SUBJECTIVE AND OBJECTIVE ADMINISTRATIVE CONTENTIOUS. COMPARATIVE LAW ASPECTS

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ABSTRACT: *Following the approach of a comparative law perspective, we are able to perceive, in the doctrinal, legislative and jurisprudential evolutions of the judicial systems considered in the present study, a common tendency to unify the jurisdictions, reaching at this moment a relative uniformity of the national jurisdictional guarantees in various law systems. The regulation of the judicial procedures that involve the public administration seems, in fact, to develop and generally to converge to forms of protection that are increasingly closer to those established in disputes between private persons before the courts of common law.*

KEYWORDS: *administrative contentious; judicial litigation body; administrative litigation body*
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From etymological point of view, the word "contentious" comes from the French word "contentieux", which at his turn comes from the Roman expression "contentiosus", which means quarrelsome.

Also, the term "contentious" derives from the Latin "contendo, -ere", which presupposes a fight in a metaphorical sense, a fight of opposing interests between two parties, one of which will be the winner (Vedinaș, 2009).

Thus, the term "contentious" represents, on the one hand, the activity of solving a legal conflict, and, on the other hand, the body invested by the law with the resolution of such legal conflicts.

In principle, the administrative litigation bodies can be divided into *judicial* litigation bodies (meaning the administrative courts), which will settle all legal conflicts given by law in their competence, and in *administrative* litigation bodies, whose competence is to resolve legal conflicts in which at least one of the parties is a public authority, so the criterion of delimitation between the two types of organs is the competence.

The present doctrine, in addition to many other criteria for classifying the administrative litigation, makes a distinction between *the subjective* administrative contencious and *the objective* administrative contencious.

The criterion of delimitation between the two types of administrative litigation/contecious is the character of the interest pursued through the application that is the subject of the administrative litigation case.

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Namely, in the case of *the subjective administrative litigation* we are talking about the cases through which the law subject is addressed to the competent authority for the protection of a subjective right or of a legitimate personal interest that is imposed as a result of an injurious administrative act or a situation assimilated to it.

On the other hand, we are talking about *the objective administrative litigation* in the situation of the action in the administrative litigation through which the competent body is notified by the applicant who tends by his action to protect an objective right or a legitimate public interest.

Thus, it is appreciated by the Romanian specialized doctrine that the objective administrative litigation aims to restore a general legal status with general and impersonal character (Vedinaș, 2009).

From this perspective, Professor Tudor Drăganu, appreciated that through the subjective administrative litigation the aim is to respect certain rights recognized by the law to some natural or legal persons, pursuing individual interests, while the objective administrative litigation follows strictly the respect of the legality, and the defense of the legal order, abstracting the legal situation of the injured party by the illegal administrative act (Drăganu, 2003).

Analyzing different national systems of jurisdictional guarantees in the field of administrative litigation, we can observe common tendencies of standardization of judicial guarantees.

Thus, *in the French legal system*, the focus on objective administrative litigation is certainly strongly maintained.

From its origins, the so-called "le contentieux administrative", which, in the hypothesis of the full-jurisdictional litigation, has always had a subjective character, since it was based on the protection of the situations of subjective law against the public administrations, but later assumed, in its most typical form, namely the appeal for excess of power, the character of an objective litigation, since its object is focused on the simple question of legality (legitimacy) and, therefore, of the compliance of the contested administrative act with the legal norms which are governing it (Scoca, 2013).

This objective character, from the point of view of the early French doctrine, led to the claim that, within the administrative process, it is excluded that the real parts can be identified, from a technical point of view.

According to the famous Laferrière statement, a case of administrative litigation „n'est pas un procès fait à une partie, c'est un procès fait à un acte" (Laferrière, 1989), since the dispute created by it has the sole objective to ensure the legitimacy of the administrative action, without involving any purpose of protecting the citizen (Chapus, 2008).

The rigidity of these approaches is mitigated by the doctrinal, jurisprudential and legislative developments that have followed one another to this day, attenuating the purely objective character of administrative disputes, by introducing various subjective elements (Scoca, 2013).

The focus on the protection of the person has increased, in particular, recently, following the pressures imposed by European law (Miron, 2014), not only of the European Union, but also of the European Convention on Human Rights, to which the French administrative judge is particularly sensitive.

