



Subjective Right and the Legitimate Interest in the Romanian Administrative Law

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Abstract: Regulating the administrative contentious represents the expression of the particular concern of the society to strengthen the legal protection of all individuals when it is in the position to “confront” a public authority. This paper examines, briefly, one of the special conditions of direct action in the administrative contentious, that is the condition referring to invoking by the claimant of its harm in a subjective right or in a legitimate interest. In this respect, the research of the two concepts - subjective right and legitimate interest - will have a starting point the presentation of various opinions from specialists in other branches of law, such as general theory of law and civil law. Based on analysis, observation and case study, benefiting from a rich and diverse literature, we highlighted the changes that have intervened in the Romanian law, which determined that the legitimate interests would be placed on equal footing with individual rights, especially since the jurisprudence tends to focus on the harm of the person and less on whether the damage was brought to its subjective right or legitimate interest.

Keywords: contentious; subjective right; legitimate interest; public authority; administrative act

1. The Conditions of Direct Action in Administrative Contentious. Introductory Aspects

The institution of administrative contentious is an essential and indispensable element of the state law (Vedinaș, 2004, p. 88), “the repair democratic form of violations committed by the bodies and administrative authorities, of limiting their arbitrary power, of securing the individual rights of administrators”, or, more synthetically, “the legal defense form of individuals - persons (natural or legal) - against public administration abuses.” (Petrescu, 2009, p. 413)

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As mentioned in a valuable work of constitutional law, the essential mechanisms by which the state law is rendered under the control of constitutional law is the judicial control of administrative acts and the organization of an independent justice (Drăganu, 2000, p. 291).

In the same paper it states that, in the state law, the control of constitutional laws represents for the rights and freedoms of individuals “a strong bulwark against the excesses that could be committed at a time of national representation. (Drăganu, 2000, p. 335)

However, the most effective form of checking the legality of administrative acts is represented by the legal review, as it is achieved outside the public administration system and it requires a procedure involving the right of defense, contradictory, equal parts, the active role of the court. (Deleanu, 2006, p. 88)

The judicial review of administrative acts is achieved either indirectly invoking the plea of illegality, or by directly, in order to cancel the harmful act to oblige the issuing authority to issue an administrative act. (Cernat, 2011, p. 47)

Most of the times, the judicial review is exercised via direct action in administrative contentious and the special conditions¹ where it may pursue this action are determined by Law no. 554/2004.

Thus, the special conditions of admissibility of administrative action are: the contested act to be an administrative act, act as defined by article 2 line (1), letter c) according to the law; the contested act to hurt a right or a legitimate interest (public or private); that act to emanate from a public authority; before the introduced action to be covered the prior administrative proceedings; the action is brought to court of administrative contentious within the period prescribed by law.

¹ In the specialized literature it refers also to the general conditions of eligibility required for the initiation of a judicial proceeding, conditions investigated by the judge in any litigation: usage and exercise capacity, the processual quality of being in the trial, confirming the existence of a right and the interest in initiating the justice service (Ciobanu, 1996, p. 265)

2. Subjective Right and Legitimate Interest - Grounds of the *Justice Actions*

2.1. General Considerations

According to the revised Constitution (article 52) and the provisions of Law of administrative contentious no. 554/2004 (article 1), the administrative contentious is primarily a subjective contentious¹, that is a defending contentious of the injured subjective rights by the violation of the law by the public authorities. (Cernat, 2011, p. 52)

Under the current legislation, a direct action of subjective administrative contentious can be based on not only the injury of a subjective right, but also of the injury of a legitimate interest.

In the general theory of law there were formulated many theories on the subjective right, going from denying the existence of the subjective to their categorical acknowledgement.

