VIEWS REGARDING THE CURRENT ADMINISTRATIVE PHENOMENON

Iulian NEDELCU

Professor PhD, Faculty of Law, Economics and Administration, ”Spiru Haret” University
avocatnedelcu@yahoo.com

Paul - Iulian NEDELCU

Lecturer PhD, Faculty of Law, Economics and Administration, ”Spiru Haret” University
paul_iulyan@yahoo.com

Abstract

An essential pillar of the rule of law – the principle of legality of the administration, which together with the separation of powers in the state, must guarantee the fundamental rights and freedoms of citizens.

The form of government, as a concept, we appreciate that it specifically designated the use and organisation of state bodies, as well as the characteristics, principles that underlie the relationship between them.

At the same time, the economic and social structure of the state, the principles underlying the organisation and functioning of power, its objectives and forces, the way in which society is reflected in the power and style it imparts to the rulers must be taken into account.

From the point of view of the forms of government, it is spoken in the specialised literature of monarchs and republics.

Within the republic, we find that the position of head of state is performed by an authority that can be either unipersonal or collegial.

We note, depending on the elements considered in the more general concept of state form that a number of notions and derived concepts appear, such as those of form of government, state structure and political regime.

The set of institutions, methods and means by which power is realised represents the political regime, which has much more complex determinations than the relations between the powers and the way they are organised.

The idea of collaboration of powers is used by the parliamentary regime, in which we find the principle of separation of powers – understanding by this, the functional autonomy especially of the legislature and the existence of specific means of mutual pressure.

From the specialised literature of public law, we come to the conclusion that there is no perfect constitutional regime – an opinion that can be criticised – that falls within pre-elaborated theoretical schemes.

Keywords: *separation of powers system*, *public administration*, *state of democracy*, *forms of government*, *rule of law.*

Introduction

Introductory Notions

Given the rationality of the administrative phenomenon, it is essential to understand the notions in a real, not abstract way of how administrative law is realised in order for the theoretical essence to harmonise with practice.

Thus, from an etymological point of view, the term *"administration"* has its origin in Latin composed of the preposition *ad* with the noun *ministry*, which could mean in a faithful translation – servant, executor. Next, the first definition of the word administration leads us to the idea of subordinate activity, but in another opinion, "*administration*" was defined as "*the act of administering, conducting public or private affairs, managing property*" or "*administrative power*" or "*the science and art of governing the state*".[1]

Therefore, from the presentation of the word "*public administration*", we will therefore note that it should not be confused with "*state administration*" – the concept of public administration referring not only to government and ministries, but also to the activity and organisational structure respectively through which the application is organised and the law is enforced within territorial and administrative divisions in accordance with the principle of local autonomy and administrative decentralisation, applicable in a state governed by the rule of law.

In administrative law, the notion of public administration is also analysed by referring to other notions: administrative authority, public power, public service, administrative body.

[1] Nouveau Petit Larousse illustré, *Dictionnaire encyclopédique*, Paris, Librairie Larousse, 1926, p. 5.

For example, Professor Anibal Teodorescu, a remarkable personality of the interwar period, used the concept of public power, which he defined as "*the power of the state to command all the individuals who make up its population, united with that of not recognising on its territory any other will coming from outside*".[2]

Indeed, for the rule of law to exist, the separation of powers in the state is required[3].

Montesquieu[4] theorised the principle of separation of powers which became a dogma of liberal democracies and the essential guarantee of individual security in relations with power.

Thus, the administration is no longer an exclusively etatist activity as it was previously known.

French Professor Emeritus Bernard Chantebout highlights the three functions that the state must perform: the legislative function, the executive function and the jurisdictional function.

Consequently, the former enacts the general rules, the latter is responsible for their enforcement or execution, and the latter has the role of resolving disputes that arise in the process of legislation.

In other words, if in French doctrine we find most theories and definitions of public administration, German doctrine emphasizes the abstract nature of the notion of public administration and concludes that "*administration can be described and yet, not defined*"[5].

On the other hand, the Anglo-Saxon system is examined together with constitutional law under the generic name of "*law relating to public administration*".

Nor do we omit the American theory that uses the following notions to define the term "*administration*": running and guiding business and institutions; government officials; policy execution; the period during which any chief executive holds a position.[6]

[2] Anibal Teodorescu, *Basic treaty of administrative law*, *I^st volume*, *II^nd Edition*, Bucharest, 1929, p. 113. Anibal Teodorescu (1881-1971) he was a Romanian jurist, corresponding member of the Romanian Academy, https://ro.wikipedia.org/wiki/Anibal_Teodorescu.

