

MORAL DAMAGES IN ROMANIAN ADMINISTRATIVE CONTENTIOUS: A FATA MORGANA?

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Abstract: *The study analyses the way compensations are granted in the case moral damages were caused to the victim, if the action is settled according to the Law no. 554/2004 on administrative litigations of assimilated administrative acts. Ab initio, there are presented the principle of legality and minimum general notions on administrative litigations. Later, the paper approaches the notions of "damages", "loss" and "compensation". The author then provides further clarification on "material damages"- "moral damages" dichotomy which may be found in the law on administrative litigations. Consequently, jurisprudential elements which denote a practice which lacks unity in approaching compensations given to damaged persons are emphasized.*

Keywords: *administrative litigations, moral damages, compensations, loss, principle of legality, principle of availability*

Prolegomena

The principle of legality represents a general principle of the law, expressively established by the Romanian Constitution and it rules over the entire theory of the administrative acts, being made of two elements:

1. obligation to comply with the law and
2. obligation of initiative to enforce the law (M. T. Oroveanu, 1998).

The first element denotes the fact that public administration cannot take any measures which are contrary to the law, having to obey the rules of law, and according to the second element, public administration must take measures so that the rules of law are obeyed and they must make sure that the law does not fail to be applied, respectively it is not a dead letter. According to this principle, which represents one of the essential elements of the classic liberal doctrine, individuals as well as public administration must obey the law, the legality in general. The famous pyramid of Hans Kelsen described in „The Pure Theory of Law” („Reine Rechtslehre”, 1934), expresses the idea of legal positivism and defines the notions of legitimacy and legality. At the top of the pyramid the Constitution is situated, followed by international treaties, law texts or administrative acts issued at central or local levels. The principle of hierarchization of these acts refers to the fact that the rules settled by acts issued by a level hierarchically superior must be obeyed when issuing acts at inferior levels.

According to the doctrine, the legality is analysed as a dimension of the rule of law, related to the fact that the Constitution of Romania proclaims, at article 1 paragraph 3, that Romania is a democratic and social state, governed by the rule of law (R-A Lazăr, 2004).

In order to understand the notion of legality, we show that the administrative acts are issued on the basis of the law, in order to enforce or organise the enforcing of the laws and the other legislative acts issued by superior authorities, feature which represents the consequence of the hierarchy of legal norms (due to the hierarchic pyramid, administrative acts at inferior level have to comply with those at superior level, the laws and the Constitution of the country). In the case of the Romanian legal system, at the top of the pyramid is the fundamental law – the Constitution, followed by international treaties, organic laws, ordinary laws, Government orders – legislative acts of the Government with power of law, legislative acts issued by other central government (normative/individual), legislative acts issued by the local government bodies (normative/individual). In this regard, by the legality of an administrative act we understand that the act must comply with the Constitution, the laws and legislative acts in force, and with other legal norms which take the form of administrative acts with superior legal force to whose enforcing they were issued (A. Trăilescu, 2019).

To comply with the hierarchy principle of the rules of law and individual acts of government bodies implies the following consequences:

- * general rules of law established by superior authorities must be obeyed by every administrative authority when issuing individual acts;
- * according to the principle *tu patere legem quam facesti* ("Don't ignore the rules you have yourself defined."), any administrative authority is bound by its own rules;
- * in the case a subordinated administrative authority legally issued a rule of law, the administrative authority hierarchically superior cannot make an opposite individual decision;
- * the administrative act must comply the dispositions which directly refer to it (competence, form), and at the same time, it must comply with the superior rules of law specific to the topic.

Based on these general principles the institution of Romanian administrative litigation was created, which can be found in the Constitution of Romania, republished in 2003, more precisely at article 52, marginally entitled "Right of a person aggrieved by a public authority", as well as in the Law No 554/2004 on administrative litigations which regulates in article 1 "litigation cases within the scope of this law", and in article 8 "the object/subject of the judicial action". Concretely, according to article 52 paragraph (1) of the Constitution of Romania "any person aggrieved in his/her legitimate rights or interests by a public authority, by means of an administrative act or by the failure of a public authority to solve his/her application within the lawful time limit, is entitled to the acknowledgement of his/her claimed right or legitimate interest, the annulment of the act and reparation for the damage", and according to paragraph (2) of the same constitutional article "the conditions and limits on the exercise of this right shall be regulated by an organic law". Additionally, according to article 126 paragraph 6 of the fundamental law: "The judicial control of administrative acts of the public authorities, by way of the contentious business falling within the competence of administrative courts, is guaranteed, except for those regarding relations with the Parliament, as well as the military command acts. The administrative courts, judging contentious business have jurisdiction to solve the applications filed by persons aggrieved by statutory orders or, as the case may be, by provisions in statutory orders declared unconstitutional", thus introducing a control that has the legal status of constitutional protector of the citizens legitimate rights and interests.

