISTRATIVE DOCUMENTS

Key words: *Damages, patrimonial liability, administrative act, author of the administrative act, the right of option for the damaged particular, legal nature, tort liability, specific legal regime.*

I. The argumentation and the objectives of our research

Starting from the fact that the legal liability is a central institution of LAW as well as from the fact thet the state and its dismemberments through their activity can cause damage to individuals, our research is intended to be a synthetic and obviously unpretentious approach devoid of the claim of completeness which would render an ample image, viewed both in terms of theoretical aspect and the spectrum of jurisprudence, of the liability for damages caused by illegal administrative acts, that is, of the manner, the conditions and the extent to which, the state and the territorial administrative units may be held responsible for their acts by which they have caused harm to the other subjects of law, with a profound focus on the local public administration activity.

In the light of the above, we have set ourselves the following objectives:

1 Therefore, we tried to clarify the concepts of responsibility and liability, showing why, and from a legal point of view, and not just in terms of general language, the two concepts are synonymous;

2 We have analyzed the significance that the legislator meant to attribute to the notion of **administrative liability** and we argued why, both the name and definition of the note, seem inaccurate and insufficient;

3 Furthermore,**we have presented diachronically the evolution of patrimonial liability for damages caused by yhe activity of the state,** by showing the way in which the irresponsibility of the state was given up, reaching the current regulation with the capture of the key issues/ essential aspects of the French doctrine and jurisprudence in the matter, being aware that they constitute the source of this form of liability;

4 We have addressed the legal nature of this form of liability and of the applicable legal

regime, starting from the fundamental notion of liability and on the premise that, what is really important is not necessarily the legal nature of this form of liability but the fact that our positive law unambiguously regulates liability for illegal administrative acts. We have reviewed as well, **the legal regime of liability for damages caused by administrative acts**, **typical and assimilated, illegal**, with highlighting the peculiarities towards the regime of Common Law Liability, respectively, towards Civil Liability. Finally, we adressed the issue of liability, for legal administrative acts and **we found, as we believe**, a legal basis for its training, starting from the fundamental truth the these acts can cause damage, as well as from the fact that the right of access to justice is a fundamental right, just as well as the right to be compensated for the suffered damage so that the exercise of a contentious in damages can only be circumscribed in the nature of a Rule of Law.;

5 We have tried to clarify the existence or non-existence, as the case may be, of the **subordination report between the state or the authority of the public administration and its officials** who have contributed by their work to the damage which implies the liability, by capturing the essential aspects of personal mistake and service mistake. Furthermore, we clarified here the meaning of the notion- *official*- in the conception of the Law on administrative contentious.

6 In order to continue with our research purpose, we have analyzed **the specific conditions for the employment of the patrimonial liability** of the administration that is, the cumulative existence of the prejudicial act, of the prejudice and of the causal report, also treating the problem of the fault of the active subject of the responsibility, with the implications of the notions of liability, based on the ideea of fault of public administration in the case of administrative acts, as well as of liability based on the ideea of bad functioning of public services, and, notions recently introduced into our legislation as a result of the entry into adoption of the Administrative Code. We have also taken into consideration the form of guilt necessary for the responsibility of the natural person who contributed to the issuance/ adoption of the illegal harmful administrative act, having as point of divergence the provisions of the Administrative Code, as well as,provisions according to which the liability of the official would be made only if he acted intentionally, which, we believe, is contrary to the precepts of The Administrative Contentious Law.;

7 We have investigated **the relationship between the responsibility of the legal entity under public law to which the unlawful administrative act belongs and the responsibility of the participants in the issuance/ adoption of the illegal administrative act** with the underlying in particular of the liability within the local public administration

authorities, namely **the responsibility of the mayor, deputy mayor, local councillors as well as civil servants and contractual staff of the local public administration,** having as starting point Art.240 of the Administrative Code, article which, prima vista, seems to exonerate from liability, at the level of the local public administration, the author of the illegal harmful administrative act;

8 We have analyzed **the area of responsibility based on the idea of guilt,** as well as **the area of responsibility in the absence of guilt**, and **the implications that the Administrative Code has in this regard**;

9 We investigated and presented **the legal regime of the action for damages concerning the**
10 **harm caused by illegal acts of authority** by analyzing the administrative appeal as an essential prerequisite for the complaint of the court of litigation, as well as the extent to which it is possible to obtain the compensation for damages by way of the exception of illegality;

