

Opinion Article

A CROSS-COUNTRY EXAMINATION: ADMINISTRATIVE LITIGATION IN CHINA AND ROMANIA*

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Summary: 1. Introduction. – 2. Brief History of Administrative Litigation in Romania and China. – 3. Similarities and Differences Between Administrative Litigation Regulation in China and Romania. – 4. Conclusions.

Keywords: comparative administrative law, administrative litigation, administrative act, China, Romania.

ABSTRACT

Background: *In this article, we have analysed the way in which the balance between public interest and private interest is achieved in administrative litigation in Romania and China. The research aims to highlight the distinct ways of solving the specific problems of this legal institution by the legislator and capitalise on the positive aspects.*

Methods: *The article uses the historical method of analysing the evolution of administrative litigation in the two countries diachronically and the comparative method that explains the*

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similarities and differences existing at the regulatory level in the two systems. The comparison will be based on the law that regulates administrative litigation in each state and on doctrinal and jurisprudential interpretations.

Results and Conclusions: Despite adopting the first administrative litigation law in China in 1989, and Romania in 1990 after the revolution of 1989 and the return to democracy, both countries have made remarkable progress in the last decades. This progress provides assurance for the protection of fundamental human rights in the adoption of administrative decisions and their subsequent judicial control.

1 INTRODUCTION

Throughout history, how a nation is governed has consistently sparked lively disputes. In the past, citizens were subjected to various forms of abuses by absolutist monarchies, prompting Henry David Thoreau to famously proclaim, 'The best government is that which does not govern at all'.²

The evolution and modernisation of states have required the recognition and protection of human rights over time. Currently, the balance between the public interest that corresponds to the achievement of the nation's desires and the private interest that requires the protection of citizens' rights is still being sought in the legislation, doctrine and jurisprudence of states. Courts often play a pivotal role in establishing this balance, with administrative litigation serving as one of the fundamental pillars underpinning any democracy.

Administrative litigation is regulated under the influence of the dynamics needs of society, aligning with the axiom captured by Petre Țuțea that 'everything flows or, more precisely, everything transforms, under the rule of the *laws of movement*'.³ Unfortunately, the ideal of rare law, as mentioned by Courvoisier,⁴ is increasingly distant.

The administrative litigation (contentious) institution comprises all the legal rules governing the settlement of disputes in which at least one of the parties is a public authority. Such litigation arises from the violation of an individual's rights or legitimate interests through an administrative act or the failure to resolve a submitted application within a legal term.⁵

Originating in France, the institution found its roots in the Law of August 16-24, 1790, which enshrined that 'ordinary courts cannot intervene in the activity of the administration, under penalty of forfeiture' (Art. 13).⁶ Subsequently, administrative jurisdictions were created through various regulations.

The way in which administrative litigation is regulated in a state reflects the degree of democratisation of that country and the extent to which legal guarantees are made available to the citizen to be able to defend himself from the abuses of public authorities.

The significant number of administrative litigation underlines the litigants' awareness of the protection procedures provided by the legislation against the excesses of public authorities⁷

2 Henry David Thoreau, *Nesupunerea civică și alte scrieri* (Herald 2021) 90.

3 Petre Țuțea, *Proiectul de tratat. Eros* (Pronto 1992) 41.

4 Claude Courvoisier, 'Idealul legii rare' (2003) 4 *Revista de Drept Public* 27.

5 Cătălin-Silviu Sărau, 'Administrative litigation systems in Europe' (2017) 7 (1) *Juridical Tribune - Tribuna Juridica* 227.

6 Loi des 16-24 août 1790 sur l'organisation judiciaire <<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000704777>> accessed 1 March 2023.

7 Virginia Vedinaș, *Tratat teoretic și practic de drept administrativ*, vol 2 (Universul Juridic 2018) 152.

and pleads for the increased specialisation of judges and lawyers in this matter, and emphasises the importance of establishing a special administrative litigation course within the faculties of law.

All over the world, the regulation of administrative litigation plays a crucial role in striking a balance between private interests and the public interest within evolving societies. By analysing the administrative litigation in China and Romania, we can shed light on the distinct approaches taken by legislators to address the specific problems of this legal institution and capitalise on its positive aspects. The approach will focus both on that *jus commune* focused on the similarities between the two systems⁸ and the existing differences.