[3] John Locke, clearly formulated the issue of the separation of powers, his concern starting from the practical necessity of moderating the strength of state powers. The author considers that in the state there are three powers: the legislative power, the executive power and the confederate power. John Locke (August 29th, 1632 – October 28th, 1704), was an English philosopher and politician of the seventeenth century, especially concerned with society and epistemology. Locke is the iconic figure of the three great traditions of thought at the heart of the spirituality of the modern age, https://ro.wikipedia.org/wiki/John_Locke.

[4] Montesquieu, (1689-1755) was a French judge, a man of letter and a political philosopher. He is the main source of the theory of separation of powers, which is implemented in many constitutions around the world, https://en.wikipedia.org/wiki/Montesquieu.

[5] Antonie Iorgovan, *Treaty of administrative law*, Nemira Publishing House, Bucharest, 1996, vol. I, p. 22-30.

[6] Dictionary of American government and politics, 1998, The Darsey Press Chicago, 1988.

Consequently, we emphasize that all European Community countries refer to the executive power, public authority, state power, executive function, as an expression of the consecration of the principle of separation or balance of the three powers of the state.

Of course, we would like to point out that the separation of powers is not allowed in the form of opposition between them, because such a conception is likely to block the activity of the state.2. Contents

Cooperation in administrative law

First of all, from the research of the notion of public administration it arises out that this represents an activity of execution and organisation of the specific execution of the law.

Thus, it can be grouped into two broad categories:

- executive activity standing for regulations, through which the organisation of law enforcement is realised, the perceptions of ethics of natural persons and legal entities are established, permuting or prohibiting a certain behaviour, going as far as the application of penalties for non-compliance with legal provisions.

The activity in this category involves the decision-making process from the adoption of legal deeds, to committing material acts by public authorities and their functioning, as the main activity.[7]

Subsidiarily, such activities may also be carried out by other public authorities: law giving or judiciary.

- the activity being a provided service, which is executed on the basis and by enforcement of the law or upon the request of the natural person or legal entities of other public authorities (in fields such as: water, telephony, mailing, transport, etc.).

For example, the service activity is carried out through legal acts, but also through material operations.

The state administration, understood either as an execution activity or as a system of state administration bodies, materialises its entire activity in a socio-political and legal context.

[7] The entire activity of organising the execution and specific execution of the law, involves several stages: the documentation activity, which gives rise to the well-known advisory administration (service) and execution; deliberative activity, or prior to issuing decisions; active administration – materialised in legal acts – administrative deeds, jurisdictional and administrative deeds and even material operations.

Regarding the legal relations in whom the public administration is manifested and realised, it should be noted that they are executed within a social group and up to the whole society, globally viewed.

The specifics of the tasks of the public administration system, also arises out from the particularities of the administrative fact of being the organiser of the political values realisation, in a given social system.

Also, a definition of the position is as[8] "*administrative activity that someone performs regularly and organized in an institution, in exchange for a salary*" or "*degree that someone holds in an administrative hierarchy*".

In other words, in relation to the public administration, the function represents a set of attributions established by law or by acts issued on the basis and in the execution of the law.

They are performed by a natural person employed in a public administration body and who has the legal ability to perform these duties of public administration.

In the opinion of Professor Erast Diti Tarangul[9], starting from the functions of the state, he classifies the public administration, from a formal and material point of view, examining as basic notions of public administration, the public service and the general interest.

As regards of public administration, functions can be described in relation to the main objective pursued by the administration and the realisation of the interests of the citizens.

These could be summarised as execution functions[10], both of the political decisions reflected in the law, and of their activity of current administration under the law, information functions not only to the legislative authority (art.110 of the Constitution), but also to of citizen, (art.31, 78 and art.107, paragraph 4 of the Constitution) and functions of realisation of the drafts of normative acts and of some political decisions.

Administrative relations and law enforcement activity involve the state authority of the subject of law that participates in their implementation – practically a legal framework within which to perform the public administration tasks.

[8] Explanatory Dictionary of the Romanian Language, Univers Enciclopedic Publishing House, Bucharest, 1998, p. 404.
[9] Erast Diti Tarangul, *Romanian Administrative Law Treaty*, Glasul Bucovinei Publishing House, Cernăuți, 1944, p. 49-56.
[10] Ioan Alexandru, *Administrative structures, mechanisms and institutions*, Ministry of Teaching, National School of Political and Administrative Studies, vol. I, 1996, p. 45.

Therefore, the tasks of the administration are classified according to several branches: according to the content of the activity (management and organisation tasks; performance tasks), depending on the nature of the device or provider of the activity (tasks of organising the execution and execution of the law), by the scope of the regulation (tasks of national interest and tasks of local interest).

