RESEARCH ARTICLE:

Administrative capacity: a comparative view between legal and administrative approaches

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ABSTRACT

The current research build on the frequent need of strengthening the administrative capacity of public institution as referred to by current strategic documents, both national or European, as an essential condition for good administration, and even beyond, for rule of law and democracy.

Defining administrative capacity of the public administration as the set of financial, institutional and human resources of the public administration as a whole, as well as the actions and activities it performs while exercising the competence prescribed by the law, the research paper is addressing important aspects as: legal capacity, legal personality and develops on administrative capacity.

KEYWORDS: *public institutions, legal capacity and personality, administrative capacity*

1.Introduction

Within a different working paper demonstration has been made as to the content of the most comprehensive definition of good administration, the one provided by the World Bank. As such good administration entails the existence of *rule of law to guarantee the safety of citizens, good administration for the equitable spending on public money, and the accountability of those managing public affairs in a transparent manner*.[1]

Thus, ensuring good administration is essentially linked to the existence of certain public institutions enjoying both the legal framework and the practical means to effectively guarantee the citizens` rights and freedoms.

The objective of this paper is thereof to analyze the different use, legislative, theoretical and jurisprudential, of the concept of administrative capacity to determine which are its essential elements, fundamental to ensuring good administration.

2.Legal capacity and the legal regime applicable

The doctrine defines the legal capacity of a person as being is ability to exercise rights and assume obligations, by caring out its own legal act. For the purpose of this paper we will consider the administrative capacity from the public administration perspective, to which end we will consider its formal sense, meaning the institutional system, comprising different administrative structures that organize the law enforcement and enforce the law as such[2].

The legal capacity is inherent to any natural or legal person. The legal capacity of a legal person stands from its set-up up to its dissolution, according to the legal provisions applicable.

To enjoy the status of legal person, an entity needy to comply with the following requirement: have its own structure and heritage, dedicated to achieve a licit and moral scope, complying with the general interest[3]. The legal person is any organizational structure that meets the legal requirements and enjoys rights and civil obligations[4].

The public legal persons are set by law, or within exceptional cases, by administrative decisions of central or local public administration structures[5]. Public institutions are legal persons set through public establishment acts of the state or local collectivities, with the aim of performing determined prescriptions or services[6].

For the purpose of this paper, we will limit ourselves to analyze the legal capacity and the legal regime applicable to public institutions.

Through legal regime we are going to acknowledge the set of rules applicable to different categories of persons, legal institutions and goods. Legal persons are subject to the legal provisions applicable to that category they belong to, as well as to the ones provided by the Civil Code, is the law does not provide otherwise[7].

Thus, for a legal person to exist there should be: (i) a dedicated and self standing organization (structure); (ii) its heritage dedicated to a certain purpose; (iii) a licit and moral scope, compliant with the general interest.

The overall appraisable rights and obligations of a legal person constitute is assets[8] and are in close relation with its legal capacity. To manage its assets, a legal person, including the public institution

[1]http://www.apubb.ro/governancestudies/.
[2]Balan. E. 2008. Institutii administrative, Bucharest, Romania: Ed. CH Beck, p. 22.
[3]Art. 187 Civil Code.
[4]Art. 25(3) Civil Code.
[5]Art. 191 Civil Code.
[6]Balan. E. op. cit, p. 74.
[7]Art. 192 Civil Code.
[8]Art. 31 (1) Civil Code.

enjoys acting capacity[9], which is exercised through is administrative structures, made up of natural persons appointed to act, in relation to third parties, individually or collectively, on behalf of the legal person[10].

Legal personality

The legal personality ensures the legal entity is a different subject of law than its constituency[11]. The legal personality is the quality of a legal person to acquire its own rights and obligations, through engaging into legal arrangements, through its legal representatives[12].

Thus we can conclude the public legal person is that, pursuant the law has legal personality, acting capacity and dedicated assets.

There should be stressed that the Romanian doctrine has indicated there is no equivalent between the notions of legal personality and legal person, but there is such equivalency for the legal personality and the one of legal capacity[13].

Regarding the ability of a public legal person, a public institution, to acquire rights and obligations, we should note that despite the art. 206 (1) of the Civil Code indicates a universality of such rights and obligations, „except for those which by their nature or pursuant the law con not belong but to the natural person"[14], the concrete content of these rights and obligations cannot be determine unless the whole art. 206 is analyzed. Thus paragraph 2 of the article indicates that „ non for profit legal entities can acquire only those rights and obligations that are necessary to *accomplish the scope set by the law*". Therefore a first element to distinguish the legal capacity of public institutions is the scope they have been established for.

3.Administrative capacity – the legal dimension

The legal administrative capacity is therefore the ability of the public legal person (public institution) to exercise public power rights and assume administrative obligations or related to its law enforcement activities, through its own legal acts. The legal acts of a public institution have the nature of administrative acts, meaning that they are one-side individual or normative acts, issued by a public institutions under public power regime, to organize the law enforcement or to enforce it, which initiates, amends or ends legal relations. There are also administrative acts the contracts put through by public authorities in order to make use of public goods, carry out public interest work, and ensure public service supply or public procurement contracts[15].

