**BABEȘ-BOLYAI UNIVERSITY**

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**FACULTY OF LAW**

# A GENERAL THEORY OF PRELIMINARY IN ADMINISTRATIVE LAW

**- SUMMARY OF THE DOCTORAL THESIS -**

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# DOCTORAL THESIS CONTENT

The paper highlights the fact that administrative law is characterized by a series of privileges, of which that of *the prior* takes a central place since it recognizes the power of the administration *to act ex officio* , without prior verification by the courts. The study shows that the doctrinal debates, both in French law and in Romanian law, have questioned the extent and even the nature of this privilege. From this question arises the theoretical approach of the research, based on the thinking of Maurice Hauriou , who linked the privilege of the prior to the very idea of public power and the order of the rule of law. The paper thus outlines the premises of a *general theory of the prior* , intended to clarify both the real content of the institution and its explanatory role on other areas such as the administrative contract, the procedural quality of the administration and the prior procedure.

The first section of Chapter I of the first part of this work analyzes the privilege of prior in administrative law, seen not only as a simple *enforceable character* of the administrative act, but as a fundamental rule of the functioning of public administration. The study highlights three main directions: the foundation of the privilege, the historical and legal context of its emergence, as well as the way in which it has been taken up and applied in legal systems.

The privilege is associated with the French professor Maurice Hauriou who defined the administration as enjoying exorbitant prerogatives based on *the concept of public power*. He is in fact the one who transformed the notion of *prior* into a principle of administrative law – the principle of prior execution. According to his vision, the administrative decision is enforceable by *its form* , which allows it to produce effects immediately, before any jurisdictional control. This statement raises, however, two problems: (i.) why administrative decisions are enforceable by their nature and (ii.) to what extent this character makes the administrative act an enforceable title in the sense of common law. In addition, Hauriou evoked a “privilege of inaction” of the administration, an idea later contested and legislatively corrected.

In fact, Prof. Hauriou tried to explain the state through *the theory of the institution* - a synthesis between the subjective vision (state as a legal person) and the objective one (state as a social organization) on the emergence of the state. In this vision, public power is seen as political power organized for the purpose of realizing an idea - the general interest. Administrative decisions are *executive acts* that reflect not only a manifestation of will, but also a mechanism for realizing positive law. In this way, the executive character of the act derives from the functioning mechanism of the state understood as an institution.

The privilege of prior, although formulated by Hauriou as a principle of prior enforcement, has often been interpreted in a confusing way. In essence, it must be understood as a specific instrument of the administration, justified by the exercise of public power and limited by the principle of legality in a state governed by the rule of law. The enforceability of administrative decisions is a particularity of public law, but does not automatically imply a right of direct forced enforcement by the administration.

Thus, section II of the first chapter deals with the issue of applying the principle of prior enforcement in administrative law, with emphasis on its legal foundation and the limits imposed by the principle of legality. The analysis highlights the continuity of the ideas formulated by Maurice Hauriou , but also their subsequent adaptations in jurisprudence and doctrine.

The administrative act is usually defined as a unilateral manifestation of the will of the public authority, characterized by enforceability. This attribute gives it immediate *binding force* , without requiring the intervention of the courts. The study thus distinguishes between: (i) enforceability , as a direct effect of the act, and (ii) forced execution, as an exceptional mechanism through which the administration imposes its decisions. The foundation of enforceability is the principle of legality, which guarantees that the administrative act is issued on the basis of and within the limits of the law. However, forced execution is permitted only if: (i) there is a special legal text, (ii) it is necessary to maintain public order or ( iii ) it is required in case of emergency. The paper therefore emphasizes the need for a clear delimitation between the enforceability of the act and the right of the administration to resort to coercion.

In this way, forced execution constitutes a means of effective enforcement of the decision, subject to strict conditions of legality and proportionality. The jurisprudence of the French Council of State has emphasized the idea that the administration cannot completely substitute the courts , and direct coercion is only allowed in limited cases. The study thus notes that any possible enforceability must maintain a balance between the prerogatives of the public authority and the protection of the rights of the citizen.

As regards Romanian administrative law, the paper analyses the adoption of the privilege of prior from French doctrine. In the absence of an express regulation, Romanian doctrine emphasises that this principle does not represent an arbitrary privilege of the administration, but a necessary means for the efficiency of the administrative act, permanently conditioned by the observance of legality. The role of judicial control is also emphasised, which guarantees that enforceability does not turn into an abuse.

