Law Review ● vol. III, Special issue 2017, pp. 47-54

ADMINISTRATIVE JUSTICE AS A TOOL OF HUMAN RIGHTS PROTECTION

*Maria ORLOV**[1]*
*Mariana IANACHEVICI***[2]

ABSTRACT

The legality and realization of human rights are the basic features of the rule of law. Administrative justice is one of the multiple tools that ensure both the realization of human rights that are infringed upon by a public authority, in particular, and the legality of the decision-making process, in general.

In confirmation of its democratic aspirations, the Republic of Moldova has established administrative justice through Law no. 793/2000. However, its efficiency depends on the quality of work of the specialized authorities designed to enforce it and such authorities have not been created in our country yet. Based on the importance of administrative justice in ensuring the realization of human rights infringed upon by a public authority, we will analyze how it has been introduced in our judicial system and what the results are after 17 years of existence.

***Keywords**: rule of law, human rights, democracy, legality, administrative justice [K10]*

Introduction

The state Republic of Moldova was formed as a result of separation from the USSR when the Declaration of Independence was adopted on August 27, 1991. As any state that shifts from an authoritarian political regime to a democratic one, a transition period was required to adopt legislation that would meet the new principles and would underpin the new public democratic authorities and institutions.

One of the new legal institutions in our country was regulated by the Law on Administrative Litigation Proceedings, no. 793/2000 that introduced administrative justice. However, this institution can operate efficiently and fulfill its mission of protecting the human rights infringed upon by a public authority only if the whole

[1] PhD, Associate Professor, „Alecu Russo" State University of Bălți, Institute of Legal and Political Research of the Academy of Sciences of Moldova, President of the Association "The Institute of Administrative Sciences of the Republic of Moldova", email – orlovmg@yahoo.fr.

[2] PhD Candidate, Executive Director, The Association for Child and Family Empowerment "AVE Copiii", email - m.ianachevici@avecopiii.md.

system of state governance applies the fundamental principles of the rule of law: legality, social equality, justice and equality before the law.

To this end, numerous strategies have been adopted to reform all areas of state authority, especially, administration and justice and, to a smaller extent, the legislative power. In addition, the entire regulatory framework has been reviewed and modernized. As for the launched reforms, they encountered multiple difficulties in the process of implementation so that no significant results have been achieved.

This is why the administrative justice has not been fully operational although the above mentioned law has introduced a concept of administrative litigation proceedings with maximum possibilities of protecting human rights that takes the form of: administrative litigation proceedings with full jurisdiction that allows both annulling the illegal administrative act and indemnifying the injured person; administrative litigation proceedings, both subjective and objective, that give the injured person and other persons the right to file a claim in the administrative court in the interest of the injured person.

I. Establishment of administrative justice in the republic of Moldova

After the declaration of independence (August 27, 1991), numerous activities aimed at modernizing and democratizing the state have been conducted in the Republic of Moldova by creating new legal institutions that did not exist in the Soviet period. These include: Constitutional Court, Court of Accounts, Ombudsman, etc. In addition, to ensure legality in the work of public administration, administrative justice has also been introduced, i.e. control by the judicial power over the legality of administrative acts with a view to protect the human rights infringed upon by a public authority.

Administrative justice is underpinned by art. 53, par. (1) of the Constitution[3], as well as by other constitutional provisions[4] that have directly or indirectly contributed to the adoption of the relevant framework-law[5]. In addition, administrative justice is supported by several international acts on fundamental human rights and freedoms[6] [7], ratified by the Republic of Moldova[8].

---

[3] Parliament of the Republic of Moldova (1994). *Constitution of the Republic of Moldova of 29.07.1994*. [online] Chisinau: Monitorul Oficial no. 1, art. no.1, from 12.08.1994. Available at: http://lex.justice.md/document_rom.php?id=44B9F30E:7AC17731 [Accessed 19.12.2017].

[4] Orlov, M. (2009). *Course of administrative litigation proceedings*. Chisinau: Elena V.I. S.R.L., page 77-78.