This text from the supreme law represents, according to great Professor Antonie Iorgovan, father of the Constitution, "the constitutional basis to protect citizens against the abuses of public authorities and, implicitly, their liability for the damages caused to citizens" (A. Iorgovan, 2005). According to administrative litigation, we mention that it represents a legal notion legally defined in article 2 paragraph (1) letter f) of the Law No 554/2004, respectively "administrative litigation represents the resolution, by administrative litigation courts designated under the organic law, of disputes where at least one of the parties is a public authority and the dispute arose from the issuance or rescinding, as the case may be, of an administrative decision, as defined herein, or from the failure on the part of such authority to resolve, within the legal timeframe, a petition related to a legitimate right or interest, or the unjustified refusal to do so".

In our scientific approach article 1 of the Law on administrative litigations is also important and it states that: "Any natural or legal person that deems him/herself aggrieved in a legitimate right or interest by a public authority, through administrative action, or as a consequence of such authority's failure to resolve such person's petition within the timeframe provided by law may approach the jurisdictional Administrative Litigations Court with a request for the rescinding of the contested action, or the recognition of the claimed right or of the legitimate interest, and for the reparation of the loss sustained as a consequence thereof. The legitimate interest may be both private and public".

In this regard, we can also mention that the etymology of the word contentious comes from the Latin "contendo, contendis, contedere" which means "to try your best, to make an effort, to fight", because it evokes the existence of contradictory interests, a fight "in a metaphorical sense, between two parties, from which one will be the winner" (V. Vedinaş, 2018). Reported to these provisions, in recent doctrine, administrative litigations was defined as "a procedure used by the courts of law according to some special rules of public law to resolve disputes, which arise in the executive activity between administration and individuals or between public authorities" (Trăilescu, 2019).

On another topic, according to the criterion of judge's recognised limits, administrative litigation is classified in the following categories:

1. Administrative litigation to rescind, when the instance, in the case the lawfulness of an administrative-jurisdictional decision is raised, rescinds the decision;
2. administrative litigation of full jurisdiction which grants full competence to the court of law, reported to the fact that the court can rescind the unlawfull decision, make the administrative organ take some administrative measures and give compensation for damages, if it is claimed by the plaintiff.

The concepts of "damages", "loss" and "compensation"

Related to the frequency the legislator of administrative litigations used the concept of "damages", as well as the terms similar from a linguistic point of view of "loss" and "compensation", in the following paragraphs, it is suitable to make some observations meant to bring some clarifications regarding the theme which represents the subject of the research. Searching for the regulation regarding the theme which represents the subject of the research, a first revelation is the one according to which the legal concept of „DAMAGES" can be found in the Law 554 of 2004 on Administrative Litigations in three distinctive paragraphs, respectively article 8, article 18 paragraph 3 and article 18 paragraph 4:

- According to the provisions of article 8 of the Law 554 of 2004 on Administrative Litigations, marginally entitled The Object of the Action at Law, A person aggrieved with respect to a right or a legitimate interest acknowledged by law, by a unilateral administrative decision, who is dissatisfied with the response received to his/her preliminary complaint, or who has received no response within the legal timeframe referred to in article 2, paragraph (1), letter h), may take legal action before the jurisdictional Administrative Litigations Court, requesting the rescinding of all or part of the administrative decision in contention, reparations for the loss sustained and, eventually, reparations for moral damages.

- According to article 18 paragraph 3, which regulates the solutions the court law may give, When the plaintiff's petition is favorably resolved upon, the court shall also decide on the compensations for material and moral damages due to the plaintiff, if the plaintiff has so requested.

- Paragraph 4 of article 18 defines the possibility to grant material and moral damages in the case the object of the action of administrative litigation is represented by an administrative contract, the text of the law mentioning the following: When the object of the litigation is an administrative contract, the court, depending on the facts of the case, may:

- a) rule rescinding of all or part of such document;
- b) obligate the public authority to close the contract to which the plaintiff is entitled;
- c) compel one of the parties to fulfill a certain obligation;
- d) express consent on behalf of one of the parties, when public interest so requires;
- e) rule payment of material and moral damages.

Thenceforward, the law on administrative litigation includes a series of norms regarding "compensation", respectively:

- Article 9 Actions at Law Against Government Orders, paragraph 5 The action stipulated in this Article can be a claim for compensation for damage caused through Government Orders, cancellation of administrative acts issued on the basis of such Orders and, as the case may be, compelling a given public authority to issue an administrative act or to perform a specific administrative operation.

- Article 16 Actions Brought Against a Civil Servant, paragraph 1 Legal actions taken hereunder may also be brought against the individual who contributed to the drafting, issuing, adopting or signing the challenged administrative act or, as the case may be, who is responsible for the refusal to examine the petition related to a subjective right or a legitimate interest, if reparations are demanded for the loss sustained or for delay. If such action is admitted by court, the individual against whom charges are pressed as above may be obligated to pay compensation, jointly with the public authority concerned.

- Article 18 Solutions Available to the Court, paragraph 4 When the plaintiff's petition is favorably resolved upon, the court shall also decide on the compensation for the material and moral damages due to the plaintiff, if the plaintiff has so requested.

- Article 18 Solutions Available to the Court, paragraph 4 When the object of the litigation is an administrative contract, the court, depending on the facts of the case, may:
e) rule payment of compensation of material and moral damages.

- Article 19 The Statute of Limitations for Compensations, paragraph 1 If the aggrieved person files request for the rescinding of the administrative decision in contention, without demanding compensation, the time bar for claiming compensation

shall run from the date when the plaintiff became aware or should have become aware of the extent of the loss or damage.

