

PUBLIC LAW AND PRIVATE LAW WITHIN ADMINISTRATIVE LAW

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ABSTRACT: *The Romanian administrative law is greatly inspired from the same branch of the French law. French administrative law is strongly dominated by Public law. The pre-eminence of the general interest, specific to the French vision of public service managed to be recognised in that area, even if to a lesser extent, by the European Union. The Romanian administrative legislation after 1990 swung between public and private law. The notion of “administrative contract” from the French law came into attention after 1990 and was specifically mentioned in Law No. 554/2004. Among the administrative contracts, the public acquisition of goods, works and services was particularly mentioned, and the competence of solving litigations concerning these contracts was established in favour of the administrative courts. However, Government Emergency Ordinance No. 76/2010 changed the competence for such litigations in favour of the commercial courts.*

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The dichotomy between public law and private law has ideological and epistemological implications that lie at the heart of legal and political science in Western Europe. The original Roman sources reveal the ideological implications¹: *publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem*². Continental law still preserves the dichotomy, although the concepts are rethought as modern societies bring to the forefront new rights and legitimate interests - a newer kind of “property” – which, although not “public” in the Roman and Civilian sense of the word (that is, belonging to the *res publica* or state), are collective or diffuse, in the sense that either they do not belong to any individual in particular, or that individuals own only an

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¹ Samuel, G 1992, “What is it to have knowledge of a European public law?”, in B De Witte & C Forder (ed.), *The common law of Europe and the future of legal education*, Kluwer Law and Taxation Publishers, Deventer, The Netherlands, p.171.

² Digestae 1.1.1.2.

insignificant portion of them³. In the United Kingdom the litigation is seen as being exclusively concerned with the settlement of disputes between individuals; the constitutional ideology of the judges remains founded on a model whereby “the nation is a collective term for millions of individuals, and it is individuals who count”.⁴

Modern philosophers have debated between the individualism and collectivism, extreme collectivism leading to socialist ideology. However, the debate pointed out that the legislator has often intervened for protecting the social organisation and the general interest from abusive exercise of individual rights. Legislation has developed complex means for restraining individual rights for reasons considered of a superior nature. The environmental and urban law are the most evident examples⁵.

The dichotomy is nowadays most evident in the French law. Although commercial law is traditionally ruled by the private law, being at the heart of it, along with family relations, public law has remained to rule in some areas. Public service is one of these sectors, as in the French law the notion of public service has developed in close relation with the public power, through legal judgements issued at the beginning of XX-th century. By the *Blanco*⁶ decision the notion of public service was consecrated and by the decisions *Terrier* and *Thérond*⁷ the criteria of identifying a public service were established: the object of the activity is to satisfy a general interest and the legal frame regulating the activity belongs to the public law. The criteria for the applicability of public law have changed from the school of Maurice Houriou up to nowadays. The fact that for some isolated operations the administration may act as an individual, without the public power prerogatives, was accepted. The judgement passed in *Société commerciale de l'Ouest africain*⁸ admitted that the administration may organise a public service in the same conditions (without using public power prerogatives), setting the basis of the notion of “industrial and commercial public service”, subjected mainly to the private law. However, even in these circumstances, the public law has not ceased entirely to rule on this category of public services. French case-law has admitted that industrial and commercial public services may have prerogatives of public power with the purpose of maintaining good quality. Thus, they are able to issue administrative acts, subjected to the control of contentious administrative courts, and have to preserve the rules of public service: continuity, adaptability, equality and neutrality⁹.

In UE law, the notion of “public service” was ignored for a long time. The European integration was aimed towards a unique market in order to facilitate the free movement of goods and services between the member states. Regarding public services, the main target was privatization of the ones with industrial and commercial character in order to subject them to the laws of free competition. This vision on public service is not particulate to UE, but integrated in a global vision specific to the period of the last decade of the 20th century according to which the state was responsible to regulate the provision of public services by private persons. Public services were seen more and more often as

³ Capelletti, M 1989, *The Judicial Process in Comparative Perspective* in Samuel, G, *op.cit.*, p. 172.

⁴ Lord Donaldson MR in *X Ltd v Morgan-Grampian Ltd (1991)* in Samuel, G, *op.cit.*, p. 172.

⁵ Bergel, L.J 2003, *Théorie Générale du Droit*, Dalloz, Paris, pp. 36-42.

⁶ Arrête Blanco, 1873, *Grands arrêtes de la jurisprudence administrative*, 15^e édition, Dalloz, Paris, 2005.

⁷ Arrête Terrier, Tribunal des conflits, 6th February 1903, a rrête Thérond, Tribunal des conflits 4th March 1910.