[5] Parliament of the Republic of Moldova (2000). *Law no. 793 on Administrative Litigation Proceedings of 10.02.2000, art.6, par.(2)*. [online] Chisinau: Monitorul Oficial no. 57-58, art. 375 of 18.05.2000. Available at: http://lex.justice.md/md/311729/ [Accessed 19.12.2017].

[6] United Nations General Assembly (1948). *Universal Declaration of Human Rights, 10.12.1948, art. 8*. [online] Available at: http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/rum.pdf [Accessed 19.12.2017].

[7] United Nations General Assembly (1966). *International Covenant on Civil and Political Rights, 16.12.1966, art. 2, par.3 letter a)*. [online] Available at: http://www.justice.gov.md/public/files/file/Directia%20rela%C5%A3ii%20interna%C5%A3ionale%20/002%20PIDCP.pdf [Accessed 19.12.2017].

The goal of this legal institution is to provide social equality and a balance between administration and the administered stakeholders, by annulling any administrative act that infringes upon the individual's legitimate rights. Considered a barometer of democracy, administrative justice (administrative litigation proceedings) is present in all the democratic states in the form of special legal instruments that are made available to the individual to recover their rights forfeited by a public authority through illegal administrative acts.

Law no. 793/2000 introduces administrative justice *with full jurisdiction*, where the court can issue a decision both on annulling the illegal administrative act and on indemnifying the injured person. In addition, the administrative court can be notified by both the injured person claiming the defense of their subjective right *(subjective administrative litigation proceedings)* and by other entities with the right of notification to protect the rights of the injured person *(objective administrative litigation proceedings)*. In the first case, the injured person may ask the court to annul the illegal administrative act and to provide them with material and moral indemnification *(administrative litigation proceedings with full jurisdiction)*, whereas, in the second case, the entities with the right of notification may claim from the court only the annulment of the illegal administrative act *(annulment administrative litigation proceedings)*.

The complexity of this legal institution has imposed the introduction of new specialized courts in the judicial system – college boards of administrative litigation proceedings within the common law courts[9]. However, these specialized courts have not been created in the Republic of Moldova yet, which impedes the efficient functioning of administrative justice and the fulfillment of its specific duties – protection of human rights.

To conclude, in a democratic state it is not enough to adopt legislation dedicated to human rights protection, but it is also necessary to create mechanisms, i.e. public authorities duly authorized to enforce such legislation.

II. Particularities of administrative justice and stipulation of such particularities in Law no. 793/2000

As mentioned above, administrative justice is a tool for protecting the human rights infringed upon by a public authority, as well as an outstanding method of providing lawfulness in public administration.

---

[8] Parliament of the Republic of Moldova (1990). *Decision no.217 of 28.07.90 on the joining of the S.S.R. of Moldova to the Universal Declaration of Human Rights and ratification of international covenants on human rights*. [online] Chisinau: Veştile no.8, art. 223 of 30.08.1990. Available at: http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=306843 [Accessed 19.12.2017].

[9] Parliament of the Republic of Moldova (2000). *Law no. 793 on Administrative Litigation Proceedings of 10.02.2000, art.6, par.(2)*. [online] Chisinau: Monitorul Oficial no. 57-58, art. 375 of 18.05.2000. Available at: http://lex.justice.md/md/311729/ [Accessed 19.12.2017].

Administrative justice can be distinguished from other types of justice (criminal, civil, etc.) through features related to: object, subject (parties), principles and procedure of examination of the administrative litigation.

The object of the administrative litigation is a special one: the administrative act issued by a public authority or the refusal of the public authority to solve a claim concerning a right stipulated by law[10].

Consequently, administrative justice can be successfully delivered only by specialized courts and judges with fundamental training in administrative law and administrative sciences.

The subject or the parties in the administrative litigation also have specific features that distinguish such a litigation from the civil litigation in particular. Even though the parties in the administrative litigation have the same names as in the civil litigation – ***plaintiff and defendant***, they are still radically different. Thus, in administrative litigation proceedings, *the defendant* is always a public authority, as defined in art. 2 and 3 of the Law on Administrative Litigations Proceedings and the *plaintiff* may be the person injured by a public authority and other persons with the right of notifying the administrative court, as set forth in art. 5 of the same Law.

