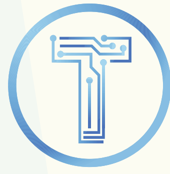

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# Aspects regarding the regulation of liability in the Administrative Code

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**Abstract**. A fundamental act for the Romanian administration was adopted in July 2019, namely the Administrative Code, which came into the legal landscape with the declared intention of contributing to the modernization of public administration, systematizing the legislation in the field and bringing more unity to the organization of law enforcement and to its concrete execution. The text transposes in a clear and unitary form, a series of already existing regulations, in separate normative acts, but also adds new legal institutions that contribute to increasing the coherence of the administrative activity. This paper aims, on the one hand, at analyzing an institution that comes as a novelty in the Romanian regulatory framework, the administrative liability, as form of liability specific to administrative law and, on the other hand, it is a brief analysis of a form of liability missing from the text of the Code, namely the ministerial liability.

**Keywords**. administrative code, administrative liability, ministerial liability

## General aspects on the administrative liability

The administrative Code, adopted by Government Emergency Ordinance [1] appeared in the Romanian legal space after almost 20 years of turmoil, attempts and changes. With the declared intention of contributing in a major way to the modernization of the Romanian public administration [2] through the advantages created by such a regulation: unity, coherence, stability, the Code brought together 16 normative acts, into a single "form".

It would be wrong to talk about a simple adherence to old regulations, although several voices supported the idea, since the Code has a unitary conception, it is structured into a logical succession of regulations, bringing new elements, non-existent until now in administrative legislation. In fact, the entire process of drafting the Code was elaborate (long-term!) and integrative, both in terms of form and substance of the regulation [3].

One of the new elements, to which we intend to refer in the following, is the administrative liability - an institution that still does not benefit from a general law containing regulations with value of principle, in this field.

Until the publication of the Code, the administrative liability had been present in the Romanian legislation, but mainly from the perspective of the contraventional liability [4] - the most developed "branch" of administrative liability, the only one that benefitted from a special law in the matter [5].

Unlike the civil and criminal liability, enshrined in some forms since antiquity, the administrative liability is considered to be relatively new [6] in the legal field, in its evolution,

going through various different regulatory variants depending on the law of the states in which it was applied. The doctrine stated that the legal issues related to administrative liability, generally resulted from the absence of general rules and applicable principles [7].

In Romania, the administrative liability appeared for the first time in the content of the Law for the establishment of the State Council which provided for the possibility of an individual - natural or legal person to obtain compensation for damage caused by the administration, the regulation being later present in the documents organizing the High Court of Cassation and Justice.

At constitutional level, the Basic Law of 1923 enshrined the administrative liability of public administration bodies [8] by regulating the possibility of the party prejudiced in his/her rights, by an administrative act made in violation of the law or by the "bad will" of the administrative authorities, to address the competent authorities for recognition of his/her right.

The institution of liability of the administrative authority was overtaken in the Constitution of 1991, revised in 2003.

**The regulation of administrative liability in the Administrative Code**

The importance that the Code gives to the institution of administrative liability results from the way in which it is presented from the beginning of the regulation, appearing as one of the objects of regulation: Thus, the content of art. 1 stipulates: *"This code regulates the general framework for the organization and functioning of public administration authorities and institutions, the status of their staff, administrative liability, public services, as well as some specific rules on public and private property of the state and administrative-territorial units [9].*

Also in *Part I, in Title II - General definitions applicable to public administration*, the legislator defines administrative liability as - *the form of legal liability which consists of all rights and obligations of administrative nature which, according to law, are born as a result of an illegal act by which rules of administrative law are usually violated"[10].*

Throughout the texts, the legal institutions are presented in a correct structure, from the perspective of regulations of legislative technique. A title that analyzes an institution begins with elements of definition, principles, regulations regarding organization and functioning, the human resource involved in the activity of the authority and, finally, closing the circle, the legal liability.

Thus, we find the *Liability of local elected officials*, regulated in Articles 231-24, the *Liability of the Prefect [11]*, the Liability of the heads of decentralized public services [12], the *Liability of civil servants [13]* or the Liability of the contractual staff [14].

A special mention should be made here, without developing the subject, on the regulation on Liability for administrative acts.

The Code introduces some completely new elements that will have effects in the interpretation of the administrative act. Thus, art. 240 introduces a new institution: **"investing the execution of administrative acts**, **with the formula of authority**, through the signature of the Mayor, the President of the County Council or the meeting President of the Local Council. We stop here just to mention that the effect of this text will not contribute in any way to increasing the efficiency of public administration but will only lead to the discharge of liability for certain subjects. The legality of the administrative act will be discussed in a new context, changing the philosophy of the legal regime of the administrative act to which we have referred so far.