11 We have shown the conditions that **the parties of a dispute related to the action in damages** must meet, with a thorough analysis of the problem concerning the lack of legal capacity in the case of public authorities and institutions, depart from contradictory solutions in judicial practice;

12 Furthermore **we have taken into consideration the procedural rules applicable to the action for damages** for the commitment of the patrimonial liability of the public administration;

13 We have presented and analyzed **the right of option for the injured individual in the light of possibilities that he has to act by judicial way** to repair the suffered damage;

14 and, finally, we have formulated our own opinions based on the intermediate conclusions of our research **on the myth of the autonomy of administrative and patrimonial liability** in the sense of demystifying this autonomy.

II. The argumentation and the importance of our research

The actuality of the theme results, on the one hand from the bending of our legislator on this form of liability, both by its inclusion in the fundamental law, that principle of the rule of law, guaranteeing the protection of the fundamental rights and freedoms of all subjects of law, as well as the special regulation in the matter, and, on the other hand, from the perpetual character of this form of liability, entailed as a natural corollary of the permanent activity of organizing the execution of the law in concrete terms and of the provision of public services, the responsibility

being a permanent theme of the individual and social consciousness leverage, of self- knowledge through an inner court and sine qua non condition of the rule of law by regulating the legal regime in order to restore the violated legal order**.**

The scientific novelty that we assumed was **the analysis of the administrative and patrimonial liability and its legal regime at the level of the local public administration,** as well as trying to substantiate the concept of patrimonial responsibility of the administration starting from the essential idea thet the notion of liability must start from the author/ the co-author of the unlawful harmful administrative act and reach the participants in its issuance/ adoption, and in no case be limited to the latter.

The motivation for choosing the theme in order to accomplish the doctoral thesis **had as a starting point the continuous actuality of the theme of responsibility perceived as the essential premise of self- knowledge and perception** of the border between licit and illicit in order to respect an ancient principle who urges to temperance and who was masterfully surprised on the frontispiece of one of the ancient constructions, namely ”***nothing too much”*****,** both at the level of the individual as much at the level of society, self- knowledge that manifests itself on the level of responsibility by assuming, voluntarily or by constraint, the consequences of their own acts and/ or deeds that have harmed one subjective right of another subject of law, assumption that calls for improvement and progress.

Regarding the research direction towards the local public administration, this aspect was influenced by the quasi- total lack of research in this direction, as well as our double quality on this level: that to be administered, like every citizen, but also that of a part of the local public administration, in terms of the status of public servant of management.

The current state of our research of the topic that forms the object of our work **includes a** reference work[1] , which was the first book in our endeavor, but it does not adress the administrative- patrimonial liability at the local public administration level, based on which we tried to develop our research. As a rule, however, the patrimonial liability for illegal administrative acts is only tangentially analyzed in courses, treatises or monographs which deal with broader research topics, such as civil liability, civil obligations or administrative contentious.

Thus, starting from the ones already shown, taking into account the great precepts of law, **blessed by the fact that study is a risk, a madness, an adventure**, and the dough of a real research leavens to baking with every page read towards documentation, with each note taken, with each road to the library, with each reading sheet and with each thought on the draft, correlating the norms of Positive Law with jurisprudence and law literature and applying the methods specific to

1 Al. Trăilescu, *Patrimonial liability for administrative acts of unlawful authority*, Ed. CH Beck, Bucharest, 2013

legal research, without trying to depict a theory sheltered from criticism, but on the contrary, we can conclude that **legal liability has an essential role in social life**, being the natural corollary of disregarding social values protected by legal norms and the guarantee of individual rights and freedoms, both by their protection and by sanctioning any act that infringes them, it is the foundation of The Rule of Law, being the essence of legal liability.