From the philosophical and sociological perspective, the subjective right expresses the relation between individual and its peers. (Cernat, 2011, p. 53)

In one of the works devoted to this theme (Cernat, 2011, p. 54) it states that, over time, *the subjective right notion* has undergone several stages:

- a) the emergence of the concept: supporting the existence of subjective rights,
- b) marking the limits of structural elements of this concept, highlighting the most important theories in this respect, such as *subjective right - will power* and *subjective right - protected legal interest*,
- c) the denial of the existence of subjective rights by invoking the reflex theory of the right supported by Hans Kelsen²;
- d) d) accepting the existence of the subjective rights (subjective right-correlative right). All these theories have led to an evolution of the concept of subjective right, developing its content.

¹ Unlike the subjective contentious, within the objective contentious the competent court is asked to rule on the existence or nonexistence of a breach of legal rules in force and if it finds such a situation, it would take the measures to restore the legality under the law, without ruling over the possible substantive rights of the claimant.

² H. Kelsen considers the subjective right as being only the reflex of another's obligation of not harming the holder, the obligation being the core element of positive law, stating that "every legal norm must necessarily establish a legal obligation (taken from Cernat, 2011, p. 63).

Referring to the last theory subjective right-correlative right, its supporters (Djuvara, 1997, p. 99) highlights the need to study the notion of subjective right correlated with a specific obligation. Everything that is allowed to a person must match what is required or forbidden to others, the Romanian scholar Mircea Djuvara concludes in one of his works.

In a more recent work of general theory of law, the subjective right represents an “individual legal faculty of a person towards another individual, in a decisive legal relationship.” (Popa, 2008, p. 318)

Under a practical aspect, this correlation was used by courts in order to determine the cases of subjective right or a simple interest, meaning that there is no right, as defined under the law, unless it is imposed in the task of a certain person an actual obligation. (Djuvara, 1997, p. 101)

In the current civil law doctrine, however, the subjective right is conceived as a “*college, privilege, power that is recognized and sanctioned by the positive law*”, “*the premises measure of an active subject conduct, guaranteed by the civil law and the possibility of claiming a certain behavior from the passive subject, in order to meet the interests of law recognized by the active subject*”, “*that power to do anything, recognized to people by the legal rules whose whole form the Law in a given society*”. (Ștefănescu, 1991, pp. 77-83)

According to the give definitions, the author highlights the connection between the subjective and objective right, noting from the subjective point of view the right represents a delimitation between subjective and objective law, while from the objective point of view, it becomes a place where one can work without bringing prejudice to the social rule. (Stefanescu, 1991, p. 79)

In another work, the subjective right is the “*possibility of the holder to exercise a certain conduct, guaranteed by the law, by the claim of pretending to the passive subject a certain behavior subject, which may be imposed if necessary by the coercion of the state*”. (Ungureanu, 2000, p. 56)

Thus there are highlighted in this way, two aspects of subjective law, namely: a) it represents an individual prerogative, that gives the holder a certain sphere of activity; b) this prerogative is under the tutelage of the objective right, which is a limit and a control for the subject right. (Cernat, 2011, p. 81)

One of the most invoked definitions given to the subjective right may be found in a valuable monograph (Deleanu, 1998, p. 45), where subjective right “*could be*

defined as the prerogative conferred by the law under which the right holder may or must carry out a certain conduct or to ask others to exercise a conduct proper to its right, under the sanction recognized by the law, in order to value the personal interest, direct, vested and actual, legitimate and legally protected, in connection to the universal interest and rules of social life”.