⁸ Arrête Société commerciale de l'Ouest africain, Tribunal des conflits, 22nd January 1921.

⁹ Foillard, P 2005, *Droit administratif*, Éditions Paradigme, Orléans, pp. 242-246.

benefits addressed primarily to individuals and, for this reason, they have to be paid with sufficient amounts to cover the costs of their production. In this context, in an indirect way, the beneficiary of the service has transformed from a “citizen” to a simple “consumer” of the service provided by the private supplier. In September 2000, the 189 member states of the United Nations Organisation adopted the Millennium Declaration. They engaged to promote a series of measures to fight extreme poverty. Among the consensual adopted measures, there were measures to reform the politics of ensuring public services, oriented towards the free market, especially regarding water and energy supply, health and education¹⁰.

Both in the case of the UE and of the UNO, the subjection of public services to the rules of free market sought effectiveness of the service in order to ensure a benefit to the consumer. From this perspective, the French vision on the public service may appear as an obstacle. The EU has even attacked the monopolies maintained by France in favour of public operators such as EDF, Air France, France Telecom. The situation created controversy in French jurisprudence regarding the legitimacy of the notion of “public service”, not observing that the debate was only about the way the service was organised. During the last decade of the 20th century a congruence between the French idea on the public service and the European frame was observed, through the case-law of the European Court of Justice. Decisions *Corbeau* (19th May 1993) and *Commune d’Almelo* (27th April 1994) pointed out that equality and continuity (basic characters of public service in French jurisprudence) are fundamentals of the general economic interest. ECJ admitted the necessity of narrowing the freedom of competition in order to permit the accomplishment of a general interest. At the same time, the concept of “universal service” was born and introduced by the European Commission in 1992. This is described as a basic service offered to all community members at accessible costs and with a standard quality level. The basic service is part of the public service and providing a universal service may be an objective for a public service organised in a competitive system.

French jurisprudence mentions the term “economic law”, pointing out that there is no part of the private law to be called so, but it is part of the public law¹¹. Economic law is built on the intervention of public authorities in economy, using public power. The purpose of the intervention is to establish rules outside the common law (*règles exorbitantes du droit commun*), aiming to give a new orientation of the economic legal relationship in order to protect a public interest. The rules of the economic public law do not apply only to the relationships between the public power and private economic agents but also concerns public persons in areas like competition and State support. The economic public law in the EU protects the Union’s interest the “*utilitas publica*”, the objectives of the Treaty and not particularly private interests. The notion of common market is an economic notion with legal and political implications towards the community interest such as the customs unification, economic and currency politic, agriculture, transportation, regional development. According to Joerges¹², we are in the presence of a rule of public economic law any time when: there is an intervention of the public power

¹⁰ Bayliss, K, Kessler, T 2006, *Can privatisation and commercialisation of public services help achieve the MDGs? An assessment*, International Poverty Centre, <http://ideas.repec.org/p/IPC/wpaper/22.html#provider>, last consulted on 30th October 2011, pp. 1-48.

¹¹ Vlachos, G 2011, *Droit publique économique français et européen*, Dalloz, Paris, p.11.

¹² *Ibidem*, p.12.

(the State or EU); the intervention concerns the economic relationships (production, exchange of goods); it concerns the macroeconomic and sectorial regulations, the control of anti competition practices as well as the organization of public sector. The definition underlines that the economic public law aims to modify the behaviour of economic agents, so that there will not be an anarchic functioning of the market, but a conformity with the objectives of a public economic policy.

A creation of French public law is the administrative contract. Jurisprudence states that we are in the presence of an administrative contract if one of the parties is a public authority and the contract contains stipulations that derogate from the common rules of private law (*clause exorbitante*), ensuring a supraordinate position of the administrative authority (for example stipulations that grant the public authority a right to control, a power to apply sanctions or the right to one-sided termination of the contract¹³). These conditions can be enlarged, as the administrative courts decided that the administrative nature of a contract is not founded on the nature of the parties but on the object of the contract¹⁴. Thus, contracts concluded between subcontractors of a motorway may be qualified as administrative. The participation to the execution of a public service may be another condition that qualifies a contract as administrative, even if concluded between private parties and in absence of a *clause exorbitante*¹⁵. Even if jurisprudence and case-law show that there is not always easy to identify a contract as being administrative or private, there is no doubt that all contracts mentioned in the Public procurement code (*Code des marches publics*) concerning procurement of goods, services and works, belong to this category. In addition, the public-private partnership contract is an administrative contract¹⁶.