Returning to the distinction indicated above, we should mention that public institutions can engage into legal relations only is these are by law of their competence, meaning those that are circumscribed to scope the public institutions has been set for.

Thus, the legal competence or administrative capacity represents a component of the legal capacity of the public institution and represents its ability to acquire own rights and administrative control obligations through public power instruments[16].

[9] Art. 37 Civil Code.
[10] Art. 209 Civil Code.
[11] Piperea, Gh. *Imitaţia şi simulaţia în noul Cod civil*, in Mihăilescu, M. E, *Consideraţii teoretice şi practice privind personalitatea juridică a sectoarelor municipiului Bucureşti din perspectiva legislaţiei civile şi administrative*, Buletin de informare legislativă nr. 4/2013, p. 13, http://www.clr.ro/ebuletin/4_2013/buletin_4_2013.pdf
[12] Supiot, A. 2007. Homo Juridicus: On the Anthropological Function on the Law, 2007, pp. 65-66, in Mihăilescu, M. E, Idem.
[13] Boroi, G. 2001. *Drept civil. Partea generală. Persoanele*, Bucharest, Romania: Ed. All Beck, p. 355, in Mihăilescu, M. E, Idem.
[14] As: right to life, dignity, marriage contracting.
[15] Art. 2 c) Law no 554/2004 on administrative contentious.
[16] Bălan, E, op. cit, p. 49.

Once analyzed the legal capacity of public institutions, we should mention that pursuant to Law no. 195/2006 on decentralization, we can identify an attempt to define the concept of administrative capacity, from a rather administrative perspective, than legal. Thus, according to 2 b) the administrative capacity is the set of financial, institutional and human resources an administrative unit has, as well as the activities it performs in order to accomplish the competence established by law, while according to Law no. 215/2001[17] the administrative unit is a "public legal person, with full acting capacity and its own assets, having fiscal capacity and enjoying rights and obligations resulting from contracts on public or private goods administration, as well as in relation to other natural or legal persons"[18].

Thus, the definition provided by Law no. 195/2006 originates in the European Charter of Local Self-Government[19], with the law is currently transposing. More precisely, the Explanatory Report to the Charter indicates that "the notion of *ability* expresses the idea that the legal right to regulate and manage certain public affairs must be accompanied by the means of doing so effectively".

A different interpretation, this time jurisprudential, referring to the "regime of fundamental institutions of the state" can be found in several decisions of the Romanian Constitutional Court issued on matters related to the ability of the Government to regulate and amend certain aspects regarding the structure and organization of public institutions through Emergency Ordinances. Within the next paragraphs we will mainly refer to Decision no. 1257/2009[20], to which the Court adverts to in is subsequent jurisprudence when clarifying the meaning of certain notions.

Thus, according to the abovementioned decision, the Constitutional Court states that "both in its previous jurisprudence, as well as in the Romanian doctrine, have considered as fundamental institutions of the state those regulated expressly by the Constitution, in detail or at least with reference to their existence, explicitly or even generic (institutions included in the 3rd title of the Constitution, as well as public authorities provided by other sections of the fundamental law)".

Also, through the collocation "regime of the fundamental institutions of the state", the Court has considered all the elements that define the legal regime applicable – their organizational structure, the functioning, their competencies, material and financial resources, the number and statute of the personnel, remuneration, the legal documents they are entitled to issue or adopt.

Recalling the initial idea this article has been set on, precisely that are elements of the legal administrative capacity of public institutions the following: its self-standing structure, its own assets dedicated to perform the scope for which they have been set up and the licit and moral scope, compliant with the general interest, on one hand, and on the other that are elements of the administrative capacity: the set of financial, institutional and human resources, the activities performed and the legal competence established by law for a public institution, we can conclude that the two sets of elements are convergent with

[17]Of local public administration.

[18]Vasilescu, B, *Organizarea administrativ teritorială şi evoluţia legislaţiei în domeniul administraţiei publice locale*, in Buletin de informare legislativă, no. 4/2013, p. 11, http://www.clr.ro/ebuletin/4_2013/buletin_4_2013.pdf

[19]http://www.coe.int/t/congress/sessions/18/Source/CharteEuropeenne_en.pdf, p. 34; The Charter was ratified by Law no. 199/1997.

[20]Decision no. 1257/2009 din 07/10/2009 regarding the objection of unconstitutionality of the Law for the approval of Government Emergency Ordinance no. 37/2009 on some measures for improving the activity of public administration, published in the Official Gazette, Part I no. 758 of 06/11/2009,https://www.ccr.ro/files/products/D1257_09.pdf.

the ones described by the Constitutional Court as essential elements defining public institutions.