If we analyze the above mentioned provision, we see the scale of formalism, confusions and lack of concordance between the pieces of legislation that exist on this aspect and can conclude that the status of plaintiff is only fully valid for the ***person whose rights acknowledged by the legislation have been infringed upon***. Therefore, such a person should be encouraged to contest and oppose to the abuses and excess of power by the public authorities via administrative justice.

As for the ***Territorial Offices of the State Chancellery*** (TOSC) which are 10 in total in Moldova, they have taken over from the prefect the function of control over the acts issued by the local public authorities, both from the office and at the request of local public authorities or of the injured person[11]. According to the Annual Report of the State Chancellery, in 2016, the TOSC checked the legality of 172,601 administrative acts and filed 816 charges in the administrative court, of which only 225 were admitted[12].

The above figures represent the annual workload for about 80 TOSC employees who have other duties as well, such as to coordinate the decentralized services in the field. Under these circumstances, since TOSC face an exaggerated workload, it

---

[10] Parliament of the Republic of Moldova (2000). *Law no. 793 on Administrative Litigation Proceedings of 10.02.2000, art.3*. [online] Chisinau: Monitorul Oficial no. 57-58, art. 375 of 18.05.2000. Available at: http://lex.justice.md/md/311729/ [Accessed 19.12.2017].

[11] Parliament of the Republic of Moldova (2006). *Law no. 436 on Local Public Administration of 28.12.2006, art.65-69*. [online] Chisinau: Monitorul Oficial no. 32-35, art. 116 of 09.03.2007. Available at: http://lex.justice.md/document_rom.php?id=C8E304A4:037190E8 [Accessed 19.12.2017].

[12] State Chancellery of the Republic of Moldova (2017). *Report on the control of legality of the acts issued by the local public authorities exercised by the territorial offices of the State Chancellery in 2016*. [online] Chisinau: State Chancellery of the Republic of Moldova. Available at: http://cancelaria.gov.md/sites/default/files/document/attachments/f.titlu-raport_pub_2016.pdf [Accessed 19.12.2017].

is difficult to assess how efficient they are in fulfilling their duties as entities with the right of notifying the administrative court and ensuring the realization of rights infringed upon by a public authority.

The prosecutor has been included as an entity with the right of notifying the administrative court, because, when the Law on Administrative Litigation Proceedings was adopted, the prosecutor had duties of ensuring the legality in the work of the public administration (the so-called general oversight – Soviet tradition) and, according to art. 5, par. 4) of the Code of Civil Procedure[13], the prosecutor also had the right to notify the court for the launch of civil proceedings. At present, neither the current Code of Civil Procedure[14], nor the Law on the Prosecutor's Office[15] gives explicit powers to the prosecutor to notify the administrative court. Thus, no amendments were made to the Law on Administrative Litigation Proceedings when the new regulations were adopted. Consequently, formally and with no practical implications, the prosecutor has the status of an entity with the right of notifying the administrative court. This is a good example of lack of concordance and systematization of the regulatory framework on administrative justice.

The Ombudsman also has the status of entity with the right of notifying the administrative court, as set forth in the Law on the Ombudsman. As in the case of the Prosecutor, the legislative body has not made the necessary amendments to the Law on Administrative Litigation Proceedings that still uses the previous name of this institution – Parliamentary Advocate. In addition, it is not clear from the above mentioned law if it is the administrative court that will be notified by the Ombudsman[16]. At the same time, in 2016, the Ombudsman's Office for Children's Rights made an analysis[17] of the acts issued by the guardianship authorities of second level and concluded that they do not meet the standards of producing such documents and undermines or jeopardize the implementation of the child's rights, including but not limited to the right to a family or necessary services etc.

---

[13] Parliament of the Republic of Moldova (1964). *Code of Civil Procedure of 26.12.1964.* [online] Chisinau: Buletinul Oficial of 26.12.1964. Abrogated through Law no. 985 of 06.06.02. Chişinău: Monitorul Oficial no. 82, art. 661 of 22.06.2002. Available at: http://lex.justice.md/viewdoc.php?id=286228&lang=1 [Accessed 19.12.2017].