Particularities of the administrative contracts are as follows¹⁷:

- the administrative authority has a right of direction and control; the public authority may give the co-contractor instructions that are mandatory;
- the administrative authority may modify one-sided the contract, if there is a need deriving from a general interest, without altering the fundamental elements of the contract and with just compensation in order to maintain the financial equilibrium of the contract;
- the administrative authority may infringe sanctions upon the co-contractor, such as fines, the entrustment of the works to a third party on the expense of the co-contractor, or termination of the contract in case of a serious fault of the co-contractor;
- the administrative authority may terminate the contract, not as a sanction, but because there is a need for the general interest;
- the theory of unforeseeability is working in the sense that if, due to an unforeseen event, the co-contractor risks not to be able to complete his obligations, the financial supplements have to be divided between the contracting parties and the indemnity for unforeseeability has to cover 90% of the co-contractor's prejudice, enabling him to execute the contract in the public interest.

¹³ Arrête *Société du Vélodrome du Parc des Princes*, Assemblée du contentieux du Conseil d'État, 26 février 1965, Recueil des arrêtes du Conseil d'État, p. 133.

¹⁴ Arrête *Société des Autoroutes de la région Rhône-Alpes*, Section du contentieux du Conseil d'État, 3 mars 1989, Revue française de droit administratif, 1989, p. 619

¹⁵ Foillard, P 2009, *Droit administratif*, Éditions Paradigme, Orléans, pp. 228-231.

¹⁶ *Ibidem*, pp.237-238.

¹⁷ *Ibidem*, pp. 244-249.

Romanian law has assumed the concept of administrative contract from the French law, but did not manage to establish coherent criteria to determine the category. Before the Second World War, jurisprudence was divided into three major groups of opinion. One of the groups admitted the existence of the concept of administrative contracts only regarding the concession contract¹⁸. Thus, the public works concession was seen as an agreement between the administration and the concessionary, where the administration had an obligation for regulating and controlling the exploitation of the public service in order to achieve and protect the general public interest. The contract was considered a complex one, containing dispositions imposed by the administration (*les clauses exorbitantes*) and dispositions negotiated by the parties. Among the characters of the contract, there were¹⁹: the administration had the right to terminate the contract either by an administrative decision or by a court decision, if there was a need for protecting a general interest, or if the concessionary did not fulfil his obligations; the unforeseeability theory applied to the contract²⁰. The Cassation Court of the time admitted, through its decisions the existence of the administrative contract, stating that the administration may conclude contracts with private persons in order to provide a public service, contracts that can be subjected either to the Civil code, or can be “public law contracts, or administrative contracts, governed by the rules of public law”²¹. Another opinion of the time rejected the theory of administrative contracts, considering that the distinction of the administrative acts into authority and managements acts is not compatible with this theory, or that the concession contract is not a simple management act, but a mixed one²². A third opinion, the less spread one, argued that all contracts concluded by the administration are administrative contracts, being subjected to the rules of public law²³.

After the Second World War, between 1948-1989, with few exceptions, the theory of the administrative contract was lost, as there was little difference between the public and private property of the state²⁴.

Starting with 1989, the theory was once again brought to life, with almost the same characters established in the inter-war period. No legislation to consecrate the theory was adopted. In 1998, Law No. 219 was adopted, regarding the concession contract. The law applied to the concession of public property, public works and public services. Only a few of the characters of an administrative contract were to be found in this law. The existence of the exorbitant clauses was recognised, but the law only mentioned that these are the clauses mentioned in the descriptive documents. The law recognized the right of the contracting body (the administrative authority) to alter the contract for exceptional reasons, affecting the local or national interest, as the case was [art. 31 par. (1)]. Also, the possibility for the administration to terminate the contract was provided. On the other

¹⁸ Iorgovan, A 2001, *Tratat de drept administrativ*, vol.II, Editura All Beck, București, p. 105.

¹⁹ Tarangul, E 1944, *Tratat de drept administrativ român*, Tipografia Glasul Bucovinei, Cernăuți, pp. 480-482.

²⁰ *Ibidem*. It was argued that if, due to unforeseen events, the obligations of the concessionary became too onerous, the administration has to alter the terms of the administrative contract, in order to prevent a poor quality of the public service.

²¹ Iorgovan, A, *op.cit.*, p. 107.

²² Negulescu, P 1934, *Tratat de drept administrativ*, Institutul de arte grafice E. Marvan, București, p.133.

²³ Strihan, P 1946, *Contractele administrative în dreptul român. Contribuții la o teorie generală*, Tipografia Curierul judiciar, București, p.7.