- Article 24 The Obligation to Do, paragraph 4 If within 3 months from the date the decision to apply the fine or pay the fees was noticed, the debtor, guiltily, fails to execute the obligation set in the writ of execution, the execution court, at the creditor's demand, shall fix the sum due to the state and the sum due to him/her as penalties, by decision made with the citation of the parties. Also, by the same decision, the court shall decide, according to article 892 of the Code of civil procedure, the compensation the debtor owes to the creditor for failure to perform the obligation in kind.

Finally, we present the norms where we identified the term "loss":

- Article 1 Litigation Cases within the Scope of This Law Any person that deems him/herself aggrieved in a legitimate right or interest by a public authority, through administrative action, or as a consequence of such authority's failure to resolve such person's petition within the timeframe provided by law may approach the jurisdictional Administrative Litigations Court with a request for the rescinding of the contested action, or the recognition of the claimed right or of the legitimate interest, and for the reparation of the loss sustained as a consequence thereof. The legitimate interest may be both private and public.

- Article 2 Terminology, paragraph 1 For the purposes hereof, the words and phrases herein below shall mean as follows: impending loss – a future but predictable material loss or, as the case may be, the grave and predictable disturbance of the operation of a public authority or a public service;

- Article 8 The Object of the Action at Law, paragraph 1 A person aggrieved with respect to a right or a legitimate interest acknowledged by law, by a unilateral administrative decision, who is dissatisfied with the response received to his/her preliminary complaint, or who has received no response within the legal timeframe referred to in article 2, paragraph (1), letter h), may take legal action before the jurisdictional Administrative Litigations Court, requesting the rescinding of all or part of the administrative decision in contention, reparations for the loss sustained and, eventually, reparations for moral damages. Such legal action before an Administrative Litigations Court may be also taken by the party that feels aggrieved with respect to a legitimate right through the failure of the administration to provide resolution of his/her case within the legal deadline or through the unjustified refusal to have his/her petition resolved, as well as through the refusal to perform a certain administrative operation needed for the exercise or protection of a right or legitimate interest. The reasons invoked in the petition requesting the rescinding of the decision are not limited to those invoked in the preliminary complaint.

- Article 11 Legal Action Filing Terms, paragraph 1 Petitions requesting the rescinding of an individual administrative decision, of an administrative act or the recognition of the right claimed and the reparation of the loss sustained may be filed within 6 months of:

- a) the date of notice of the reply to the preliminary complaint;
- b) the date of notice of the unjustified refusal to settle the petition;
- c) the date of expiry of the legal timeframe for the resolution of the preliminary complaint, or the date when the legal deadline for settling the petition runs out;
- d) the date of expiry of the deadline stipulated in article 2, paragraph 1, letter h), calculated as of the date of notice of the administrative act issued for a favorable settlement of the petition or, as the case may be, of the preliminary complaint.

- Article 14 Stay of Execution paragraph 1 For well grounded reasons and for the purpose of avoiding impending loss, the aggrieved person may, on the date of notifying the superior authority to the issuing public authority, subject to article 7, request the jurisdictional court to rule the stay of execution of the challenged unilateral administrative decision, pending a decision on the merits of the case is reached by the first-instance Court. In case the aggrieved person fails to file action for rescinding within 60 days the suspension shall end lawfully and without any formality.

- Article 19 The Statute of Limitations for Reparations, paragraph 1 If the aggrieved person files request for the rescinding of the administrative decision in contention, without demanding reparations, the time bar for claiming reparations shall run from the date when the plaintiff became aware or should have become aware of the extent of the loss.

Consistent with those above mentioned, we think that the normative text which complies with the norms of legal technique imposed by the Law no. 24 of 2000 is represented by article 18 of the Law on Administrative Litigations, marginally entitled Solutions Available to the Court, which stipulates at article 3 that When the plaintiff's petition is favorably resolved upon, the court shall also decide on the compensations for material and moral damages due to the plaintiff, if the plaintiff has so requested. Through a teleological interpretation, the quoted text envisages that any person that deems him/herself aggrieved may request (monetary) compensation, for the material and moral damages caused by the public authority, the legislator making an adequate distinction between material damages and moral damages, institutions which, in our opinion, are included in the constitutional notion of "loss". Finally, we state that in the Constitution of Romania, the term "compensation" is used at article 44 marginally entitled "Right of private property", the term of "loss" being mentioned only at article 52 which regulates the "Right of a person aggrieved by a public authority".

Material damages – moral damages dichotomy

The source of the research regarding material damages – moral damages dichotomy should reside in the analysis of the provisions of article 18 of the Law on Administrative Litigations, article marginally entitled Solutions Available to the Court, which disposes at article 3 that in the case the petition is favorably resolved upon, the court shall also decide on the material and moral damages due to the plaintiff, if the plaintiff has so requested. This normative text corroborates the other articles where the term "damages", respectively "loss" can be found. In such conditions, strictly in the virtue of the principle of availability, the Administrative Litigations Court is requested to obligate the public authority, in the meaning given by the same normative document, to pay compensations which have the legal nature of material and moral damages. The manner the solutions available to the Administrative Litigations Court are regulated is to be regarded in correlation with article 8 of the Law 554 of 2004 on Administrative Litigations, which offers a normative framework of the action in administrative litigation, the different measures that may be imposed by decisions of the court which represent specific ways through which the supposed right or legitimate interest of an aggrieved person by a public authority is recognised and through which the right guaranteed by article 52 of the Constitution is effectively realised (Constitutional Court, Decision no. 1239/18.11.2008, published in the Official Journal of Romania no. 841/15.12.2008).