The clarification of some notions such as society, state, executive power or public administration start from the institutional reality of the moment, namely the existence of Romania in the administrative space of the European Union.

Thus, the adoption of *OUG (Government Emergency Ordinance) No.57/2019 of July 3rd, 2019* on the Administrative Code is almost a bias in relation to the concluded European partnerships, maybe not so imperative and necessary given the current legal provisions.

An interesting remark is the fact that the supreme law, the Constitution of Romania, establishes the terms of – *balance* – or – *cooperation of powers in the state* – and not – *separation*. According to the Constitution approved by referendum on December 8th, 1991, in Romania *the only holder of power is the Romanian people*.

Regarding the object of activity of administrative law, the question was asked in the specialised literature, if it is not, somehow, the same as the object of public administration as a form of achieving state power.

Administrative law consists of the social relations that form the object of public administration in the conditions in which the notion of public administration is also defined by the formal criterion of the law.

Administrative law as a branch of law regulates only certain social relations specific to its object of activity. Regarding the object of activity of administrative law, the question was asked in the literature, if it is not the same as the object of public administration as a form of achieving state power.[11]

It is important to specify, however, that although the object of administrative law is similar to that of public administration, it is not to be confused with it. Public administration

[11] Alexandru Negoiță, *Administrative law and Administration Science*, Atlas Lex Publishing House, Bucharest, 1993.

consists in organizing the concrete execution of laws and other acts of state authorities based on the law.

The content of the administrative law identifies some social relations that could be the object of other forms of activity of the state, such as, for example, the settlement of jurisdictional administrative deeds that through their procedure can also be the object of the activity of justice.

These activities are located at the confluence between public administration and other forms of state power that can be considered as or not part of the administrative activity and therefore may or may not be regulated by the rules of administrative law in relation to how it disposes. the law, a fact already emphasized in comparative law.[12]

Last but not least, there is a complexity of social relations that manifests itself within the groups of people organised in order to perform the duties of public administration, as well as between these groups of people and public institutions or state authorities.

The organisation and activity of those who perform public administration must be subject to legal regulation.

In other words, the social relations that form the object of the administrative law are those relations that forms the object of the public administration carried out according to the legal norms by the public administration authorities.

It follows that the administrative law consists of the social relations that form the object of public administration in the conditions in which the notion of public administration is also defined according to the formal criterion of the law.

The principle of legitimacy

The principle of legitimacy is the principle that appoints the bounds of the actions of the public authorities, limiting their power, without injuring their undertaking spirit.

Such a hypothesis comes from the ascertainment according to which the law regulation cannot provide absolutely everything, fact that warrants the public authority to implement the regulation when informed.

[12] André de Laubadère, *Traité élèmentaire de droit administratif*, Paris, 1963.

Distinction between discretionary power and bound power has a crucial interest, since it determines the legality requirements of the administrative act with regard to the relationship between its object and its motives, therefore having direct consequences in the legal field and that of the jurisdictional control.

As unanimously expressed by all doctrinarians, in the current activity of public administration, it is indispensably required to be achieved a balance between the two types of competences.

Thus, the administration action cannot adjust to a generalisation of the bound competence, which would actually be the equivalent of determining a reflex conduct, based on administrative type automatisms, in applying pre-established rules[13] .

For that matter, most of the times, administration has to permanently adjust to specific and changing circumstances that the rule of law cannot provide[14]. On the contrary, an administration which has very wide discretionary powers, does not offer to the administrated people any security, since it would tend to abuse and contingency. For these reasons, the bottom line is the need of a dosage[15] between the two types of competences.

Conclusions

Thus, in order for an optimal functioning of the authorities and public services vital to the organization of the company, the need for legal regulation of the organization and functioning of the public administration under the rule of law derives from the nature of the object of this activity.

No doubt that public administration is a truly interesting topic dedicated especially to scientific research for the importance it shows in the proper functioning of vital public authorities and services.

Research object not only for jurists, but also for economists, historians, sociologists, philosophers, political scientists and even anthropologists, public administration has as main purpose the realisation of political values as a form of expression of the general interests of society, values that are materialised in law.

[13] André de Laubadere, J. C. Venezia, Y. Gaudement, *Traite de Droit Administratif*, Tome 1, 14ed, L.G.D.J., Paris, 2001, p. 643-650.
[14] Jean Rivero, Jean Waline, *Droit administratif*, 17ed, 1998, Dalloz, Paris, p. 86.
[15] Ibidem.