²⁴ However, there were voices proclaiming the theory of the administrative contract. See in this respect Gilescu, V 1970, “Natura juridică a contractului de specializare universitară”, *Revista română de drept*, no. 7, p. 122.

hand, the competence to solve litigations between parties, concerning the completion of the contract, was established in favour of the common private law courts. Excluding the contentious administrative courts, a private nature was given to the contract. In front of the contentious administrative courts, the possibility to observe the conduct of the administrative body is higher, as theories like the excess of power (*exces de pouvoir*), linked to public law, limit the discretionary power of the administration. Such things are not discussed in front of a commercial court²⁵. It was observed that, on one hand some of the dispositions proved that the public interest is more important than the private one, but on the other hand, the concessionary, like any private merchant, seeks and is entitled to the highest profit. Article 32 from the Law No. 219/1998 stated that the concessionary would not be obliged to support a heavier burden caused by the actions of administration or the force majeure. However, exceptional reasons or force majeure are not the same thing as an unforeseen economic event, and the theory of unforeseeability does not apply in commercial contracts²⁶. For example, Decision No. 15/2000 of the Constitutional Court states that an “exceptional reason” is the case of a “major public danger”. Also, due to the private law appearance created by the competence to judge the litigations, the possibility of control for the administration upon the actions of the concessionary was appreciated as being limited. But in this case, how can the public authority observe the public interest²⁷?

A few years later, the public procurement of goods, public services and public works was regulated by the Government Emergency Ordinance No. 60/2001. This time, the rules proved the public nature of the contract: litigations were in the competence of the contentious administrative courts, following an appeal to the administrative authority.

Through the dispositions of the Law No. 554/2004, of the contentious administrative, the term of administrative contract was used and in this way legally recognised. Article 2 par. (1) letter c) showed that there are also considered administrative acts the contracts concluded by the administrative authorities concerning concessions of public goods, public works, public services and public procurement of goods. The law explicitly said that conflicts concerning these contracts are in the competence of contentious administrative courts. As for other administrative contracts, the contentious administrative courts were also competent if as special law stated so. Among other contracts that were considered to be administrative the public-private partnership was nominated²⁸.

In 2006, the need to align to the EU rules regarding transparency in the contracts concluded by the administration resulted in new legal dispositions. Government Emergency Ordinance No. 54/2006 on the concession of public property replaced Law No. 219/1998. Although the competence in solving the conflicts related to the completion of the contracts was established in favour of the contentious administrative courts, the law preserved the same provisions regarding the possibility of the administration to alter the contract for exceptional reasons: the action of the administration and force majeure. However, the Ordinance stated that public authorities have the right to permanently

²⁵ Iorgovan, A, *op.cit.*, p. 238.

²⁶ About unforeseeability in commercial law Popovici, P.M. 2008, *Drept comercial român*, Editura Napoca Star, Cluj-Napoca, p. 161.

²⁷ Iorgovan, A, *op.cit.*, p.236-241.

²⁸ Dragoș, D.C 2005, *Legea contenciosului administrativ. Comentarii și explicații*, Editura All Beck, București, pp. 104-108.

control the concessionary in order to determine if he is fulfilling his obligations according to the contract (art. 55).

The procurement of public goods, public works concession and public services concession were regulated by the Government Emergency Ordinance No. 34/2006 concerning public procurement. This Ordinance had lot of dispositions concerning the procurement procedure, but no dispositions regarding the completion of the contract and the competence to solve the litigations concerning the completion of the contract. In respect to the procurement procedure, the parties could solve their litigations in front of the National council for solving complaints, which is an administrative body with jurisdictional activity, and further in front of the contentious administrative sections of the Courts of Appeal, in the judiciary system. At the time, our opinion was that these contracts are administrative contracts, according to article 2 par. (1) letter c) from the Law No. 554/2004, so all the characters of such contracts should apply to the public procurement contracts. Also, litigations regarding the completion of such contracts should be in the competence of the contentious administrative courts, according to the dispositions of the same law²⁹. However, the Government had a different opinion. The Government Emergency Ordinance No. 76/2010 amended the Government Emergency Ordinance No. 34/2006 by introducing par. (11) to the article 286, stating that the litigations concerning the completion, nullity, annulment, cancelation or one-sided termination of the public procurement contracts are in the competence of the commercial sections of the tribunals where the corporate seat of the contracting authority lies. Some authors concluded that the parties, after concluding an administrative contract with the entire rigor specific to these contracts, will act as equal parties in a commercial contract afterwards, the litigations in this stage being in the competence of the commercial courts and not subjected to the rigour of the contentious administrative procedure³⁰. What can we understand - that the contract has both natures at the same time, administrative and commercial, as it cannot change its nature after it is concluded? We do not think that a more flexible interpretation can be given to the contract in the implementation stage than in the concluding stage. A mixed competence, divided between the stages of the contract will only raise controversies on the interpretation of clauses. Also, as generally administrative contracts are excluded from arbitration, should we understand that litigation concerning the implementation of the contract may be subjected to arbitrage, while litigations concerning the conclusion of the contract may not?

