# Administrative litigation systems in Europe

Associate professor **Cătălin-Silviu SĂRARU**[1]

***Abstract***

*The article, analyzing the administrative litigation in the comparative law, groups the existing types of administrative litigation into four major systems, namely: a) States with administrative jurisdictions who have the State Council on top, administrative body with consultative and judicial role (the French system); b) States with administrative jurisdictions completely separated from the active and consultative administrations (the German system); c) States with administrative jurisdictions included in the judicial system; d) States with no administrative jurisdiction (English system). The administrative contentious systems analyzed have developed in line with historical evolution and legal traditions and have been continually adapted to the realities existing in each state. The manner in which the administrative contentious is regulated in a State reflects the degree of democratization of that country, the extent to which the citizen enjoys legal safeguards to defend himself against abuses by public authorities. The scientific novelty of this article is to capture the latest trends in the evolution of the administrative contentious systems analyzed. This study aims to provide an easy working tool for reforming administrative litigation on comparative law in states with young democracy. In the research we used the comparative method, the historical and the logical method.*

***Keywords:*** *administrative litigation, comparative administrative law, judicial system, dualist law system, administrative jurisdictions.*

***JEL Classification:*** K23, K33, K41

## 1. Introductory considerations

The term "contentious" comes from the Latin word *contendere* = to struggle, to confront, and, from a legal point of view, serves to designate the character of judicial acts and proceedings involving contradictory debates, quoting parties, etc., processes before the courts being likened to Long time "of judicial fights where each party is fighting contradictory for the recognition and defense of its law" [2].

The administrative contentious institution comprises all the legal rules governing the settlement of disputes in which at least one of the parties is a public authority, litigation having as its object the violation of a person's right or a legitimate interest by an administrative act or by the failure to resolve within a legal term an application.

---

[1] Cătălin-Silviu Săraru – Department of Law, Bucharest University of Economic Studies, Romania, catalinsararu@yahoo.com

[2] See Constantin G. Rarincescu, *Contenciosul administrativ român*, 2nd edition, „Universală" Alcalay & Co., Bucharest, 1936, p. 105, n.s. 1.

Depending on the bodies that deal with administrative litigation, there are four major administrative litigation systems[3]:

a) States with administrative jurisdictions who have the State Council on top, administrative body with consultative and judicial role (the French system);
b) States with administrative jurisdictions completely separated from the active and consultative administrations (the German system);
c) States with administrative jurisdictions included in the judicial system;
d) States with no administrative jurisdiction (English system).

We emphasize that there is a limited number of systematic studies on comparative administrative structures and administrative litigation remedies in comparative law. Worthy to mention are: Jürgen Schwarze, *Droit administratif européen*, 2e éd. Complétée, Bruxelles, Bruylant, 2009; J. Ziller, *Administrations comparees: les systemes politico-administratifs de l'Europe des Douze*, Montchrestien, Paris, 1993. In Romania we mention the reference volume of professor Ioan Alexandru - *Drept administrativ comparat (Comparative administrative law)*, Lumina Lex, Bucharest, 2000.

These work points out that although there is no model of public administration and administrative litigation at the level of the EU Member States, public administrations in these states share a set of values and principles that make up the pillars of European administrative law: legality of government action, the principle of tort liability of public administration, ensuring the rights of the defense, trust and predictability, openness and transparency of procedures, the right to a fair trial, the principle of legitimate expectations and legal certainty, the principle of proportionality, the principle of motivating decisions, etc.

The scientific novelty of this article is to capture the historical context that has led to the creation of distinct administrative contentious systems and to the analysis of their latest evolutionary tendencies.

## 2. States with administrative jurisdictions who have the State Council on top, administrative body with consultative and judicial role (the French system)

In **France**, even during the Great Revolution of the eighteenth century, a particular view of the separation of powers in the state was observed. Thus, although France was the first state which, following the desideratum of the revolution, proclaimed the separation of the administrative authority from the judicial authority by the Law of August 16-24, 1790, it also ruled through the Law of September 6-11

[3] See Ioan Alexandru, *Tratat de administraţie publică*, Universul Juridic, Bucharest, 2008, p. 664; Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck, Bucharest, 2016, pp. 429-435. For an analysis of the courts dealing with administrative litigation in the Member States of the European Union, see the portal https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-ro.do (last consultation on 01.05.2017) and the site of the Association of State Councils and supreme administrative jurisdictions (ACA Europa): www.aca-europe.eu (last consultation on 01.05.2017).