Therefore, the phenomenon of administration was thus approached in a monodisciplinary way by each of the specializations and the image provided could not comprehend the complexity and nuance of the mechanisms, institutions and structures involved in the functioning of administration.

It is the state itself that must accurately determine the limits of its powers in the form of the law, as it does with regard to liberties, but it is not appropriate to act more than it is within its legal competence.

In this regard, the renowned theorist in administrative sciences, prof. univ. dr. Ioan Alexandru remarks the essential property of the state governed by law, which results from the application of the principle of legality in the activity of public administration which, together with the organized division of state power into three components, aims to guarantee the citizen's freedom from the direct State's intervention.[16]

Consequently, the result of the legal normative activity is represented by the multiplicity and variety of activities and forms of organisation of the public administration system.

An important way to achieve the organisation and functioning of the public administration system that provides an objective criterion for assessing the conduct of persons performing public administration is the legal norm.

If we consider the law execution, the public administration system is the instrument with which the law is realised. In order to meet this mission, the public administration, seen as an activity and as an organisation system, must also be subject to the law.

In this way, the principle of legality of public administration activity is outlined, as a fundamental principle. Unlike the 1991 Constitution, the text of the Constitution revised in 2003 dedicates its superset position as a general principle, placing it at the top of the legal norms pyramid: "*generating constitutional supralegality*"[17]

Thus, law is thus a necessary and binding dimension for the public administration.

[16] Ioan Alexandru, *Compared administrative law*, Lumila Lex Publishing House, Bucharest, 2000, p. 134-135.
[17] Rozalia Ana Lazăr, *Legality of the Administrative Act*, ALL Beck Publishing House, Bucharest, 2004, p. 52.

The principle of legality is also expressly stated in the "*Code of Good Administrative Behaviour*" adopted by the European Parliament on September 6th, 2001).

As a result, it is imperative that it be interpreted dynamically in the sense of the obligation of public administration authorities to act to enforce the law and to take the necessary measures, including coercive measures, in order to restore the violated legal order.

This explanation derives from the very purpose of the public administration that of being in the service of the general interests of society expressed in law.

In the Romanian legal system with all the opposite opinions supported in the specialised literature we must recognise the thesis of the plurality of norms applicable to the administration of administrative, private law or other branches of public law.

A comparison of European systems highlights two "*types*" of law applicable to the administration in the European space, namely the Anglo-Saxon system (which does not recognise the existence of administrative law as a separate branch of common law, so the administration is subject to common law rules (common-law), as well as administrative disputes settled by common law courts) and the francophone system (present in most European states, based on the recognition of exorbitant law for the state administration, respectively administrative law, with the recognition of the existence of separate administrative jurisdictions common law courts structured in a system headed by a supreme administrative court)

It is important for defining the sphere of administration and the distinction between the public administration made by the state structures respectively by the local authorities and the administrative activity carried out by the other state bodies (public authorities): Parliament, courts, Constitutional Court.

References

- **Alain Moyrand , *Le droit administartif* , tome^{2emme}, Lère Edition, L'Hermes 1993;**
- **Andre Roux, *Droit constitutionnel local*, Economica Publishing House, Paris, 1995;**
- **Ioan Alexandru, *Public Administration, Theories. Realities. Perspectives*, Lumina Lex Publishing House, Bucharest, 1999;**
- **Apostol Tofan Dana, *Administrative Law*, *1st vol.*, All Beck Publishing House, Bucharest, 2003;**
- **Bernard Brachet, *Droit public. Droit constitutionnel et Libertes publiques*, Les cours de droit, Paris, 1995;**
- **Bruno Remand, *La Région: une unité politique d'avenir*, 2^{emme} édition, Montchrestien, Paris, 1995;**
- **Charles Debbasch, *Institutions administratives*, 3^{emme} édition, Paris, 1975;**
- **Corneliu – Liviu Popescu, *Local autonomy and European integration*, All Beck Publishing House, 1999;**
- **Dan-Claudiu Dănişor, *Constitutional law and political institutions, 1st vol*., C.H. Beck Publishing House, Bucureşti, 2007;**
- **Jean Rivero, *Droit administratif*, 12ème édition, Paris, Dalloz, 1987;**
- **Nedelcu Iulian (co-author, coordinator), *The President of Romania and the central public administration*, CH Beck Publishing House, Bucharest, 2018;**
- **Nedelcu Paul – Iulian, *Decentralisation – comparative study*, Universul Juridic Publishing House, Bucharest, 2015;**
- **Vedinaş Verginia, *Theoretical and Practical Treaty of Administrative Law. Ist Volume*, Universul Juridic Publishing House, Bucharest, 2018.**