The same process of rejecting the administrative contract theory, after consecrating it by Law No. 554/2004 is observed in respect with the public-private partnership contract. Government Ordinance No. 178/2010 does not specify if such a contract has an administrative or a commercial nature. Jurisprudence appreciated that the rules concerning the awarding of the contract show that the contract is an administrative one³¹. In this case

²⁹ Fodor, E.M 2008, *Drept administrativ*, Casa de Editură Albastra, Cluj-Napoca, p.227.

³⁰ Tabacu, A, Singh, A 2011, "Recentele modificări ale O.U.G. nr. 34/2006, un temei pentru reorientarea contractelor administrative spre libertatea contractual?" (Recent amendments of the G.E.O. NO. 34/2006 – grounds for the reorientation of the administrative contracts towards contractual liberty?) in *Revista Transilvană de Științe Administrative*, nr. 1 (28), p. 176.

³¹ Before G.O. No. 178/2010 Puie, O 2007, *Recursul administrativ și recursul jurisdicțional*, Universul Juridic, București, p.148; after Petrescu R. N 2011, "Reflexii asupra legii parteneriatului public-privat", paper presented

as well, litigations concerning the conclusion of the contract are in the competence of administrative jurisdictional bodies followed by courts, and litigations concerning implementation, nullity, annulment, cancelation or one-sided termination and obtaining damages are in the competence of the commercial courts.

A Green paper of the EU [COM (2004) 327 final]³² stated that, in relation with the frame of the contract several points should be observed, even if the contractual provisions governing the phase of implementation of the PPPs are primarily those of national law:

- the appropriate assessment and optimum distribution of the risks between the public and the private sectors, according to their respective ability to assume these risks;
- since they concern a service spread out in time, PPP relationships must be able to evolve in line with changes in the macro-economic or technological environment, and in line with general interest requirements; thus, the descriptive documents transmitted to the candidates during the selection procedure may provide for automatic adjustment clauses, such as price-indexing clauses, or stipulate the circumstances under which the rates charged may be revised. They can also stipulate review clauses on condition that these identify precisely the circumstances and conditions under which adjustments could be made to the contractual relationship;
- in general, changes made in the course of the execution of a PPP, if not covered in the contract documents, usually have the effect of calling into question the principle of equality of treatment of economic operators. [42] Such unregulated modifications are therefore acceptable only if they are made necessary by an unforeseen circumstance, or if they are justified on grounds of public policy, public security or public health.

All these are characteristics of an administrative contract, according to Romanian jurisprudence and legislation.

As we have pointed out in the beginning, not all law systems are subjected to the division private law – public law. The EU law perceives all the contracts we have discussed above from a commercial point of view, recognising at the same time the necessity of clauses of the *caluse exorbitante* nature. The same situation is to be found in the Canadian law, in the province of Quebec. In the contracts concluded, the administrative bodies have the same obligations like a private person, but the superiority of the administration, in order to protect the public interest, is achieved by the *clauses exorbitantes*. Also, in numerous situations the administrative bodies maintain a right of control and a right to impose instructions during the implementation of the contract by the private contracting party. All litigations concerning the implementation of the contract may be solved by judicial authorities or by arbitrage. Litigations concerning the validity or public order matters (such as formalities for obtaining a prerequisite authorisation) are excluded from arbitrage³³.

as key-speaker at the national conference *Interdisciplinaritatea în analiza fenomenului administrativ contemporan*, Sibiu, 27-28 May.

³² Green Paper on public-private partnerships and Community law on public contracts and *concessions* [COM(2004) 327 final, at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2004&nu_doc=327 last accessed on 30th October 2011.

³³ Lemieux, P 2008, "Le code civil du Quebec et l'administration publique", *Acta Universitatis Lucian Blaga*, No. 2, Year VIII, pp. 62-64.

What we have tried to point out is the need of coherence to one's law system. If in the Romanian legal system jurisprudence recognised the concept of administrative contract, legislation names such contracts and the judiciary system has special courts with a general competence on the administrative acts of the administration, there is no point in mixing things up. Such an approach will not give flexibility to the implementation of an administrative contract, but will induce confusion as to what extent the public interest should be protected.