In this sense, the study concludes that the administrative act does indeed enjoy enforceable force. However, *its enforceable force* is not defining for any administrative act and, for this reason, it is not capable of truly expressing the true content of *the privilege of prior*. In fact, this privilege refers to the ability of the administration to issue administrative acts of a unilateral nature, but binding on third parties, without the need for prior judicial intervention. Essentially, the administrative act is privileged in that, although it is unilateral and although its prior confirmation in court is not necessary, it is legally effective and eficient, and, depending on its actual binding content, its effectiveness and efficiency will be manifested either through binding force (expressed by enforceability or opposability, as the case may be) or through enforceable force. As for the forced execution of its prescriptions, to the extent that this is required, this is a matter of *competence*. More specifically, in the absence of a procedure expressly provided for by law, the forced execution of administrative acts must be approved by the competent courts.

Section III of the first chapter examines the enforceability of the administrative act in relation to the principle of legality and the limits of its practical application. Thus, the study aims to observe the "extra legem " character of the prior privilege and thus puts into question the extent to which the public administration has the power to act beyond the written rules, relying on *the legitimacy* of its power. The text emphasizes that, although the administrative act is subsumed under the principle of legality, there are situations in which

the administration exercises a power of intervention that does not expressly derive from a normative text.

In essence, the administration is recognized as being able to intervene directly in cases of emergency or resistance, using the coercive force of the state. The jurisprudence of the French Council of State has accepted that these situations, although not expressly regulated, are part of the very nature of public order. Thus, the idea of an implicit competence is outlined, but strictly delimited by necessity and proportionality. However , although the legitimacy of interventions without an express legal basis is recognized, they are subject to the principle of legality in a broad sense. *Extra legem power* is accepted only if it aims to protect the general interest and respects the values of the rule of law. In Romanian law, the Constitution and the jurisprudence of the Constitutional Court confirm that the action of the administration cannot exceed the legal framework without being justified by urgency or by the protection of public order.

Therefore, the study notes that the power of the administration is not arbitrary: even *extra legem actions* must be legitimized by law and limited by the legal order. Thus, if the administration has an *extra legem power* , it is not unlimited, but must remain anchored in the desire to satisfy *the public interest.* The analysis demonstrates that *extra legem* does not mean an action against the law, but an intervention justified by exceptional circumstances, legitimized by the general interest and controlled by the principle of legality. This vision strengthens the balance between the efficiency of the administration and the protection of citizens' rights.

Chapter II of the first part continues with an analysis of the problem of the "exorbitance of prior action" of the public administration, analyzing in parallel the relations of public law and private law. Although the public administration acts unilaterally, this feature is not unique, unilateral acts also existing in private law. The doctrine has emphasized that many of the "privileges" considered specific to the administrative act ( executability , binding character, unilaterality) are found, under certain conditions, also in *unilateral civil acts*.

Acts of private authority, such as representation, majority decisions, collective agreements, internal regulations, disciplinary sanctions or matrimonial agreements,

illustrate the fact that even in relations between individuals there are situations in which unilateral will produces binding effects on others. These examples demonstrate the closeness between the mechanism of the unilateral civil act and that of the administrative act. In this way, the study observes that: *(i.) power* as a way of manifesting a *collective interest* is also found in relations between individuals; *(ii.) the exercise* of private power involves the issuance of unilateral acts of private *authority*. From this perspective, the administrative act no longer seems so *privileged* as long as it *does not* differ in *nature* from the unilateral civil act (when it is one of authority). However, the regime of the administrative act remains an *exorbitant one* , the exorbitantness being justified by the purpose pursued by the issuance of administrative acts, namely the purpose of satisfying a *public interest* , considered superior to any private interests, even *collective ones.*

Starting from the similarities previously noted between the power relations in the two areas of law, section II of chapter II addresses the distinction between public law and private law. These similarities have led to the challenge of the autonomy of administrative law, questioning its "exorbitant" character. The central question thus becomes whether or not the existence of a *special regime* confers real autonomy on this branch of law.

At a doctrinal level, the autonomy of administrative law thus faces two major objections: *on the one hand* , the structural similarities with the mechanisms of private law, and *on the other hand* , the fact that the elements invoked to justify the difference – such as *enforceability* or *the general interest* – are not sufficient to constitute a distinct branch of law. However, the study notes that there are also opinions in the doctrine that support the autonomy of this branch, arguing that the purpose of protecting the public interest and the mechanisms of judicial control give administrative law a special character.

The conclusion of the second chapter is that although there are elements of approximation to private law, the specificity derived from its purpose and from *the legal regime* applicable to public administration acts continues to support its distinctiveness , making it an *exorbitant right* and, for this reason, an *autonomous one* , the idea of a privilege of the prior representing an additional argument in this regard.

Part II of the thesis focuses on *applications of the prior privilege* in the matter of administrative contracts, issues related to procedural quality in administrative litigation and not only, but also in the matter of prior procedure.