Although he received many criticism, the definition is repeated by other authors as well, who have agreed to report the notion of “subjective right” in order to define it, at the term “legal situation”, stating that the term of subjective right is often used to refer to different legal situations. (Avram, 2006, p. 112)¹

2.2. The Subjective Right and the Legitimate Interest in the Romanian Administrative Law

After 1990, one of the most analyzed aspects in the literature focused on the distinction between “subjective right” and “legitimate interest”, as, some legal writers and courts did not admit the idea of protecting including the legitimate interests of individuals including on the way of administrative contentious. (Cernat, 2011, p. 118)

As mentioned in the specialized literature, the subjective right consists of will and interest, the interest being an element of subjective right. However, not every interest can be the sub-layer of a subjective right, but one that is likely to be individualized in the person of a subject or more determined subjects and is likely to bring it or them a direct profit. (Dragoş, 2002, p. 517) In other words, not all interests represent of the structure of some subjective elements. (Cernat, 2011, p. 120)

Some interests have an independent existence, category which the Administrative contentious law affirms when using the phrase “legitimate interest”. However, even the given definition is the fact that the protection offered to interest is achieved by taking into consideration a subjective future, foreseeable, prefigured right. As such, when questioning the distinction “legitimate right- interest” it is taken into account any interest that is not yet part of the structure of a subjective right. It is considered

¹ In his book, the author distinguishes between “subjective right – power”, “subjective right-freedom”, “subjective right-faculty.” These distinctions highlight the existence of a dynamic reality, where the subjective right is only the final moment of achievement, the fulfillment of legal will, choosing, finally, defining the subjective right by using the term “privilege” and not by using the term “power”, “faculty” or “freedom”.

that the legal protection of these interests of such interest is determined by the fact that without this protection, it would be jeopardized even further the future birth of the “foreseen” subjective right. (Cernat, 2011, p. 120)

Going further on the distinction between the two notions, it was found that a subjective right holder is authorized by law to conduct certain activities or to refrain from carrying out others, without obtaining a prior court decision that thus would authorize, when an interest protected by law does not give its bearer the ability to perform certain activities or to refrain from them (the possibility that can be obtained only after a judicial action). (Cernat, 2011, p. 121)

The relation “subjective right” – “legitimate interest” is discussed in the specialized literature and by relating it to the discretionary power of public administration. To public authorities there is recognized a certain freedom of appreciation in choosing the possible ways of fulfilling the duties only in the cases and conditions provided by the law. Therefore, the public authorities will exercise their discretionary power in compliance with the fundamental and subjective rights guaranteed by the Constitution and laws.

In the meaning of Law no 554/2004, the injured subjective right may be legalized in the Constitution, it may be established by law or other regulations (ordinances) or it can be recognized or given by any other regulation issued or adopted by the competent body. (Albu, 2008, p. 192)

As previously stated, regarding the subjective right, the legitimate interest appears as a legal situation prior to subjective right, as a potentiality with high possibility, being only a matter of time (until a permit is issued or to be adopted an administrative act, for example).

However, not every interest can be invoked as a reason for action to the administrative contentious court, but a legitimate interest in the subjective rights of the person.

The law defines private interest legitimate interest as being an opportunity to claim a certain behavior, for the achievement of a future, foreseeable, prefigured subjective right. Under the same law, the legitimate public interest is defined as being the interest that targets the rule of law and constitutional democracy, guaranteeing the fundamental rights, freedoms and duties of citizens, satisfying the community needs, the achievement of public authorities.

But when it is invoked the presence of a legitimate interest, it must be considered not only the definition given by the law, but its features identified by the doctrine

as well, because the philosophy of the constitutional texts is, in the meaning of the extension of the protection granted to citizens, beyond the limit of subjective rights. (Vedinaş, 2009, p. 171)

3. Conclusions

Legislating the administrative contentious is the expression of the concern for insuring the legal protection of citizens, because, as stated in the specialized literature, where there is power, there is the tendency to abuse it (Cernat, 2011, p. 265).

By Law of administrative contentious no. 554/2004 it was established the ability to protect not only subjective rights - legal situations definitively created, but also the legitimate interests in forming legal situations that precede the subjective rights.

Therefore the changes in a Romanian law have determined the legitimate interests to be placed on equal footing with the individual rights, especially since the jurisprudence tends to focus on the injury on the person and less on whether the injury was made to a subjective right or a legitimate interest.

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