of the same year that administrative litigation will be entrusted to the administration, establishing from the beginning a duality of jurisdiction - a judicial and administrative jurisdiction. It is thus clear that the ordinary judge has no right to disrupt in any way the proper conduct of the administration's activity. During the Napoleon Bonaparte period, the State Council would be established as an administrative body, first with advisory functions to the government[4], then by the law of May 24, 1872, also with judicial functions of litigation in which the state administration figured. For a long time, administrative litigation has been settled in two jurisdictions - prefectural councils in each department, as a first instance, and the State Council, both as a court of first instance and appeal. By the Decree-Law of June 17, 1938 were included in the competence of prefectural councils also disputes arising from public contracts. Since 1953, the administrative councils subordinated to the State Council have been set up by reorganizing the former prefect's councils. By Law no. 87-1127 of 31 December 1987 on the reform of administrative litigation, which entered into force on 1 January 1989, three levels of administrative jurisdiction were established - inter-departmental administrative courts, administrative courts of appeal and the State Council.

The dualist law system has given rise to conflicts of jurisdiction between the courts (represented by the Court of Cassation and the ordinary courts) and administrative (represented by the State Council and the administrative courts). Hence the necessity of establishing a new institution with jurisdictional powers, namely the Conflict Tribunal[5] instituted by art. 89 of the Constitution of 1848 to resolve conflicts of jurisdiction between the two jurisdictions. The Conflict Tribunal was organized in a first form by the regulation of 28 October 1849 and the law of 4 February 1850, but having an ephemeral existence, being abolished during the Bonapartist regime of Napoleon III (1852-1870). He was re-established by the law of 24 May 1872, his duties being consolidated by the law of 20 April 1932 and the decree of 25 July 1960. His powers are also reflected in the organizational structure, the Tribunal being composed of a law-based president in the person of the minister of justice and eight judges, four members of the State Council and four magistrates of the Court of Cassation. The decisions of the Conflict Tribunal have played an important role over the years in shaping the legal regime of administrative law institutions. Thus, in its case-law, the Conflict Tribunal recognized the existence of an administrative contract concluded between two private persons for the purpose of carrying out a public interest mission (the case *Société entreprise Peyrot* of 08.07.1963) and deduced the exclusive jurisdiction of the administrative courts in disputes concerning to the public service delegation contracts (the „*Blanco*" case of 1873).

---

[4] The State Council is established by the Constitution of December 13, 1799 (*22 frimaire de l'an VIII*) which in art. 52 states: "Under the direction of the consuls, a State Council is charged with drafting the draft laws and regulations of the public administration and solving the difficulties that will arise in administrative matters".

[5] About the "Conflict Tribunal" see Ioan Leş, *Instituţii judiciare contemporane*, C.H. Beck, Bucharest, 2007, pp. 623-624.

It is therefore noted that in France the force and tradition of the executive power imposed the creation of administrative bodies with autonomous jurisdictional powers of the judiciary, which did not happen, for example, in England.

The French model for organizing administrative jurisdictions also inspired other countries, such as Belgium, Italy, the Netherlands, Luxembourg, Greece.

In **Belgium**, in 1946, the State Council was created as an administrative body, with a double role as in the French model: the role of government consultative body and administrative tribunal. The State Council judges appeals against decisions of lower administrative jurisdictions and, unlike the French model, its decisions could be appealed against by the Court of Cassation.

In **Italy**, administrative jurisdiction is exercised by the administrative courts (*Tribunali Amministrativi Regionali* or TAR set up in 1971) and by the State Council (*Consiglio di Stato*). The State Council established in 1865 is currently an administrative body with consultative role and jurisdictional role. Conflicts of jurisdiction are settled by the Court of Cassation.

In the **Netherlands** administrative litigations are usually judged by regional courts. In cases involving civil servants and social security issues, the appeal may be brought before a special appeal court - the Central Court of Appeal (*Centrale Raad van Beroep*) - and in most other cases, in addition to the Administrative Jurisdictional Division of the Council of State.

In **Greece**, the State Council first operated between 1835-1844, then for a short period from February to November 1865, and was finally established by the Constitution of 1911 and has been operating since 1929 to date. State Council decisions have provided the highest legal precedent for lower administrative courts and have set standards of interpretation of the Constitution and laws, contributing to the advancement of legal theory and practice[6].