Thus, the first chapter of the second part analyzes the privilege of prior in the execution of administrative contracts. In the legal tradition, this privilege has been associated with the unilateral administrative act, being perceived as a manifestation of the power of the administration to issue binding acts ex officio. However, the first part of the study shows that the privilege should not be confused with enforceability , which belongs only to certain categories of acts. From this perspective, in the field of administrative contracts, the privilege of prior plays a central role: the administration is not only a contractual partner, but retains a position of authority that allows it to impose clauses or decide *unilaterally* on the execution of the contract, to the extent recognized by law. This reflects the specificity of the public power relationship that distinguishes administrative contracts from civil ones.

The privilege of prior consent confers on the administration an exceptional legal power, but its exercise is strictly conditioned by the legal framework and does not automatically equate to the power to enforce its own decisions. In this way, the study focuses in section II of this chapter on the three major prerogatives of the contracting administration: (i) unilateral denunciation, (ii) unilateral modification and ( iii ) the power of control and direction. These prerogatives illustrate the superior position of the administration in relation to the private contractor. Unilateral denunciation is distinguished from termination under common law, being justified by the general interest and not by the non-performance of obligations. Unilateral modification allows the administration to adapt the contractual clauses to meet public needs, and the power of control gives it the right to supervise the execution of the contract. The comparative analysis with French law shows that these prerogatives are recognized as defining features of the administrative contract, although some recent opinions question their "exorbitance", highlighting the existence of similar mechanisms in private law.

Section III of the chapter analyzes the tendency to contractualize these exorbitant prerogatives, a tendency also highlighted in the jurisprudence of the Constitutional Court. The study demonstrates, however, that the provisions of art. 8 paragraph (3) of Law no.

554/2004 establish a hierarchy of principles applicable to a contract concluded in the public interest and which, in this way, allow the administration *to act unilaterally, ex officio* in the execution of an administrative contract, even in the absence of an express clause.

In essence, if by its *nature* the administrative contract brings to the table of negotiations between the parties specific principles of common law (such as the equality of the parties), its public interest *purpose brings to the same table a special, derogatory regime.* However, the text of art. 8 paragraph (3) LCA establishes a first rule of this regime: *the public interest* will prevail over *contractual freedom* with the consequence that the administration will *impose itself* , ex officio, with binding force, in the execution of the contract. In fact, the contractual partner assumes this hierarchy of principles incident to the execution of the contract concluded primarily *to satisfy the public interest,* thus having to be aware of the special regime applicable, but also of its obligation to ensure, together with the contracting authority, that the public interest is satisfied. In this way, the power of the administration to act ex officio in the sense of intervening unilaterally in the execution of an administrative contract must be recognized as a general principle of administrative law.

Chapter II of the second part deals with *the procedural dimension of the prior privilege* and its impact on administrative litigation.

The study emphasizes that administrative law is an exorbitant right, derogating from common law, created to provide the administration with the necessary tools to enforce the law and achieve the public interest. The privilege of prior action, as the foundation of the administration's action, gives it the power to issue unilateral acts with binding effects, without the consent of third parties and before any judicial review. In Romania, this reality is confirmed by art. 1 para. (1) of the Law on Administrative Litigation. The procedural dimension of the privilege consists in the fact that the administration's acts enjoy the presumption of legality and are immediately applicable, while the injured parties only have *the subsequent avenue* of litigation to challenge them. This situation places the individual in a position of initial legal inferiority, being forced to bear the consequences of the act until a possible annulment by the court.

Thus, the privilege of prior action places the administration in a distinct position compared to individuals, because its unilateral acts produce binding effects immediately, under the presumption of legality. Individuals can only react subsequently, by way of appeal, which reveals the structural imbalance between the two parties. This situation is doubled by another fundamental particularity: the administration does not act to defend its own subjective rights, but by virtue of the public interest.

Thus, the study highlights the fact that the active procedural capacity of the public administration does not derive from the same logic of protecting individual rights as in the case of private individuals, but from its role as guarantor of legality and promoter of the general interest. The administration can refer to the court to obtain confirmation of the legality of its acts, to defend public order or to request the sanctioning of behaviors that hinder the achievement of the public interest.

The study notes, however, that this active procedural capacity is not unlimited: it is conditioned by the respect of constitutional principles (legality, proportionality, rule of law). Thus, the public administration has its own active procedural capacity, justified by the defense of the public interest and consolidated by the privilege of the prior. This reflects the exorbitant nature of administrative law, but must be permanently balanced through jurisdictional mechanisms so as not to become an instrument of abuse.

Starting from art. 1 par. (1) and (1^1) of Law no. 554/2004, it is shown that, in principle, administrative litigation is *subjective in nature* : the plaintiff must invoke the infringement of a subjective right or a legitimate interest, private or public. Private individuals can defend a public interest only in the subsidiary, in connection with the defense of a right or interest of their own. In this context, the question arises to what extent the administration itself can have active procedural capacity. In this sense, the analysis highlights the fact that the public administration does not act to defend its own subjective right, but to protect legality and the public interest. This constitutes an essential difference compared to individuals. Therefore, when the law recognizes the capacity of the administration as a plaintiff, it is based on its role as guarantor of the legal order and the proper functioning of public services. The situation is closer to objective litigation, in which the purpose is to verify the compliance of acts and facts with the law, not the defense of an individual right.