The analysis from the perspective of comparative law has the advantage of creating a global framework, but, most importantly, facilitates the normative evolution in the sense that the legislator can identify the best solutions to fit its own legal system.⁹

However, this comparative research faces several difficulties. Firstly, there is a lack of comprehensive research, which hinders a thorough examination of the subject. Additionally, resulting there are numerous discrepancies in legal terminology resulting from different historical developments. Furthermore, the language barrier remains a significant problem.¹⁰

2 BRIEF HISTORY OF ADMINISTRATIVE LITIGATION IN ROMANIA AND CHINA

Chinese law has historically been influenced by a variety of legal systems, including the Romano-Germanic legal system, the Anglo-Saxon legal system, and traditional Chinese legal practices. However, the Romano-Germanic legal system was the dominant influence on Chinese law in the modern era, especially in civil law.

During the late Qing Dynasty and the beginning of the Republic of China, many Chinese jurists and reformers sought inspiration from European legal systems as models for legal reform. German law, in particular, emerged as a useful model for reforming the Chinese legal system. This influence is evident in the development of the first Chinese Civil Code in the early 20th century, which drew heavily from the German Civil Code.¹¹

Since the establishment of the People's Republic of China in 1949, the Chinese legal system has continued to be predominantly influenced by the Romano-Germanic legal tradition, particularly in civil and commercial law. However, the Chinese legal system also incorporates elements of traditional Chinese legal practices and, to a lesser extent, the Anglo-Saxon legal system.

Regarding the evolution of administrative law, we note that there was no regulation of administrative litigation initially. Disputes between citizens and the government were resolved through administrative procedures or by filing petitions addressed to the government. Legislation and administrative rules have long been excluded from the court's purview, which stops Chinese courts from examining and influencing any policies through

8 Jakub Handrlica, Vladimír Sharp and Kamila Balounová, 'The Administrative Law of the Czech Republic and the Public Law of Ukraine: A study in International Administrative Law' (2022) 12 (2) Juridical Tribune - Tribuna Juridica 196, doi: 10.24818/TBJ/2022/12/2.03.

9 Nicolae-Alexandru Ceslea, 'The Communication of Administrative Decisions and the Course of the Time Limits for Challenging Them. Comparative Law Solutions and Perspectives of Evolution in Romanian Law' (2021) 11 (1) Juridical Tribune - Tribuna Juridica 95.

10 Robert Siuciński, 'Administrative Procedure as a Key Factor in Development of Control over Administrative Power - a European Perspective' (2020) 10 (3) Juridical Tribune - Tribuna Juridica 428 est seq.

11 Ching-lin Hsia and others (trs), *The Civil Code of the Republic of China* (Kelly & Walsh 1930-1931).

adjudicative activities, let alone deciding core political questions.¹² In 1989, the Chinese government passed the first Law on Administrative Disputes, which established a formal administrative litigation system that allowed citizens to challenge administrative decisions in court and provided for the possibility of compensation to citizens for damages caused by illegal administrative acts.

Since adopting the Law on Administrative Disputes, the Chinese legal system has continued to develop and refine its administrative litigation procedures. In 2014, the Standing Committee of the National People's Assembly adopted an amendment to the Administrative Litigation Law that expanded the scope of administrative litigation and made it easier for citizens to file administrative lawsuits. The amendment also provided provisions for expedited procedures in certain cases and granted the courts the authority to review administrative normative documents. These legislative changes are arguably significant, and represent symbolic steps towards the rule of law and a higher level of judicialisation.¹³ As Professor Hu Jianmiao remarked, 'the changes in the scope of administrative litigation could serve as the barometer of the advancement of the rule of law in China.'¹⁴ Subsequent changes in the law created the conditions for administrative litigation to become an increasingly important means of resolving disputes between citizens and the government in China. However, the Chinese government still exercises significant control over the legal system, and many critics argue that administrative litigation remains subject to political influence and pressure.¹⁵

The administrative legal regime of the People's Republic of China (PRC) is a fascinating field of research for any comparative legal study due to its unique characteristics and distinct flavour.¹⁶

In Romania, the establishment of administrative litigation can be traced back to Law No. 167/1864 *for the establishment of the State Council*,¹⁷ which created the State Council in the United Principalities of Moldova and Wallachia. Modelled on the French model, the State Council had legislative (preparation of draft laws), administrative (administrative advice and disciplinary forum for civil servants), and administrative litigation powers.