In the **Romanian Principalities**, Alexandru Ioan Cuza establishes, according to the French model, on February 11, 1864 a State Council with legislative attributions (drafting of draft laws), administrative duties (administrative counseling and a disciplinary forum for civil servants) and contentious attributions administrative. The State Council was abolished by the Law of 12 July 1866 on the division of the various powers of the State Council.

### 3. States with administrative jurisdictions completely separated from the active and consultative administrations (the German system)

The system of administrative jurisdictions in **Germany** has begun to develop on the backdrop of the bourgeois movements of the second half of the nineteenth century, which imposed the establishment of some constitutions of the Länder based on the principle of the separation of powers in the state, equality before the law for all citizens and the recognition of individual freedoms[7]. Since 1863 autonomous

[6] See the website of the Greek State Council : www.ste.gr/FL/main_en.htm (last consultation on 01.05.2017).

[7] For details see Ioan Alexandru, *Drept administrativ comparat,* Lumina Lex, Bucharest, 2000, p. 36.

administrative courts, separate from the administration and the ordinary courts, have been established in the provinces. Subsequently, a higher court was established between 1872-1875 - the Prussian High Administrative Court (O.G.V.).

As a result, the German system of administrative jurisdictions developed from bottom to top, unlike the French system that developed from top to bottom, building a whole system of administrative jurisdictions in the territory after being first created by the Council of the State.

Currently, in Germany the administrative courts (*Verwaltungsgericht*), the higher administrative courts (Oberverwaltungsgericht) - existing on the Länder - and the Federal Administrative Court (*Bundesverwaltungsgericht*, established on 8 June 1953) are usually competent to hear disputes of administrative litigation. The law on administrative jurisdiction[8] enshrines in the first article the independence of the administrative courts that exercise administrative jurisdiction, distinct from the administrative authority. This system differs in this way from the French system in which the supreme court in the area of administrative contentions - the State Council - is an administrative authority that also has an advisory role for the Government's decisions.

This system of autonomous administrative jurisdictions, separated from the administration and ordinary courts, has been taken over from Germany and other countries, such as Austria, Portugal, Sweden.

In **Austria**, administrative litigation disputes are judged by the High Administrative Court (*Verwaltungsgerichtshof*) which verifies the lawfulness of the public administration and, starting January 1, 2014, the administrative courts. At federal level there is the Federal Administrative Court (*Bundesverwaltungsgericht*) based in Vienna. There is a Regional Administrative Court (*Landesverwaltungsgericht*) in each province.

In **Portugal**, the system of administrative litigation courts includes administrative and fiscal tribunals at first instance set up in 1930, the central administrative courts established in 2003 (north-based in Porto, and south-based in Lisbon) and the Supreme Administrative Court set up in 1870 (*Supremo Tribunal Administrativo*, which has country-wide competence). Conflicts of jurisdiction between courts are settled by a *Tribunal de Conflito,* governed by law in 1933.

In **Sweden** administrative courts are organized into a three-tier system: administrative courts, administrative courts of appeal and the Administrative Supreme Court established since 1909. In addition, a number of specialized courts and tribunals have been set up to resolve certain types of cases and matters.

A particular case is **Luxembourg**, where, following the constitutional reform of 12 July 1996 and the organic law of 7 November 1996, the competence of the State Council was reduced exclusively to the consultative function and

[8] Adopted on 21 January 1960, in its consolidated version of 19 March 1991, as amended by Art. 9 of the law of December 9, 2006 of 21, on www.bijus.de (last consultation on 01.05.2017).

administrative tribunals and Administrative Court have been established as independent administrative bodies distinct from the ordinary judiciary[9].

### 4. States with administrative jurisdictions included in the judicial system

In some states litigations on administrative disputes are judged by specialized sections of ordinary courts.

Thus, in **Spain** the administrative litigation is judged by a whole set of administrative jurisdictions integrated into the judicial system[10]:

a) administrative litigation judges

b) central dministrative litigation judges

c) administrative litigation divisions of the Higher Courts of Justice - organized at the level of each autonomous community (there are 17 autonomous communities in Spain)

d) the administrative audit division of the National Audience (*Audiencia Nacional*) - which exercises judicial review of administrative decisions taken by senior officials (Spanish Government ministers, State secretaries) and certain specialized agencies (Spanish Data Protection Agency, Commission for Competition Protection etc.)

e) administrative litigation division of the Supreme Court.