In the article regarding the Object of the Action at Law, more precisely article 8 paragraph 1 of the Law on Administrative Litigation, it is largely presented the fact that the aggrieved person may take legal action before the jurisdictional Administrative Litigations Court, requesting the rescinding of all or part of the administrative decision in contention, reparations for the loss sustained and, eventually reparations for moral damages. After reading this legal text we notice that the legislator makes a just distinction between the term of "material damages", which they identify by the term of "loss" and "moral damages", which they define in the same way, respectively "moral damages". From a literary point of view, according to the Romanian Explanatory Dictionary, the meaning of the word "damage" is that of loss, injury, (material or moral) damage, compensation. To support our conclusion, we also present the provisions of article 2 of the same normative document, the authentic dictionary of terms of the Law on Administrative Litigation, which stipulates that the impending loss means a future material (our note and not moral) but predictable loss or, as the case may be, the grave and predictable disturbance of the operation of a public authority or a public service.

Although certainly the legislator wanted to make a clear distinction between the possibility to request the reparation of the loss sustained, respectively material damages, as well as reparations for moral damages, in article 1 paragraph 1 of the law entitled Litigation Cases within the Scope of This Law, the organic legislator gets us to understand that the aggrieved person may approach the jurisdictional Administrative Litigations Court with a request for the rescinding of the contested action, or the recognition of the claimed right or of the legitimate interest, and for the reparation of the loss sustained as a consequence thereof, respectively only for requesting material damages (for the reparation of the loss sustained as a consequence thereof), omitting to mention the possibility of the justice seeker to approach the court for the reparation of moral damages, possibility they however present later, in the text of articles 8 - The Object of the Action at Law and 18 - Solutions Available to the Court. Ad absurdum, through a literary interpretation of the text which regulates the subjects of seisin we should accept the fact that the aggrieved person may approach the jurisdictional Administrative Litigations Court strictly to request, besides the recognition of the claimed right, compensations for the material damages caused by the public authority, by eluding constitutional and legal norms. Dis bene iuantibus, the analysed text is open to criticism because it does not make a distinction between the material damages and moral damages that can be requested, respectively be granted by the Administrative Litigations Court, in the hypothesis the plaintiff requests them, and at a first analysis of the text, the aggrieved person could think that the term loss represents damages, no matter their nature, material or moral.

This interpretation is also given by corroborating the constitutional provisions, because the constituent legislator shows in article 52 paragraph (1) that "any person aggrieved in his/her legitimate rights or interests by a public authority, by means of an administrative act or by the failure of a public authority to solve his/her application within the lawful time limit, is entitled to the acknowledgement of his/her claimed right or legitimate interest, the annulment of the act and reparation for the loss", failing to make a distinction between the type of loss, material or moral, and *ubi lex non distinguit, nec nos distinguere debemus*. De lege ferenda, it would be necessary to change article 1 of the Law on Administrative Litigations no. 554/2004, in order to harmonize the norm with the legal text identified in the entire normative document, respectively to mention *expressis verbis*

the fact that the aggrieved person may also approach the court for reparations for moral damages and not only for the reparation of the loss sustained as a consequence thereof, respectively material damages. The main argument to support this proposal resides in the observation of the elements of direct action on administrative litigation, respectively:

1. Parties of the actions - considerations regarding the provisions of article 2 paragraph 1 letter a) and b) of the Law on Administrative Litigation no. 554/2004;
2. Object of the action – protection of the civil subjective right and the object of the request to file legal action – the tangible claim on which the court must make a decision;
3. Cause of the action - *causa petendi* and the cause of the request to file legal action - *causa debendi*.

In concrete terms, in order to have the administrative litigation court analyse the object of the action promoted by the justice seeker in the administrative litigation, respectively to request the rescinding of the contested action, the recognition of the claimed right or of the legitimate interest, and the reparation of the loss sustained as a consequence thereof (our note: to grant compensation for material and moral damages), as a matter of priority the court must note if the justice seeker is a subject who has the right to approach the court. Coming back to recent doctrinaire opinions (Vedinaş, 2018), we specify that depending on the object of the request, respectively in the hypothesis it is represented by a unilateral administrative decision, issued for specific purposes or for regulatory purposes, the following categories of actions are identified:

a) Actions in administrative litigations that have as an object to rescind the decision, being possible to request the rescinding of all or part of the unilateral administrative decision, issued for specific purposes or for regulatory purposes, as it is stipulated at article 8 paragraph 1 of the law which shows that the aggrieved person may approach the administrative litigation court designated under the organic law of disputes, to request the rescinding of all or part of the decision;

b) Actions through which, besides the rescinding of the decision, in the subsidiary claim, material damages, moral damages, material and moral damages are requested, the doctrine considering that the following may be requested:

- material damages,
- moral damages,
- material and moral damages,

reported to the provision that can be found in article 8 paragraph 1 of the law, which states that the aggrieved person may approach the administrative litigation court designated under the organic law of disputes, to request the rescinding of all or part of the decision, reparations for the loss sustained and, eventually, reparations for moral damages. In this situation, the doctrine considers that the aggrieved person may request material damages and/or moral damages, which can be exclusively material, exclusively moral or material as well as moral damages (Vedinaş, 2018). By exception from the stipulations in paragraph 1, paragraph 1 index 2, action grounded on the violation of a legitimate public interest can only address the rescinding of the act or the compelling of the defendant authority to issue an act or another document, respectively perform another administrative operation.

Taking into consideration the express text of the legislator, which grants the plaintiff, in the virtue of the principle of availability, the possibility to request reparations for the loss sustained and, eventually, reparations for moral damages, because the

conjunction "and" cannot be equal to the conjunction "or", we think that the plaintiff may require, based on article 8 paragraph 1 of the law:

- material damages,
- material and moral damages,

with the remark that the legislator thought that in all the cases the administrative litigation court observed the unlawfulness of the decision, or the unjustified refusal to resolve a petition, the aggrieved person suffers a material prejudice which causes some material damages, being also possible to suffer a moral prejudice, which gives the aggrieved person the right to request moral damages too.

c) Actions which have as an object to obligate the public authority to issue a new administrative act, issue a new document or perform a certain administrative operation, according to article 18 paragraph 1 of the law.

d) Actions which have as an object to obligate the public authority to issue an administrative act, issue a new document or perform a certain administrative operation, accompanied by the request for material and/or moral damages (Vedinaş, 2018)

We reiterate within this classification the fact that, in our opinion, in the hypothesis the court identifies the unjustified character of the refusal to respond to a petition, article 2 letter i) of the law defining the unjustified refusal to respond to a petition as the explicit statement, by excess of power, of the will to not resolve a petition and assimilating to this unjustified refusal the failure to enforce an administrative decision resulting from a favorable resolution of a petition or, as the case may be, a preliminary complaint, the legislator presumes the fact that the plaintiff suffers a material prejudice, fact which allows them to request "reparations for the loss sustained", and in the hypothesis the non-patrimonial suffering is also proved, he/she may request for "and eventually, reparations for moral damages". Regarded from a schematic point of view, article 8 regulates the object of the action at law in administrative litigation is presented in the following formula:

a person aggrieved with respect to a right or a legitimate interest acknowledged by law, by a unilateral administrative decision

a) who is dissatisfied with the response received to his/her preliminary complaint (article 2 letter j) preliminary complaint – a complaint whereby the issuing public authority or, as the case may be, the next in rank authority, is requested to review an administrative decision specific to a case or with a regulatory power, in the sense of having it rescinded or amended);

b) who has received no response within the legal timeframe referred to in article 2, paragraph 1, letter h) (failure to resolve a petition within the legal timeframe – a public authority's failure of responding to a petitioner within thirty (30) days of the submission date, unless the law provides otherwise);

c) who considers him/herself aggrieved with respect to a right or a legitimate interest acknowledged by law by

- failure to resolve the petition within the timeframe (failure to resolve a petition within the legal timeframe – a public authority's failure of responding to a petitioner within thirty (30) days of the submission date, unless the law provides otherwise);
- unjustified refusal to respond to a petition (article 2, letter i) unjustified refusal to respond to a petition - the explicit statement, by excess of power, of the will to not resolve a petition; it is assimilated to the unjustified refusal and failure to enforce an administrative

decision resulting from a favorable resolution of a petition or, as the case may be, a preliminary complaint);

- the refusal to perform a certain administrative operation needed for the exercise or protection of a right or legitimate interest (although article 2 letter 1 already assimilates to the unjustified refusal to respond to a petition the failure to enforce an administrative decision resulting from a favorable resolution of a petition or, as the case may be, a preliminary complaint) may take legal action before the jurisdictional Administrative Litigations Court in order to request:

1. the rescinding of all or part of the administrative decision in contention,
2. reparations for the loss sustained
3. and, eventually, reparations for moral damages.

Correlatively, this text of law must be corroborated with the provisions of article 18 paragraph 1 – paragraph 3, which mention the solutions available to the court

The court, examining a petition, may, as the case may be,

1. rescind of all or part of an administrative act,
2. obligate the public authority to issue a new administrative act,
3. obligate the public authority to issue a new document,
4. obligate the public authority to perform a certain administrative operation,
5. rule on the lawfulness of the administrative operations based on which the challenged act was issued,
6. decide on the compensations for material and moral damages due to the plaintiff, if the plaintiff has so requested.

Moral damages in the particular case of the failure to enforce an administrative decision resulting from a favorable resolution of a petition

In the present study we also aim to approach the soundness of granting moral damages for tergiversating the solution to the plaintiffs request, respectively the failure to enforce an administrative decision resulting from a favorable resolution to a petition, and to try to understand the major reason of the court according to which, in the particular case of the failure to enforce a decision of the local council which approves to grant the land for free use based on the Law no. 15/2003 regarding the support given to young people to build their house, "to grant to the plaintiffs the land represents a sufficient and equitable satisfaction".