And it is precisely in the reason of being of the Law that **the necessity to correctly qualify the aspects on which the ignorance of the spirit and the weakness of the letter, leaving them to the legal interpretation** , has its source, and in the legislative maze in which those entitled to create legal norms throw us, **one must have the folly TO THINK with his own mind and trying to bring his contribution be it small to the very reason of being of the Law.** Or as a contemporary italian philosopher, prophetically said: „ *Why are you silent, in you service, jurists?"*

And, in this bold approach, a guiding principle was the following paragraph: *„Learn how to think. This is what I hoped to learn from Noica. In a world where most of the people think flat, barren, impersonal, so, in a world where the majority do not think at all, what you can wish for more than anything is the madness of thinking on your own".*

Finally, the key idea from which we started our adventure was that **research must be less of a vehicle for the circulation of ideas and their sterile processing of doctrine, and more as a vehicle of questions,** characteristic being precisely the very character that makes it seem „ unfinished" and which can be translated into the fact that not necessarily the answer to the raised problem imports, but the discussions generated by the question, because if an answer illuminates, a question enlightens us, and a proper research has to do just that: to stir up the depth of the axiom according to which **everything can be, and must be, in Law- and put it under the sign of discussion.**

III. The thesis structure

In order to achieve the objectives we have set ourselves, presented in the introductory part of the thesis, **we structured our research into two parts,** each of which includes several chapters.

Thus, **in the first part of the research**, we highlighted the special importance which the law as it exists (broad regulation) has in the state's liability and its dismemberments so that individuals harmed in their rights and/ or legitimate interests to have at hand the legal means by which they will be able to repair the suffered damage as a result of the activity of the state (section

1) and we' ve shown why the concepts of responsibility and liability are synonymous, which constitutes an element of novelty concerning our research (chapter II). Afterwards, we diachronically analyzed how it went from the irresponsibility of the state to the posibility of holding it accountable (chapter III), by taking into consideration the essential aspects of French Jurisprudence, which, alongside the Blanco Decision of 1875, coming on the background of changing the political regime, stipulated that the State can and must be held accountable. We have also diachronically presented the regulations in our country regarding the possibility of assuming the responsibility of the state and the public administration. Finally, we delimited the object of our research (chapter IV), in this case the patrimonial liability of the administration for the damages caused by illegal administrative acts from other forms of patrimonial liability of the State, namely liability for acts of judicial power, liability for acts of legislative power, liability for limits of public service, liability in connection to the valorisation of the goods and the provision of public services, as well as liability for damages caused by legal administrative acts, liability to which we have tried to find a legal basis.

In the second part of the research we analyzed the exorbitant legal regime of administrative- patrimonial liability for damages caused by the act of public power, starting from the inconsistency of the provisions issued by the Administrative Code regarding the administrative-patrimonial liability (Chapter I). Furthermore we analyzed the legal nature (Chapter II) and the constituent elements (Chapter III) of this form of liability, and in Chapter IV we have analyzed the patrimonial liability of the local public administration. In Chapter V we have analyzed the specific procedural regime of the action in compensation for damages caused by illegal administrative acts and at the end of the research we briefly presented the conclusions.

IV. The findings of the research

The liability, being a universal dimension of the Law, **could not bypass the activity of public administration, activity involving the execution of laws, organising the execution of laws and the provision of public services,** all in order to fulfill the mission that the public administration has in any State of Law, namely the satisfaction of the public interest.

The administrative act, as the main form of manifestation for the public administration, as an essential tool for achieving the mission of the administration to satisfy the public interest **may cause damage to individuals,** and our legislator has elevated to the rank of constitutional principle

the right of the injured person in a right of his own/ or in a legitimate interest by a typical or assimilated administrative act **in order to obtain** recognition of the alleged right which was claimed and/ or the legitimate interest, the annulment of the act and **the repair of the damage.**

The patrimonial liability of the administration for damages caused by illegal administrative acts which implies the cumulative fulfillment of the following **conditions:** a) to exist an administrative act, typical or assimilated, illegal; b) the administrative act has caused material and/or moral damage to a subject of law; c) the direct causality between the administrative act issued/ adopted illegally and the caused damage; d) the presumed fault, consisting in the very illegality of the act, of the legal person governed by public law to which the illegal administrative act belongs.