[14] Parliament of the Republic of Moldova (2003). *Code no. 225 of 30.05.2003 Code of Civil Procedure.* [online] Chisinau: Monitorul Oficial no. 130-134, art. 415 of 21.07.2003. Available at: http://lex.justice.md/viewdoc.php?id=331818&lang=1 [Accessed 19.12.2017].

[15] Parliament of the Republic of Moldova (2016). *Law no. 3 on the Prosecutor's Office of 25.02.2016.* [online] Chisinau: Monitorul Oficial no. 69-77, art. 113 of 25.03.2016. Available at: http://lex.justice.md/md/363882/ [Accessed 19.12.2017].

[16] Parliament of the Republic of Moldova (2014). *Law no. 52 on the Ombudsman of 03.04.2014.* [online] Chisinau: Monitorul Oficial no. 110-114, art. 278 of 09.05.2014. Available at: http://lex.justice.md/md/352794/ [Accessed 19.12.2017].

[17] Tentiuc, T., Office of the People Ombudsperson (2016). Thematic Report: The analysis of activities of the guardianship authorities – territorial structure of social assistance and family protection as result of examination of the elaborated models of issued documents. [online] Chisinau: Office of the People Ombudsperson. Available at: http://ombudsman.md/sites/default/files/document/attachments/analiza_ activitatii_daspf_0.pdf [Accessed 19.12.2017].

The ***National Integrity Commission*** was included at a later stage[18] as an entity with the right of notifying the administrative court. Later on, it was renamed into the National Integrity Authority (NIA) and is regulated through a new law[19], without the corresponding amendments being made in art. 5, letter d[1] of the Law on Administrative Litigation Proceedings.

Although recently adopted, the Law on the National Integrity Authority also contains multiple confusions. According to art. 7, par.(2), letter f) and g), NIA has the following duties: ***files claims with the court*** *to acknowledge the absolute nullity of the issued administrative act... with the violation of the legal regime of conflicts of interests...* ***files a claim with the court*** *as soon as a conflict of interests has been recognized to apply… suspend… the administrative act...* As we can see, the legislative body does not specify which court must be notified by the NIA, just like in the case of the Ombudsman. Instead, art. 36, par. (1) of the same Law stipulates that the *„person that was subject to the check may contest the decision within 15 days from its receipt,* ***in the administrative court***. Therefore, the law explicitly stipulates that it is the administrative court that will check the legality of the acts issued by the NIA based on the notification of the injured person. We can only assume that the NIA will also notify the administrative court asking it to *„recognize the absolute nullity of the administrative act"*.

In our view, these legislative confusions and errors, including the ones related to the use of different legal terms to define the same phenomenon, in the text of the same law, are inadmissible for the legislation of a state governed by the rule of law. They undermine from the start the enforcement of these legal provisions. Such a legal formalism is even worse when these provisions are dedicated to human rights protection.

The common law courts and the specialized ones, in case of cancellation of the exception of illegality[20]. As shown by the judicial practice, this entity with the right of notifying the administrative court is not functional and does not contribute to the protection of human rights infringed upon by a public authority. First, because the essence of the exception of illegality has been distorted by the amendments made to art. 13 of the Law on Administrative Litigation Proceedings as a result of which, the exception of illegality can be cancelled only with regard to the regulatory administrative acts, but not to the individual administrative acts, as was initially stipulated. Second, because no specialized administrative courts were created where

[18] Parliament of the Republic of Moldova (2000). *Law no. 793 on Administrative Litigation Proceedings of 10.02.2000, art.5, lit. d[1].* [online] Chisinau: Monitorul Oficial no. 57-58, art. 375 of 18.05.2000. Available at: http://lex.justice.md/md/311729/ [Accessed 19.12.2017].

[19] Parliament of the Republic of Moldova (2016). *Law no. 132 on the National Integrity Authority of 17.06.2016*. [online] Chisinau: Monitorul Oficial no. 245-246, art. 511 of 30.07.2016. Available at: http://lex.justice.md/md/366044/ [Accessed 19.12.2017].