Thus, in the Decision no. 1181/23 September 2021 given by the Court of Appeal of Timișoara, the administrative disputes and fiscal court, the Court of Appeal appreciates that the plaintiffs' petition to receive moral damages for the refusal of the public authority to enforce the decision of the local council no. 301/2019, because the refusal to respond to a petition cannot be considered in itself and in any conditions, an unlawful deed which generates a moral prejudice. In order to pronounce such a decision, the Court notes that the request for damages filed by the plaintiffs is not grounded because the refusal to respond to a petition cannot be considered in itself and in any condition an unlawful deed which generates a moral prejudice; because the tergiversation of the solution to the plaintiffs request cannot be totally imputed to the defendants, and to allocate to the plaintiffs the land represent a sufficient and equitable reparation. It is also stated that the conditions necessary

to lead to criminal civil liability had to be cumulatively proved, resulting from the economy of dispositions of articles 1349 and 1357 of the Civil Code, respectively:

- the existence of an unlawful deed committed by the defendants;
- the guilt of the defendants;
- the production of a prejudice by the unlawful deed of the defendants and
- the presence of a connection of causality between the deed and the prejudice.

The Court considered that, in this case, the plaintiffs did not manage to prove the extrapatrimonial prejudice they had suffered as consequence of the deeds imputed to the defendants, not being enough to theoretically appeal to the attributes of the human personality, and being necessary to show and prove, concretely, the elements which attest the existence and the extent of the prejudice. The simple discomfort cannot represent the basis for granting moral damages, because there is no sign that such a discomfort (thus inherent to any limitation of a right) would have been materialized, in the case of the plaintiffs, into a suffering of a certain gravity and duration, which would justify its compensation through a monetary equivalent. Besides, as the first-instance court noticed, to allocate the land represents a sufficient and equitable reparation.

The other similar panels in similar cases pronounced in the same way, respectively in the Decision no. 140 as of February 16th, 2021 pronounced by the Court of Appeal of Timișoara, although the first-instance court, regarding the plaintiffs' obligation to pay moral damages, starting from the provisions of the Civil Code – article 1357 and the following, notices, firstly, the presence of an injuring unlawful deed – the refusal of the defendants to enforce their own decision, refusal qualified as unjustified, and, due to this culpable behaviour, the plaintiff suffered a moral prejudice. Similar decisions of the first-instance court in administrative litigation, with identical arguments, are represented by the Sentence no 162 dated February 18th, 2021, Sentence no. 328 dated March 18th, 2021 and Sentence no. 61 dated January 26th, 2022, pronounced by Timiș General Court. In the content of these decisions it is clearly expressed the fact that the passage of a long period from the moment the selection request was approved, the documentation was handed over by the plaintiff, represents sufficient elements to appreciate the soundness of a request for moral damages, the requested sum being a reasonable one. In this context, the court appreciates that to ascertain the violation of the plaintiff's right to benefit of the land allocation does not represent a sufficient equitable reparation for the moral prejudice the plaintiff suffered. On the other side, the first-instance court mentions that it cannot be appreciated that to obligate the defendants to allocate the land to the plaintiff represents a sufficient and equitable reparation, under the condition that the accused authorities themselves recognised this right to the plaintiff, but, in spite all these, they did not enforce their own decisions, and, as Decision no. 451 dated October 28th, 2020 of the Local Council certifies (decision through which the allocation decision is suspended), they do not have the intention to apply it. We state that through the pending legal approach it was not required the obligation to allocate the land to the plaintiff, but it was required the obligation of the defendant, the Mayor of Timișoara city, to enforce the unilateral administrative decision issued for specific purposes which is represented by a decision of the local council through which it was approved to allocate the land for free use, and it also were requiring material damages as well as especially moral damages (in value of Euro 5,000), taking into consideration the provisions of the special law which impose to the mayor an imperative term of 15 days to enforce such an administrative decision. After noticing the unlawfulness

of the refusal to enforce their own decision as an unlawful deed, the first-instance courts admitted the request for compensation of euro 5,000 and jointly obligated the defendants to pay the sum of euro 5,000, or to pay the sum of euro 3,000 for the suffered prejudice. In one of the cases, Timiș General Court certifies the fact that the moral prejudice was proved, and when judging the request for moral damages, they admitted that in order to appreciate the soundness of a request for moral damages, they took into account the passage of a long period of time from the moment the selection criteria were approved to the moment the Decision of the local council no.301 dated June 14th 2019 was enforced, which made the plaintiffs experience a period of emotional discomfort, frustration and uncertainty.