In **Romania** the administrative litigation disputes are judged by the Administrative Litigation Sections organized at the level of the tribunals, courts of appeal and the High Court of Cassation and Justice.

### 5. States with no administrative jurisdiction (English system)

There are also states where litigation of administrative disputes are judged by ordinary courts, according to rules specific to common law, without a specialization within distinct sections.

The classic case is the **United Kingdom**, where the subordination of public administration to judicial control has been slow, over several centuries. In the Anglo-Saxon law, there was no French revolutionary context that promptly imposed a limitation on the powers of the sovereign and a clear distinction between public law and private law. For a long time, the dogma of the irresponsibility of the crown and certain agents of the Crown has been applied in the UK. Gradually, the administration's action was subject, within certain limits, to the control of the ordinary courts of justice, according to the same rules applied to individuals, the

[9] See the site of the Luxembourg administrative courts : http://www.justice.public.lu/fr/organisation-justice/juridictions-administratives /index.html (last consultation on 01.05.2017).

[10] See Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa - the document is available online at : http://noticias.juridicas.com/base_datos /Admin/r28-l29-1998.t1.html#t1 (last consultation on 01.05.2017).

administration being required to seek the judge's authorization to take certain coercive measures to which the law was entitled only in this way[11].

The classical English constitutional theory, as it was exhibited at the end of the 19th century by A.V. Dicey[12], does not recognize a separate system of administrative courts (dualist law system) to review the decisions of public bodies (as in France, Germany and many other European countries). Instead, it is considered that the activity of public administration should be subject to the control of the ordinary courts of law (a unitary system of law).

The judicial control of English administration is based on the theory of excess power (doctrine *ultra vires*), which allows ordinary tribunals to decide whether the administration has acted within the limits of its legal power.

However, the theory of excess power (*ultra vires*) must, according to English case-law, be applied reasonably. In principle, it is admitted that everything that can be regarded honestly as an accessory or as a consequence of what is authorized by law is not to be regarded as a legal interpretation, as an excess of power.

In 1965 the Law Commission was created, as an independent statutory body to propose reform strategies, to codify the positive right and to ensure that the laws are fair, modern and clear.

At the initiative of the Law Commission, they were unified, starting with 1977 in England and 1980 in Northern Ireland, through Order 53, the previously existing procedures, establishing the possibility of bringing a request for judicial review (*application for judicial review*) against the action of the administration by which the applicant obtain a *Quashing order*, a *Prohibition orde*r prohibiting for the future a public administration action (for example, preventing the deportation of a person whose status of immigration was wrongly decided), a *Mandatory order* of the public authority to carry out its tasks (for example, requiring the administration to approve a building plan), a *Declaration* that clarifies the rights and obligations of the parties in the process, an order (*Injunction*) through which, where there is an imminent risk of damage or loss of property, the court may order interim measures to terminate the action of the administration in order to protect the injured party's position, also the possibility of seeking *Damages* under the conditions permitted by law[13].

In the English system, court judgments are sometimes based on *natural justice*, discretionary power abuse, or *public interest immunity*, aimed at disclosing or failing to disclose information necessary to hear the case. It was only in 1968 that the House of Lords decided that it was the responsibility of the courts to examine the

---

[11] Ioan Alexandru, *op. cit.* (*Tratat de administraţie publică*), 2008, p. 657.

[12] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edition with new Introduction) (1915), first edition published in 1885 under title: *Lectures introductory to the study of the law of the constitution.*

[13] Under English law, damages can not be granted solely because a public authority has acted illegally. In order for a court to pay damages, it is necessary: a) to have a cause of "private law", such as negligence or breach of a statutory obligation; b) the injured party's request to be based on European Union law or the 1998 Human Rights Act.

reality of the public interest invoked by ministers when they refused to provide indispensable documents for the settlement of the cases.

Currently, in the United Kingdom, the ordinary judge of the administration is the tribunal - the *First-tier Tribunal* and the *Upper Tribunal*. Against the decisions of the *Upper Tribunal* may appeal to the Court of Appeal (England and Wales) or the *Court of Session* (in Scotland).