Doctrine and jurisprudence have shown that this active position of the administration raises tensions: on the one hand, it strengthens the role of the state as defender of the general interest; on the other hand, it risks creating a procedural asymmetry in relation to individuals, who are obliged to prove direct harm. In order to avoid excesses, the study underlines the fact that the action of the administration must be *strictly limited to the defense of the public interest* and exercised only under the conditions provided for by law.

The conclusion of the section is that the public administration has its own active procedural capacity in administrative litigation, based on the defense of the general interest, but this is conditioned by the principle of legality and controlled by the jurisdiction to protect individual rights. In essence, the public administration usually has the competence and privilege to *act ex officio* to protect the public interest. Judicial control, on the other hand, is predominantly subjective in Romanian law and is triggered at the initiative of an injured person. By way of exception, the law allows the triggering of an objective control by certain public authorities, such as the Public Ministry or the Prefect, by virtue of express powers established by law.

Judicial practice has, however, revealed the tendency of the courts to recognize the active procedural capacity of public authorities even when they did not have an express competence provided for by law. Thus, the Mayor General and the Municipality of Bucharest were accepted as plaintiffs to protect public interests related to construction discipline, although Law no. 50/1991 already established special procedures and clear attributions for the detection and sanctioning of violations. The courts argued that the invocation of a legitimate public interest is sufficient and that the right of access to justice cannot be restricted in the absence of an express prohibition.

The study contradicts this view: procedural capacity cannot be recognized in the absence of legal personality or an express legal text. The mayor, as a body of the administrative-territorial unit, does not have its own procedural capacity, but can only represent the unit. In addition, public interest does not justify, in itself, the initiation of a dispute in the absence of a clear legal attribution, as it would transform the court into a body for the control of general legality, contrary to the principle of separation of powers. Thus, according to the study, the courts have erroneously applied the common law

provisions, generating an unjustified extension of the competence of the public administration and a confusion between public interest and self-interest.

The conclusion of the section is that, in the absence of a special procedural legitimacy established by law, the public administration cannot file actions exclusively on the basis of defending an abstract public interest. It can only act: (i) as a defendant, when exercising public power; (ii) as a plaintiff, only if it justifies its own interest, just like any private individual; or ( iii ) on the basis of special powers expressly provided for by law, when the law allows it to trigger objective judicial review.

Finally, the study analyzes the privilege of the preliminary procedure in administrative litigation, also seen as an essential condition for the exercise of legal action. The preliminary procedure involves the formulation by the injured party of an administrative complaint – either a free appeal, addressed to the issuing authority, or a hierarchical appeal, addressed to a higher authority. This stage has the role of offering the administration the possibility to review its acts without the intervention of the court. Although its foundation is linked to the principle of revocability of administrative acts and the right to petition, the current preliminary complaint goes beyond the simple petition, being conceived as a true pre- litigation phase that anticipates the litigation.

The analysis highlights the tension between the principle of revocability and that of the security of legal relations: acts can be revoked, but only as long as the legal stability of individuals is not affected. This limitation reflects the balance between the flexibility that the administration should enjoy and the need to protect citizens. At the same time, the comparative study shows that the mandatory prior procedure is not generally recognized in all legal systems, being the result of different legal traditions.

The conclusion of the section is that the privilege of the preliminary procedure expresses the specificity of administrative litigation: it strengthens the position of the administration, but also offers a first chance to correct illegal acts. At the same time, due to its mandatory nature, it raises questions regarding effective access to justice and compatibility with the principles of the rule of law.

The paper then analyses how Romanian legislation grants unjustified privileges to the administration in the preliminary complaint procedure, transforming it into a burden

for the individual, far from its natural role as a defense instrument. The paper analyses this finding in the field of tax appeal, objective litigation, suspension of the administrative act, but also of special deadlines for filing the complaint. The conclusion, unfortunately, was that the preliminary complaint, in its current form, is more a mechanism that privileges the administration than a guarantee of the individual's right to defense.

In this way, the study highlights the fact that the privilege of prior is not a simple myth, but a specific mechanism of administrative law through which the administration can act ex officio, through unilateral binding acts, in order to protect the public interest. This exorbitant regime is justified by the role of the administration, but remains limited by the powers established by law and subject to judicial control to prevent abuses. In essence, the theory of prior configures a tripartite balance between the administration, the individual and the administrative litigation judge, in which the public interest takes precedence, but without excluding the guarantees of protection of individual rights.