The moral prejudice suffered by the plaintiffs as consequence of the long lack of action of the defendants was also proved by the oral testimony given in the case. From the declaration of the witness, friend of the plaintiff, it results that they were affected by the lack of the land, having to hire a house and live together with his wife and the two minor children. The witness also states that the lack of the land the plaintiff was expecting to get two years ago generated an additional stress, given the fact that their daughter had serious health problems, respectively a brain tumour, suffering several surgical interventions – the last fact being certified by the medical records included in the file of the case. The first-instance court appreciated that it is obvious that long-term uncertainty regarding the possibility to acquire their own house had a negative impact on the family, adding up to the hard attempts the plaintiffs went through. Consequently, the first-instance court adds that to simply notice the violation of the plaintiffs' right to benefit of the land allocation cannot represent a sufficient and equitable reparation for the moral prejudice they suffered. In order to reach to this conclusion, the court also takes into account the fact that the defendant authorities themselves recognised this right of the plaintiffs, thus without enforcing for a long period of time their own decisions. The first-instance court accepted our arguments, according to which the tergiversation in enforcing the law by a representative of the public authority lead to frustration and uncertainty, a status of legal uncertainty, the impossibility to allow the plaintiffs to adequately adapt their behaviour. The sum required does not lead to an unjustified income in the case of the victim of the prejudice, neither to an excessive penalty for the administration which caused the damage, being proved the fact that in this case the honesty, dignity and love for the family, the pillar of society, were harmed.

Rhetorically we asked ourselves why the Court of Appeal of Cluj (Court of Appeal of Cluj, Administrative and Tax Litigation Chamber, decision no. 2963 dated July 6th, 2011 https://www.curteadeapelcluj.ro/cacj_vechi/Jurisprudenta/sectia%20comerciala/Comercial%20%20trim%203%202011.pdf) can grant moral damages in value of lei 10,000 to a developer for the administration guilt which produced mistrust, suspicion and frustration (by issuing an unlawful certificate of urbanism) and the Court of Appeal of Timișoara does not grant moral damages to a family that since 2016 has been waiting that local administration obeys the law, law which obligates the Mayor to enforce a decision of the local council in 15 days, not in several years, the obligation certified by an irrevocable decision being partially willingly fulfilled, reported to the fact that only after filing some actions to amend the Mayor of the City, the young people were summoned to sign the bailment contract and the delivery and acceptance report. According to the Methodological norm to apply the Law no. 15/2003 regarding the support given to young people to build

their house dated July 29th, 2003, article 5 paragraph 2, The Mayor has to enforce the decision of the local council to grant for free use the land to build a house, within 15 days from its approval by the local council, on the basis of a delivery and acceptance report. By the mention "to allocate the land to the plaintiffs represents a sufficient and equitable satisfaction", allocation which was made in March 2019, indubitably results the fact that the court of appeal, more precisely the Court of Appeal of Timișoara, agrees to a certain extent to the Mayor's attitude to defy the law which imperatively imposes a term of thirty (30) days, which they enforced it several years later, with tergiversation.

Coming back to the reasons used to prove the moral prejudice, we also presented the fact that this psychic discomfort may be characterised, according to the psychological doctrine, as stress, this being a psychosocial phenomenon characterised by tension, strain and psychic discomfort caused by the external factors which are perceived as being aggressive, difficult or painful. According to researches, in stressful moments, cortisol is released in the body, a substance which, in the case of prolonged stress, attacks nervous cells, more exactly the region responsible for the well-being and positive thoughts. The moment the stress becomes cronic, it results a background favourable for depression and anxiety, affections which also affect the quality of sleep.

In this context, even the fact of noticing the violation of the plaintiffs right to benefit of the allocation of land does not represent in any case a sufficient and equitable reparation for the moral prejudice they suffered. On the other hand, it cannot be stated that to obligate the defendants to allocate the land to the plaintiffs represents a sufficient and equitable reparation, when the defendant authorities themselves recognised this right of the plaintiffs, but, in spite of all these, they did not enforce their own decisions, and, as the Decision of the Local Council no. 451 dated October 28th, 2020 stated (a decision of the local council which approved the stay of the allocation decision, later successfully attacked in court), they don't have the slightest intention to enforce them, only as a consequence of other filed actions.

In older jurisprudence, it is stated that the full reparation of the prejudice means to eliminate all the harmful consequences of an unlawful and culpable action, patrimonial or non-patrimonial, as the case may be, in order to place the victim in the previous situation, according to the principle *resoluto iure dantis, resolvitur ius accipientis*, and in the hypothesis the request for recognition is accepted, the court shall also decide on the material and moral damages (The High Court of Cassation and Justice, Administrative and Tax Litigation Chamber, Decision no. 2037 dated March 29th, 2005, in the Bulletin of Cassation no. 3/2005). In the same sense, it becomes clear that the moral damages correspond to harming honesty, dignity, honor, public image or professional prestige of the person, their goal being a compensatory one, which clearly must neither represent any excessive penalty for the one that caused damages, nor a personal enrichment without just cause for the victim under the form of an unjustified income. Precisely because of that, regarding the moral damages, material proves to quantify the suffered loss cannot be used, the court having the right to decide, taking into account all the circumstances of the cause, on the global amount which represents an equitable reparation compared to the effects of the deed which caused the prejudice (The High Court of Cassation and Justice, Administrative and Tax Litigation Chamber, Decision no. 608 dated February 5th, 2010). In another case, the Court of Appeal of Timișoara grants damages in amount of euro 1,000, noticing the existence of a prejudice independent of the fact that the documents contested

by the plaintiff, as a consequence of the appeal, were not canceled, and noticing that they are lawful, the court of appeal notices the production of the so-called moral prejudice.