Lately reforms in the legal system tend to specialized bodies with jurisdiction that control the activity of public administration. Thus, in England and Wales the **Administrative Court** was established as a specialized court of the *Queen's Bench Division* of the *High Court of Justice of England and Wales* having jurisdiction over administrative law and exercising control over the courts and tribunals lower and other public bodies.

In addition to these courts, over 50 specialized courts and administrative authorities operate in the UK and have jurisdiction over a wide range of areas (education, labor, pensions, finance and commerce, health, intellectual property, land, transport, construction , Gambling, etc.) [14].

Other countries that do not traditionally have specialized administrative litigation courts are **Denmark** and **Norway**. In these countries, the *Ombudsman's* Institution (People's Advocate) played an important role in defending the citizens' rights against the abuse of public administration. The institution of the *Ombudsman* was set up in Sweden in 1809 by Parliament, which introduced the Parliamentary Ombudsman's Bureau in the new Constitution, with the role of overseeing the protection of citizens' rights, by checking through inspections and surveys how public authorities comply with the laws. The institution of the Parliamentary Ombudsman was taken over by Finland through the 1919 Constitution and by Denmark in 1954, later taken over by a number of countries (under the name of mediator, ombudsman or the lawyer of the people).

## 6. Conclusions

The administrative contentious systems analyzed have developed in line with historical evolution and legal traditions and have been continually adapted to the realities existing in each state.

As a result of this analysis, we notice that in most states there is a tendency to create judges specialized in administrative law. Practically, under the conditions of social complexity of today, it is difficult to accept that a judge can be fully competent in all civil, commercial, criminal, labor law and administrative law[15]. Diversification of regulated social relations has forced the specialization of judges.

The existence of some courts or sections of the courts specialized in hearing certain disputes does not imply a lack of cooperation between them. In France, the

[14] For a complete list of them, see: https://en.wikipedia.org/wiki/List_of_tribunals_in_the_United _Kingdom (last consultation on 01.05.2017).

[15] See Ioan Alexandru (coord.), *Drept administrativ*, Omnia, Braşov, 1999, p. 482.

collaboration between the judge and the administrative judge is commonplace in the case of contentious for the interpretation and appreciation of legality[16].

The manner in which the administrative contentious is regulated in a State reflects the degree of democratization of that country, the extent to which the citizen enjoys legal safeguards to defend himself against abuses by public authorities.

The regulation of administrative contentious should provide the specialized courts with clear procedural rules capable of enforcing the procedural rights of litigants, with the ultimate aim of protecting substantive rights violated by unlawful administrative acts[17].

## Bibliography

1. Alexandru, Ioan (coord.), *Drept administrativ*, Omnia, Braşov, 1999;
2. Alexandru, Ioan, *Drept administrativ comparat*, Lumina Lex, Bucharest, 2000;
3. Alexandru, Ioan, *Tratat de administraţie publică*, Universul Juridic, Bucharest, 2008;
4. Dicey, A. V., *Introduction to the Study of the Law of the Constitution* (8th edition with new Introduction) (1915), first edition published in 1885 under title: *Lectures introductory to the study of the law of the constitution*;
5. Pacteau, Bernard, *Manuel de contentieux administratif*, Presses Universitaires de France, 2e édition, 2010;
6. Rarincescu, Constantin G., *Contenciosul administrativ român*, 2nd edition, „Universală" Alcalay & Co., Bucharest, 1936;
7. Rivero, Jean; Waline, Jean, *Droit administratif*, 14e édition, Dalloz, Paris, 1992;
8. Săraru, Cătălin-Silviu, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck, Bucharest, 2016;
9. Vedinaş, Verginia; Vişan, Liliana; Pasăre, Diana Iuliana, *Argumentare juridică europeană în favoarea necesităţii modificării Legii contenciosului administrativ. Succintă prezentare a Legii nr. 262/2007*, „Revista de Drept Public" no. 3/2007.

[16] See Bernard Pacteau, *Manuel de contentieux administratif*, Presses Universitaires de France, 2e édition, 2010, pp. 119-120, 136; Jean Rivero, Jean Waline, *Droit administratif*, 14e édition, Dalloz, Paris, 1992, pp. 199-200.

[17] Verginia Vedinaş, Liliana Vişan, Diana Iuliana Pasăre, *Argumentare juridică europeană în favoarea necesităţii modificării Legii contenciosului administrativ. Succintă prezentare a Legii nr. 262/2007*, „Revista de Drept Public" no. 3/2007, p. 77, 78.