[20] Parliament of the Republic of Moldova (2000). *Law no. 793 on Administrative Litigation Proceedings of 10.02.2000, art.13, par.(1).* [online] Chisinau: Monitorul Oficial no. 57-58, art. 375 of 18.05.2000. Available at: http://lex.justice.md/md/311729/ [Accessed 19.12.2017].

the exception of illegality could have been cancelled. The Courts of Appeal and the Supreme Court of Justice have been using the provisional formations of the court that are set forth in art. 34, par. (6) of the same Law for 17 years already.

All of the above mentioned reconfirms that the framework law has set out administrative litigation proceedings, both subjective and objective. It gave an additional possibility to the multiple public authorities and institutions with human rights protection duties to use administrative justice as a tool for protecting the person whose rights have been infringed upon by a public authority. However, the transition period that is too long already and the slow pace of democratic reform implementation in our country have undermined this opportunity. Moreover, the institution of administrative justice itself has been undermined.

Administrative justice has the power to solve specific litigations where the object is always a consequence of the work of public authorities and the latter have the status of active entity (defendant) in such litigation. Consequently, the principles that the specialized courts in this area should follow must be different from the common law justice. For example, principles that are typical of this form of justice might be: *ensuring the legality in public administration, responsibility of the state to its citizens, presumption of the state's guilt in terms of annulling administrative acts, protection of human rights in the spirit of the law, principle of justice and social equality, inadmissibility to reconcile the parties or give up the claim in case of check of the legality of administrative acts etc.*[21]

In our opinion, one of the most serious errors that has led to the failure of administrative justice in our country was the assimilation of administrative litigation proceedings with the civil ones, without the awareness that the state (public authorities and civil servants) cannot be judged under the same rules as the individuals. Thus, the legislator has set out the following in art. 278 of the Code of Civil Procedure: *The administrative litigations are examined by the corresponding courts in line with the general provisions of this code,* ***with the exceptions and amendments set forth in the legislation on administrative litigation proceedings****,* without taking into account or amending the provisions of art. 34, par. (1) of the Law on Administrative Litigation Proceedings, adopted earlier that stipulates the opposite – *„The provisions of this law are complemented with* ***the provisions of the Code of Civil Procedure****"*[22]. Therefore, it is not clear whether the special law is complemented with the provisions of the Code, as a general law or vice versa.

It is regrettable that in 17 years the courts (judges) did not pay attention to these legislative confusions and did not cancel the exception of unconstitutionality to remove them. The easiest way has been chosen - to fully apply the provisions of the Code of Civil Procedure.

The lack of adequate regulations in the administrative litigation procedure has made it impossible to develop a uniform judicial practice in administrative justice.

---

[21] Orlov, M. (2009). *Course of administrative litigation proceedings*. Chisinau: Elena V.I. S.R.L., pp. 77-78.

[22] Ibidem, pp. 150-151.

At the same time, all these gaps might be removed and the functionality of this legal institution can be restored by codifying administrative justice[23], i.e. adopting a Code of Administrative Justice (Code of Administrative Litigation Proceedings) that should cover both material and procedural provisions on this matter.

Conclusions

By its essence, administrative justice is an efficient tool for protecting the human rights infringed upon by a public authority and ensuring the legality in the governance process.

The Republic of Moldova has recognized the importance of administrative justice in the democratization of the country by adopting the Law on Administrative Litigation Proceedings. At the same time, it has not established a system of specialized courts to enforce this law. Instead, the Parliament is examining in the second reading a draft Administrative Code. When this Code is adopted, the Law on Administrative Litigation Proceedings will be abrogated. Thus, the governance will no longer be required to create specialized administrative justice courts. As a consequence, we have no guarantee that, in the future, the human rights infringed upon by a public authority will be protected in the spirit of the law and of the democratic principles.

[23] Orlov, M. (2013). La codification du contentieux administratif. *Curentul Juridic*, year XVI. No.1 (52), 2013, Printing House of the University "Petru Maior", Tîrgu-Mureş, 2013, p. 87-92.

Orlov, M. (2012). Reflections on the procedure of examining administrative litigations in the Republic of Moldova. *Institute of Administrative Sciences "Paul Negulescu" of Romania, Scientific Notebooks no. 12-14*, Printing House "Universul Juridic", Bucharest, 2012, pp. 379-387.