• The concrete analysis of the institution of **Administrative Liability** is performed in part VII of the Code, in four titles, as follows:

Title I, *General Provisions*, contains texts which outline by definition, the notions with which the regulation is going to operate. Thus, in a correct legal technique, from the proximate gender to the specific difference, legal liability is first defined, as *"the form of social liability established by the state, following the violation of legal regulations through an illicit fact and which determines the bearing of corresponding consequences by the guilty party, through the use of the coercive force of the state in order to restore the rule of law, thus violated" [15]*, the legislator further specifying the forms that legal liability may take in administrative activity, for deeds committed by public administration staff, respectively dignitaries, officials, public contractual staff, but also other categories of staff from the central and local public administration authorities.

Being a category of legal liability [16], the administrative liability is defined in Article 565, as *"that form of legal liability which consists of all related rights and obligations of administrative nature which, according to the law, are born as a result of an illegal act that violates the rules of administrative law".* The text further provides that liability is determined by the form of guilt and the degree of participation in the violation of the law and that it does not exclude and may be supplemented by other forms of legal liability.

The text of the Code identifies and recognizes as forms of administrative liability: disciplinary liability, contraventional liability and patrimonial liability.

At the end of Title I, as a corollary of the General Provisions, the legislator finds appropriate to establish the framework for carrying out administrative liability, by stating a set of principles that will draw guidelines for the application of sanctions, after identifying situations where administrative liability will occur.

Thus, the content of Article 567 refers to **the principle of legal liability** - which provides that administrative liability will not be able to operate outside the law, it may be applied within the limits, according to the procedure and by the authorities invested for this purpose by law; the **principle of fairness or proportionality of liability** which aims at correlating the sanction with the degree of social danger of the deed and **the principle of expediency** in natural thinking to eliminate, as much as possible, postponements and delays in the application of the sanction.

We appreciate positively the legislator's option to provide in a separate article, a series of principles, anticipating the situations in which a certain case will not be able to find immediate correspondent in the text of law, and thus helping in the interpretation of the regulation.

The distinguished professor Verginia Vedinaș considered also the presence of the principle of prevention [17] opportune, and we appreciate that the enunciation in this article of the principle of liability, according to the principle of legality, would create a bridge between law and morality. It would go beyond the strictness of the rule, within the individual who is ultimately called to obey the law, in the first place and naturally, out of conviction and conscience, assuming responsibility and thus, often avoiding situations of violation of the rule that would lead to the emergence of a form of liability.

In fact, in order for the administrative liability to function, in the sense of achieving its goals, it is necessary for the law to be able to create, in the consciousness of its addressees, a sense of responsibility [18].

• Articles 568-571, under Title II, regulate the administrative-disciplinary liability, another element of novelty concerning the existence of a general regulatory framework.

Art. 568 defines the administrative-disciplinary liability and regulates the applicable principles, respectively the adversarial nature, the right to defense and the control of the administrative contentious courts.

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The infraction of discipline, the subjects of liability and the individualization of the administrative-disciplinary sanction complete Title II of Part VII.

Title III, which contains a single article, refers to and defines the administrative-contraventional liability as *"the form of administrative liability that occurs in the event of a contravention identified under specific legislation in the field of contraventions".*

In an analysis of legislative technique, from the perspective of the act form, we find a little strange the dimension of this "Title" which is strictly limited to a single article, but we appreciate that the legislator wanted to comply with the rules of legal technique, giving the regulation, a coherent and unitary form.

From the content perspective, as previously stated, of all forms of administrative liability, the contraventional liability is the only one that, at the time of the Administrative Code, benefitted from a special law - GO 2/2001, the institution being regulated in detail by a specific rule.

At the end of Part VII, Title IV regulates, throughout its seven articles, the Administrative-patrimonial liability, another element of novelty brought by the Administrative Code; so far, there has not been any framework regulation for this institution, provisions existing in a series of normative acts [19] with starting point, in the constitutional regulation that enshrines the right of the person prejudiced by a public authority to repair the damage and recover the damage caused by the activity of that authority.

The administrative-patrimonial liability is defined as the form of administrative liability which consists in obliging the state, or as the case may be, the ATUs to repair the damages caused to a natural or legal person by any judicial error, for the limits of the public service, by an illegal administrative act, by the unjustified refusal of the public administration to resolve a request regarding a right recognized by law or a legitimate interest [20].

Following the text, the conditions in which the administrative-patrimonial liability intervenes for damages resulted from different types of administrative activities, are distinctly regulated, respectively:

- Damages arising from organizational and functional deficiencies (of some public services);
- damages caused by administrative acts; in its development, the framework regulation established by law 554/2004 on administrative litigation is complied with;
- damages caused by ways of capitalizing public goods and services;

An important provision refers to the patrimonial liability of the public authorities' staff with delegated attributions, the text specifying that the delegated person is responsible for the damages caused in connection with the exercise of the delegated attributions. We mention that this can occur only if the delegation is made in writing, clearly mentioning the delegated powers, otherwise, if the act of delegation is issued in violation of the conditions provided by law, two things occur: its nullity and the delegated person's exoneration from liability.