Administrative capacity – the applied dimension

Simultaneously we can observe public authorities have developed several programmatic documents, all referring to administrative capacity[21]. A first analysis of these documents indicates that they focus both on determined public institutions, as well as on public administration as a whole, meaning that in this understanding, the administrative capacity also includes elements of inter-relation and cooperation between the different institutions that make up the administration.

Also, the references to efficiency and cost effectiveness, as well as to high quality standards rise a legitimate question on how comprehensive is the above definition regarding the administrative capacity, since the mentioned concepts refer to practical aspects of the public administration – its concrete activity.

This applied, functional, dimension results indirectly both from the national, but also from the international documents regarding the strengthening of the administrative capacity. It can be also found with different theories and methods developed by civil society organizations engaged into monitoring the capacity of public administration to perform its role.

Two such examples that are worthy to be mentioned are the Good Governance Benchmark developed by Council of Europe as part of the European Label of Governance' Excellence[22] and the Study on the National Integrity System[23] developed by Transparency International.

The Good Governance Benchmark, launched by the Council of Europe[24] does not mention in itself the idea of administrative capacity, but it lists a set of indicators against which governance excellence can be measured. As such, the first indicator for efficiency and effectiveness regard the capacity of a municipality to "plan its activities and budget according to its strategic guidance plans at a strategic and operational level" such as the achieved results meet the agreed objectives. It also mentions that the best possible use is to be made of the available resources. A different principle evaluated focuses on the abidance of the law by the local authorities, including with regard to their competence, while a third principle regards the professional competence and *capacity*. Under the former, professional skills of the staff and elected officials are directly linked to the performance of governance delivery, translated into a plain language question for public survey as "Most elected officials in this municipality are competent people who (usually) know what they are doing"[25].

On a different note, the Study on the National Integrity System assesses the vulnerabilities to corruption of public and private institutions that play a role in fighting corruption. As such the study reveals that within institutions characterised by lack of appropriate regulations and by unaccountable behaviour, corruption is likely to thrive, with negative knock-on effects on the goals of good governance, sustainable development and social cohesion. The analysis is carried on 13 functional pillars of the integrity system, each pillar made of

[21]Operational Programme Administrative Capacity.
[22]https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2878591&SecMode=1&DocId=2349620&Usage=2.
[23]http://www.transparency.org.ro/politici_si_studii/studii/sistemul_national_de_integritate/index_en.html.
[24]http://www.coe.int/t/dgap/localdemocracy/WCD/Toolkits_en.asp.
[25]Good Governance Benchmark, p. 10.

one or more institutions, mostly public institutions, depending on their role in fighting corruption.

For the purpose of this study, *capacity*, or the ability to act, has been assessed in terms of resources and legal status, which underlies any effective institutional performance. The assessment also looked at the interactions between institutions to understand why some are more robust than others and how they influence each other. "The NIS presupposes that weaknesses in a single institution could lead to serious flaws in the entire system. Understanding the interactions between pillars also helps to prioritize areas for reform"[26].

4.Conclusions

In our opinion, this broader sense of administrative capacity should also include elements regarding the concrete functioning on an institution, its actual practice and the concrete solutions found. This need also results from the analysis of Law no. 195/2006 as a whole, as it mentions as criteria for evaluating the administrative capacity the capacity to collect taxes, the level of professional training for staff, or the lawfulness of the documents adopted or issued. However, the criteria mentioned by the secondary legislation[27] are neither comprehensive, nor sufficiently objective to effectively determine the administrative capacity of a certain institution.

In light of this functional dimension, we could state that a comprehensive definition of the administrative capacity of public institutions includes the set of financial, organizational (structural, organizing) and human resources a public institution enjoys, *as well as the actions and activities it performs* while exercising the competence prescribed by the law.

Equally, we can define the administrative capacity of the public administration as the set of financial, institutional and human resources of the public administration as a whole, as well as the actions and activities it performs while exercising the competence prescribed by the law. Referencing institutional resources we should also consider the interaction, inter-relation and cooperation of these institutions, both regarding the whole spectrum of legal competences of the public administration, but also regarding the avoidance of overlapping, the two described under the concept of efficiency.

These last remarks are also consistent with the working text of the new Administrative Code, the August 2015 version, which defines the administrative capacity as the set of financial, institutional and human resources an administrative unit enjoys, ***as well as the way these are fructified in its own activity, while performing the competences prescribed by the law***[28]**.**

[26]Coşpănaru, I. and others. 2012. *National Integrity System Assessment Romania*, 3rd Edition, Bucharest, Romania: Transparency International Romania.

[27]Decision no. 139/2008 of 06/02/2008 on the approval of the Methodological Norms for the application of the Framework Law on decentralization no. 195/2006.

[28]Art. 137 h) Administrative Code Project, Part. IV- Local Public Administration.

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5. Law no. 554/2004, on administrative contentious.
6. Romanian Administrative Code Project.
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