Even before that, there was a tendency to adopt some forms of subjective protection in the objective litigation of the appeal for excess of power, with the introduction of significant changes in the procedural law of the internal French administrative law. In particular, it was considered, on the preventive measures of protection of the law subject, the introduction in the French administrative process of some ordinances (Ferrari-Breeur, 2009) such as the reform realized with the Decree no. 2010-164 of February 22, 2010, offering guarantees similar to those of civil procedure. In particular, in the discussions in the preliminary proceedings, the protection of the parties' position has been considerably extended, with the introduction of a public hearing in an oral debate, where it is possible to discuss for example the results of an expert opinion (Stahl, 2010).

Even before such law interventions, the hybrid nature of the actions in administrative litigation was divided between the objective and subjective protection.

All this since, in the doctrinal analysis, it was emphasized to highlight the necessity of existence in the administrative process of the interest to act (intérêt à agir) was highlighted, as a condition of admissibility of the action in administrative litigation, which inevitably leads to the power of the administrative judge to verify , according to the objective law, the legitimacy of the administrative document, provided that during the entire process the applicant has his private interest to obtain such a verification (Scoca, 2013).

To all these is added the presence of some institutions, such as the right of the plaintiff to give up to the trial, having as a result the out-of-court settlement, without being possible to resort to an objective verification of the legitimacy of the act that is the subject of the action, aspects that lead to the mixed nature of the French administrative litigation[1].

Starting from the French administrative system, a comparison is required to be made with the subjective type of administrative protection model, specific to the German administrative court system. In Germany, the principle of separation of state powers is invoked, unlike in the French administrative system, precisely to substantiate the constitutional provision of identifying the administrative judge, as a distinct branch of the judicial system, but with the same independence and status as ordinary judges.

The administrative judge is not provided with a special role, but only with a "specialization" in carrying out the judicial tasks. He has nothing to do with the executive or the legislative power. It is also not assigned to him any advisory function alongside the jurisdictional one. The German administrative courts have the same training as the ordinary judges, not being strictly connected to the public space. The basic idea here is that the division fulfills only specialization requirements and does not consider distinct and antagonistic jurisdictional powers.

The point of view from which the German administrative judge departs is different from that of the French judge.

It is the point of view of the subjective protection. Therefore, it is not primarily the pursuit of the legality of the administrative act, but rather the protection of the subjective right. This aspect is the one on which the administrative judicial action is based. It follows the consequence of a restricted procedural legitimating compared to France jurisprudence and doctrine, but with an emphasis placed on the procedural position of

1 Art. R 636-1 al Codului judiciar administrative francez.

private law the subject in question, in order to assure the equality between the parties, which derives from procedural rules similar to the civil process (Pretis, 2007).

The diversity as regards the European continental administrative systems is emphasized when the attention is paid to the US administrative law, which essentially presents itself as a procedural law system, a law system that governs the decision-making procedure performed by the agencies and which provides judicial protection forms before the ordinary courts, only as a later, additional form of verification and control over the legality of the administrative act. Therefore, a great attention is paid to the procedural forms prior to the issuance of the administrative act, which thus become themselves, a guarantee of the subjective rights of the private persons involved in the administrative procedure, which is oriented to guarantee the fundamental principle of the double process.

In the United States, even more than happens for example in the United Kingdom, the ordinary judges are verifying the legality of the administrative act. However, there is not a single procedure, but a multitude of specific verification paths. The system is based, in fact, on the provision of legal remedies, provided by the special laws that establish the different procedures of issuance regarding the decisions whose judicial control must be carried out. Therefore, each administrative action has the specific procedural remedy provided by law. The consequence is a highly fragmented discipline, which nevertheless provides a single hypothesis for general federal court action, which operates where there are no provisions that provide for specific administrative procedures.

In this regard, it should also be mentioned that in the American system the judicial protection established by the ordinary courts is almost like a second court of protection, since the protection of the private citizen against the public authorities is primarily a procedural protection.

After this brief review of some of the essential characteristics of the systems of protection against the injunctive administrative act, it turns out that whatever is the choice of national jurisdiction as regards the competence to verify the activity of the public authorities (the existence of an administrative judge, especially in France or belonging to the ordinary judicial system in Germany, or the judicial and procedural protection in the United States), a necessity appears to be indispensable, even if it is not yet fully and uniformly implemented in different jurisdictions. (Lamorgese, 2014)

It is about the need to guarantee the circumstance that the necessity of the legal character of the administrative act will not prevail at the expense of guaranteeing the subjective, especially the procedural, rights of the private citizen. This requirement is solved by carefully choosing the appropriate protection instruments, a priori requiring an additional essential element, namely legal certainty, as a preliminary condition of the procedure for requesting judicial protection.

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