However, adopting the 1866 Constitution, Article 131 abolished the Council of State and established the obligation to adopt an ordinary law apportioning its powers.

Subsequently, the 1923 Constitution and then the Administrative Litigation Law of December 23, 1925 assigned the adjudication of administrative litigation disputes to the judiciary, respectively, the Courts of Appeal and the Court of Cassation. This established a comprehensive administrative litigation system with full jurisdiction, empowering the court to cancel the harmful administrative act and grant compensation to the injured person.

From 1948, with the establishment of the communist regime, until the adoption of the Constitution of 1965, the courts could not control the legality of administrative acts except

12 Shiling Xiao and Yang Lin, 'Judicial Review of Administrative Rules in China: Incremental Expansion of Judicial Power' (2022) 17 (2) *Journal of Comparative Law* 389.

13 *ibid.*

14 Jianmiao Hu, 'Changes and Trends of Scope of Administrative Litigation in China: Designation, Limitation, Recovery and Expansion' (2005) 5 *Tribune of Political Science and Law* 3.

15 Wei Cui, Jie Cheng and Dominika Wiesner, 'Judicial Review of Government Actions in China' (2019) 1 *China Perspectives* 36, doi: 10.4000/chinaperspectives.8703.

16 Muruga P Ramaswamy, 'The Impact of the New Chinese Foreign Investment Law 2019 on the Administrative Legal System Governing Foreign Investments and Implications for the Investment Relations with Lusophone Market' (2019) 9 (2) *Juridical Tribune - Tribuna Juridica* 330.

17 Law of Romania no 167/1864 For the Establishment of the State Council 'Pentru infiintarea unui consiliu de statu' of 11 February 1864 <<https://legislatie.just.ro/Public/DetaliiDocument/19659>> accessed 1 March 2023.

in cases expressly provided by law. Later, based on the provisions of the 1965 Constitution, Law No. 1/1967 regarding the adjudication by the courts of the claims of those injured in their rights by illegal administrative acts.¹⁸ According to the provisions of Art. 1 of Law No. 1/1967, the person injured in his right by an illegal administrative act could ask the competent court, under the law, to cancel the act or oblige the administrative body summoned to court to take the appropriate measure to remove the violation of his right, as well as to repair the damage. Also, the unjustified refusal to satisfy a request regarding a right and the failure to resolve such a request within the term provided by law was considered an illegal administrative act.

After the Revolution of 1989 and the return to democracy, the *Administrative Litigation Law* No. 29/1990¹⁹ instituted a subjective dispute with full jurisdiction. In the reparation of the damage, it was expressly provided for the first time that the court would also be able to decide on moral damages.

Another element of novelty brought by Law No. 29/1990 was the establishment of administrative litigation sections at the Supreme Court of Justice and the courts.

The legal action was conditional on exercising the preliminary procedure of the administrative appeal by offering the possibility to the issuing or hierarchically superior administrative authority to revoke or modify the allegedly illegal administrative act.

Later, Law No. 554/2004²⁰ was enacted to provide a more comprehensive framework for administrative litigation, adapting to the evolution of society. This law regulates *subjective litigation*, where a subjective right or a legitimate private interest is infringed upon, and *objective litigation*, which addresses the violation of legitimate public interest. Law No. 554/2004 expands the scope of the persons eligible to initiative objective litigation, extending beyond the prefect (regulated by the 1991 Constitution) to include the People's Advocate, the National Agency of Public Servants, the Public Ministry, and any subject of public law as stipulated in Art. 1 para. (8).

Law No. 554/2004 recognised the possibility of addressing the administrative litigation court and the injured third party in a right or a legitimate interest through an individual administrative act addressed to another subject of law. The law expressly provides that administrative contracts, assimilated to administrative acts in the sense of the law, can be appealed to the administrative court.

The law also regulates various aspects such as the exception of illegality, actions against Government ordinances, the conditions for attacking normative administrative acts in administrative litigation, the nature of procedural terms, the procedure for the execution of

18 Law of Romania no 1/1967 Regarding the Adjudication by the Courts of the Claims of Those Injured in their Rights by Illegal Administrative Acts 'Privind judecarea de către tribunale a cererilor celor vătămați în drepturile lor prin acte administrative ilegale' of 26 July 1967 <<https://legislatie.just.ro/Public/DetaliiDocument/22106>> accessed 1 March 2023.