The illegality **of the administrative act is the** ***sine qua non*** **condition** which is the basis for the mandatory report of release, in the absence of finding the illegality of the administrative act which is not possible, at least in the optics of the current jurisprudence, the engagement of this specific form of liability: the administrative- patrimonial liability. If the illegality of the act implies its annulment, or, on the contrary, **it can mean only removing it from a pending trial through the mechanism of the exception of illegality remains an open dicussion, and we have tried to argue in the sense of admitting such a possibility of finding the illegality of the administrative act and by way of the exception of illegality.**

However, there are also administrative acts exempted, based on the law, from the censorship of the administrative courts, so that, being impossible to prove their illegality, the individuals harmed in their rights or legitimate interests are unable, *prima vista*, to obtain the compensations, to which, according to the great precepts of Law, they are entitled. In this hypothesis, the cause of damage by an administrative act exempted from the control of the administrative court, **we appreciated that it is necessary to recognise the access of a contentious in damages, provided a special damage is being proved,** because one means an administrative act that cannot be verified in terms of legality, that being so presumed absolutely by the legislator, and anothe thing is to admit that such an act, which comes out of the usual pattern of the category from which it is part, so which implies an exorbitant, abnormal, exceptional competence with which the state and the administration are entitled, may be the source of damage, and, consequently, it must be the source of patrimonial liability. Thus, a double wish would be achieved: the activity of the state would not be jeopardized at all, the act would be in force from issuance until its purpose is achieved, and individuals would have the opportunity to see the suffered damage compensated by these acts, whose legality and finality will not be determined by the recognition of a contentious in damages at the fingertips of the individuals. For, after all, the Law presupposes the finding of practical

solutions for conciliation in a manner as elegant as possible, of the opposing interests. And for maintaining social peace, which validates any legal solution, the right to reparation for the prejudiced individuals by the activity of the state, be it administrative or government, it looks like a pressing necessity. So (why) what are we waiting for?

In addition to the legal person governed by Public Law to whom the illegal administrative act belongs, **another person can be held responsible (and must be)- namely the natural person**, that is the dignitary, the civil servant or the contractual staff, who contributed to the elaboration, issuance, adoption or conclusion of the administrative act, or, as the case may be, who is guilty of refusing to resolve a request for a subjective rigt, or for a legitimate interest, the injured individual being free to establish, based on the principle of availability of the civil process, the procedural framework of the action in compensation.

We established that at the level of the local public administration, a level where we have deepened the research, there are texts of Law that conflict with the constitutional principle instituted by the article 52 of The Constitution, as well as with the special regime imposed by the Law No. 554/ 2004, but also with the general regime stipulated by the Civil Code. Thus, Article 240 stipulated by The Administrative Code provides that the administrative and patrimonial liability for acts issued by local public administration authorities is incumbent to officials and to the contractual staff of the specialized apparatus of the mayor, respectively of the County Council which, in violation of the legal provisions is based from the technical and legal view of their issuance, adoption or countersigns, or approves, as the case may be, for the legality of these acts.

In other words, the common persons who compose the bodies of the public administration authorities, respectively, The Mayor, The Local Council, The President of the County Council and The County Council, they seem to be exonerated of liability on the only condition, necessary and sufficient alike, that the harmful illegal administrative acts were based from the technical or legal point of view, and/ or countersigned or endorsed by civil servants or by the contractual staff within the local and/ or county public administration apparatus.

However, we established that the patrimonial responsibility for the damages caused by illegal administrative acts must orbit around the notion of author of the administrative act, author who must be (and, he is, indeed!), responsible for the harmful consequences of its acts, so that the only possible interpretation of the article no.240 from The Administrative Code must be in the sense that he holds the responsibility of the persons who contributed, substantianting from the technical point of view and/ or from the legal point of view when drafting the administrative act but in the sphere of these persons enter (and must enter!), local elected officials, too. Any interpretation in the sense that the liability of local elected officials operates only in the hypothesis

in which the administrative acts are not substantiated, countersigned or endorsed from a legal or technical point of view by the officials or contractual staff from the specialised apparatus contravenes the norms of Positive Law, but also the great principles of The Law in general. *Nota bene ,* however if the nominal author of the illegal administrative act of the injury cannot be charged with any fault in the issuance/ adoption of the act, he will not be (and shall not be!) held responsible!

Finally, **the existence of a patrimony from which the damages established by the court could be compensated is the essence of the action in damages**, from the legal point of view being inconceivable that an entity without its own patrimony may be legally obliged to the satisfaction of a patrimonial claim formulated by another subject of law, so that such an action,whether it is exercised concurrently or after the action for annulment must be directed against the legal entity under Public Law to whom it belongs the illegal administrative act of injury and who is the owner of the patrimony, and implicitly of a budget of his own, from which the prejudiced particular, could be compensated. Thus, in the case of local public administration, the action in damages must be directed against the administrative- territorial unit, which is endowed with patrimony and its own budget, to which it actually belongs the administrative act issued/ adopted by the local public administration authorities, that is, by its bodies.