Considering the regulations regarding the administrative liability, we appreciate that a general normative framework has been created in this matter, which, obviously in time, will be adjusted by the administrative life and practice.

**Forms of specific liability in the regulation of the Administrative Code. Government liability**

The administrative Code provides, for each public authority to which it regulates the organization and operation, the conditions under which the liability of that authority occurs.

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Thus, following the hierarchy of administrative levels, in Part II - *Central Public Administration*, Title I refers to the institution of the Romanian Government, and in its conclusion, in Chapter V, we find the regulation of the Government Liability.

Starting from the constitutional regulation on Government liability [21], the content of the Code is brief, comprising only three articles, which we consider to be too little to determine, on the one hand, a self-contained Chapter in a regulation of such magnitude and, on the other hand, to cover a legal institution of major importance.

The legislator found it appropriate to keep in force the Law on Ministerial Liability [22] and the Code just overtook the provisions on Government liability previously contained in the law on the organization and functioning of the Government, repealed by the entry into force of the Administrative Code.

The chapter of the Code refers, in its opening, to the principle of legality; Article 48 stipulates for the Government - as a whole, but also for its members, the obligation to fulfill its mandate in compliance with the Constitution and the laws of the country, as well as with the Government Platform accepted by the Parliament [23].

Further, the text of art. 49 establishes the conditions for the intervention of political liability - only in front of the Parliament; each member of the Government is politically accountable in solidarity with the other members, for the activity of the Government and for its acts.

Through the form and content of the regulation, we find that the legislator attaches major importance to the political liability of the Government, the other forms in which the liability of members of the Government may intervene, remaining the same as in the old regulation: *"Members of the Government are liable from civil, contraventional, administrative or criminal perspective for the deeds committed in the exercise of their attributions, under the conditions of the law and of the present Code"*. Liability occurs based on the laws governing the common law in the matter, supplemented by the provisions of this Code.

Article 50 further states that: *"the assessment of the necessity and timeliness of the administrative acts of the Government belongs to the Government" [24]*.

Part of the regulation content is also found in the text of art. 5 of Law 115/1999, the Code pointing out the situations in which a form of liability of the Government members may intervene: *"for the deeds committed in the exercise of their attributions"*.

Chapter V - Government liability could be continued with rules on ministerial liability, a regulation that is missing from the content of the Administrative Code.

At the moment, the ministerial liability is regulated by Law 119/1999 - an outdated law, with summary content - which makes us discover, the lack of interest of the legislator towards the "loading" of the ministerial position with regulations of responsibility in connection with the activity which the members of the Government are required to carry out in the successful and efficient performance of duties conferred by law.

The inability of the legislator to adapt in time the regulation on the liability of the Government members comes from the simple observation of the small number of changes that the special normative act has undergone since its adoption - we are talking about only 8 amendments and 2 agreements with Decisions of the Constitutional Court in more than 20 years, the last of which is due to the entry into force of the new Criminal Code in 2012. And these elements may lead to the picture that, due to the summary nature of the regulation, there are legislative privileges for a certain social category.

All these represented, for the legislator, sufficient reasons for the institution of ministerial liability to find its place in the Administrative Code, obviously following a comprehensive and in-depth debate on legal norms.

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Given that a good administration is related to the efficiency of the administrative activity, which represents, in fact, the appreciation of the quality of the Government's activity, we cannot understand why the legislator does not pay deeper attention to the institution of liability of those who carry out these activities since it is the element that perfectly closes the existence of an administrative institution.

**Conclusions**

We genuinely appreciate the concern of the legislator to concretely regulate the administrative liability, knowing that it is an essential component of any form of social organization. The expected legal institution finds its place in the Administrative Code, which we consider to be a beginning for the concrete regulation of ministerial liability - a much discussed, but relatively superficially contained norm.

Even if the current regulation of the administrative liability is not perfect, we appreciate that it can be a starting point for finalizing a unitary conception of the notion of administrative liability in all its forms, an important part of legal liability, without which the edifice of administrative regulation cannot be considered complete and cannot operate at satisfactory efficiency parameters.

We especially appreciate the need to amend the Code, in the near future, in the sense of including in its content the rules governing ministerial liability. The institution of ministerial liability is one of the basic elements of the constitutional system, directly influencing the democratic character of the state, and a correct regulation in this field, in accordance with the constitutional text will bring extra order in our society.

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