When evaluating the prejudice, the court paid attention to the jurisprudence of the supreme court, respectively the fact that through Decision no. 153 dated January 27th, 2016, given in appeal by Civil Section I of the High Court of Cassation and Justice, it was decided that in order to decide the existence of a moral prejudice, defined in the legal doctrine and in jurisprudence as any harm brought to one of the prerogatives which represent the attribute of the human personality and which is expressed by physical or moral pain, experienced by the victim, the character and importance of the non-patrimonial harmed values must be taken into consideration, taking into account the social environment the victim lives in, education, culture, morality standard, personality and psychology of the victim, circumstances in which the deed was committed, the social status etc. Because it is about harming some values without economic value and about the protection of some rights which are mentioned, as elements of the private life, at article 8 of the Convention for the Protection of Human Rights, but also of values protected by the Constitution and national laws, the existence of the prejudice is subject to a reasonable evaluation, on an equitable basis which corresponds to the real and effective prejudice caused to the victim. Regarding the proof of the moral prejudice, it is shown that the High Court of Cassation and Justice stated that the proof of the unlawful deed is enough, following that the prejudice and the report of causality shall be presumed, the courts having to deduce the production of the moral prejudice from the simple presence of the unlawful deed able to cause such a prejudice and the circumstances in which it was committed, the solution being influenced by the subjective, internal character of the moral prejudice, its direct proof being practically impossible.

The first-instance court rejected this head of claim, motivated by the fact that proof of the suffered loss was not made, and admitting the head of claim regarding the payment of the difference in wage relating to the rank and position of the job for which the plaintiff run, respectively the differences resulted from the received wage and the wage due to the new position, the moral damages no longer being justified.

Following the cancellation of the decision of the first-instance court and the rejection of the heads of claim regarding the obligation of the defendants to appoint the plaintiff as police officer and grant the professional rank of police subinspector, the Court of Appeal notices that they must be compensated for the suffered moral prejudice. Thus, the recurrent plaintiff prepared for the exam, allocating a part of their time for study, in order to get the desired result. It is well-known the fact that in order to take part to an exam each competitor must make some supplementary effort to enlarge and acquire the knowledge necessary to get a certain job. Then, the stress caused by the failure to be appointed on the job, inevitably influenced the psychic of the plaintiff, fact which was declared by the witness who appeared before the first-instance court. Also, the prejudice caused by the loss of a real and serious chance must be repaired, as long as the contest was organised by an institution of the state. There is a link of causality between the prejudice caused by the loss of the chance to get an advantage and the deed which generated it. The failure to issue the administrative act to appoint on the job, from reasons which do not depend on the plaintiff, the failure to get the job of police officer, the failure to get the appropriate wage although they prepared for this exam and they were declared admitted, they all are sufficient reasons to grant some moral damages.

According to article 1385 of the Civil Code: (1) Damages shall be fully compensated, unless otherwise provided by law. (2) Compensation may also be awarded for future damage if its occurrence is not in doubt. (3) The compensation must include the loss suffered by the injured party, the gain which he could have made under normal circumstances and which he has been deprived of, and the expenses he has incurred in order to avoid or limit the damage. (4) If the tort/delict also caused the loss of the opportunity to obtain an advantage or to avoid damage, the compensation shall be proportionate to the likelihood of obtaining the advantage or, as the case may be, avoiding the damage, taking into account the circumstances and the specific situation of the victim.

The prejudice suffered by the recurrent plaintiff is certain and still not repaired, the existence of the prejudice being sure and not in doubt. Summa summarum, regarding the extent of the prejudice, it is noticed that the recurrent plaintiff claimed with title of moral damages, the sum of euro 10,000, sum which is appreciated by the court to be an exaggerated one, as long as the recurrent plaintiff did not correctly reported when evaluating the prejudice. Thus, the court considers that the sum of euro 1,000, respectively the equivalent in lei of this sum, calculated at the NBR rate in the payment day, is enough to repair the moral prejudice, taking into account that the recurrent plaintiff may try to get the job they competed for, when the competition will be legally organised (Court of Appeal of Timișoara, Administrative and Tax Litigation Chamber, Decision no. 1806 dated September 26th, 2018, irrevocable).

Conclusions

The action in subjective administrative litigation, the way it is regulated in article 1, paragraph 1 correlated with article 8 paragraph 1 of the Law no. 554/2004 on Administrative Litigation, also implies the incidence of administrative and patrimonial liability of the public authority which has to enforce an administrative act issued following the favourable resolution, in order to effectively and efficiently protect the legitimate rights and interests of the aggrieved person and repair the loss caused by the unlawfull administrative behaviour. The incontestable conclusion to be emphasized is that according to which the unilateral administrative decision issued following a favourable resolution of the petition must not turn into a dead letter, by the passiveness of the public authority which issued or adopted it, respectively by the tergiversation to obey the letter and the spirit of the law.

De lege ferenda, it is necessary to harmonize the entire normative architecture so that the aggrieved person that suffered a material loss or a moral prejudice should be lawfully and seriously compensated for, and the moral damages claimed by an action in administrative litigation should not represent a real Fata Morgana.

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