According to the seductive principle which implies that any idea which emerges from the sterile pattern of the common, **the idea of autonomy of patrimonial liability for damages caused by illegal administrative acts**, it can only be based on the essential differences which separates it from the liability of Common Law, that is, from the criminal civil liability, thus giving it independence from it, knowing that the legal autonomy of our institution occurs when an ensemble of rules/ set of rules shows original and common features, allowing the outline of a corpus of Law distinct from others.

From the analysis of the constituent elements of **this form of liability, however, we found that, these are the common elements of tort civil liability**, namely: a) an unlawful act; b) an injury; c) the causality between them, and, d) culpa. The only „exemption" from civil liability is that the unlawful act may consist only of an administrative act ruled as illegal by a Court of Law. Of course, a number of special procedural rules, such as deadlines/ limitation periods, competent court, etc..., are also included in the procedural regime established by Law No. 554/ 2004, but these aspects do not constitute in any way „ *special rules relating to essential matters and which have a high degree of originality, but only a specially applicable legal regime to one and the same institution: civil tort liability".*

On the other hand, even if, as we have seen, the administrative and patrimonial

responsibility for damages caused by illegal administrative acts has a *wide legal consecration* in the Administrative Code, which, at *prima vista*, seems to confer the status of a legal institution of its own accord, this independence cannot be real as long as the special legal regime that regulates it is not enough to be applied independently of the general regime of Common Law. Thus, completing with the rules of The Civil Code is absolutely mandatory, because, for example, how to apply mandatory solidarity, stipulated by Art.16 from the Law on the Administrative Contentious and art. no.575, paragraph 2, from The Administrative Code, between officials and public authority if not by the rules of The Civil Code? And the examples can continue: how does it works and what does it means the terms *prescription* and *revocation*? What are the conditions of the damage and what does it consists of, etc.?

At the same time, admitting the autonomy of the patrimonial liability for damages caused by illegal administrative acts, and it is regulated by The Law on the Administrative Contentious and The Administrative Code, we also admit that its employment under the procedural conditions stipulated by The Law on the Administrative Contentious represents the only possibility that the individual has for the compensation of the suffered damage. Or, as we tried to demonstrate in our research, the procedure of obtaining compensation for damages **by administrative litigation for the damages caused by illegal administrative acts must represent only „an additional means (from the Common Law) and more effective against abusive acts of the authorities”**, the individual harmed in his or her legitimate rights or interests by an illegal administrative act, **having the possibility to choose**, based on the principle of availability, the procedural path to cover the suffered damage, being able to choose from any of the following ways: a) **an accessory application**, once with the main action against the typical administrative act or assimilated under the stipulation of the articles **1,8,11 and 18 from The Law on the Administrative Contentious;** b) **a principal action in compensation**, after the annulment of the administrative act or the admission of the action against the unjustified refusal, express or tacit, or after revocation of the administrative act, pursuant to **Article 19 from The Law on the Administrative Contentious;** c**) a main action in damages brought to The Common Law Court, by invoking the exception of illegality of the administrative act pursuant to Article 1349 and the follwing from The Civil Code in conjunction with Article 28 of the Law on the Administrative Contentious.**

Moreover, the injured individual, under the rules of the Civil Code which governs passive solidarity has at hand in order to repair the damage, at his free choice and **in accordance with the principle of availability** which governs the civil process, **any of the following ways**: 1) The application for a summon to the Administrative Court both against the legal entity under Public Law, as well as against the official who contributed to the issuance/ adoption of the illegal

administrative act of the victim, requesting the annulment of the act and the granting of compensation; 2) the introduction of the application for summon to the Court of Law only against the legal entity under Public Law, requesting the annulment of the act and the granting of compensation; 3) referral to the Common Law Court with an action in claims only against the official who contributed to the issuance/ adoption of the illegal harmful administrative act requesting compensation.

Finally, as shown, **the patrimonial liability of the public administration for damages caused by its illegal unlawful administrative acts cannot be cumulated with civil liability,** the person injured by an administrative act not having the possibility to held responsible the administration for patrimonial responsibility twice, that is, for once an administrative liability established by the Law No. 554/2004 and the Administrative Code, and a civil delictual statuated by the Civil Code as well, for the simple reason that the purpose is the same for both types of liability: the compensation for damage.

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