19 Law of Romania no 29/1990 On Administrative Litigation 'Legea contenciosului administrativ' of 7 November 1990 (updated until 24 July 1997) <<https://legislatie.just.ro/Public/DetaliiDocument/793>> accessed 1 March 2023.

For an analysis of the provisions of this law in doctrine, see Alexandru Negoită, 'Legea contenciosului administrativ' (1991) 6 Dreptul 3; Alexandru Negoită, 'Legea contenciosului administrative: aspecte de drept procesual' (1991) 7/8 Dreptul 12; Dumitru Brezoianu, Contenciosul administrativ (Metropol 1995) 75; Valentin I Prisăcaru, Contenciosul administrativ român (2nd edn, All Beck 1998) 163-248.

20 Law of Romania no 554/2004 On Administrative Litigation 'Contenciosului administrativ' of 2 December 2004 <<https://legislatie.just.ro/Public/DetaliiDocument/57426>> accessed 1 March 2023. For an analysis of the provisions of this law in doctrine, see Alexandru Negoită, 'Legea contenciosului administrativ' (1991) 6 Dreptul 3; Alexandru Negoită, 'Legea contenciosului administrative: aspecte de drept procesual' (1991) 7/8 Dreptul 12; Dumitru Brezoianu, Contenciosul administrativ (Metropol 1995) 75; Valentin I Prisăcaru, Contenciosul administrativ român (2nd edn, All Beck 1998) 163-248.

final court decisions in administrative litigation, as well as other aspects that will be further analysed.

The evolution of society determined that, over time, this law underwent numerous amendments brought by the legislator or imposed by the decisions of the Constitutional Court by which exceptions of unconstitutionality were admitted.

3 SIMILARITIES AND DIFFERENCES BETWEEN ADMINISTRATIVE LITIGATION REGULATION IN CHINA AND ROMANIA

First of all, it is important to note that both countries have a law that regulates the general administrative litigation procedure - the Administrative Litigation Law of the People's Republic of China (ALL PRC)²¹ from 1989 with subsequent amendments, respectively in Romania the Administrative Litigation Law (ALL R)²² adopted in 2004, with subsequent amendments.

Both laws regulate the judicial control of administrative decisions, giving the possibility to citizens, legal entities and other organisations whose rights or legitimacy have been violated by administrative acts to bring actions against the issuing public authorities and the officials who contributed to the issuance of the acts.

In both countries, administrative disputes are settled by administrative sections established within the courts - the people's courts in China and tribunals in Romania (Art. 4 of ALL PRC and Art. 2 (1) letter g) ALL R).

In Romania, administrative litigation courts are represented according to the provisions of Art. 2 para. (1) letter g) from Law No. 554/2004 by the Administrative and Fiscal Litigation Section of the High Court of Cassation and Justice, the administrative and fiscal litigation sections of the appeal courts and the administrative and fiscal litigation sections of the tribunals.

Regarding the establishment of material competence, as stated in the provisions of Art. 10 para. (1) from Law No. 554/2004, disputes regarding administrative acts issued or concluded by local and county public authorities, as well as those regarding taxes and duties, contributions, customs debts and their accessories of up to 3,000,000 lei are handled by the administrative-fiscal litigation sections of the tribunals. On the other hand, disputes concerning administrative acts issued or concluded by the central public authorities, as well as those regarding fees and taxes, contributions, customs debts, as well as their accessories greater than 3,000,000 lei, fall under the jurisdiction of the administrative-fiscal litigation sections of the appeal courts, unless otherwise provided by a special organic law. The interpretation of this regulation results in establishing the jurisdiction of the administrative litigation court according to the following rules:²³

1. When the object of the administrative act concerns fees, taxes, contributions, customs debts, and their accessories - the competence of the administrative court is established according to the value (value criterion). Thus, administrative acts concerning such matters with a value of up to 3,000,000 lei are resolved in substance by the administrative-fiscal

21 Law of the People's Republic of China On Administrative Litigation of 4 April 1989 <<https://www.chinafile.com/ngo/laws-regulations/administrative-litigation-law-of-peoples-republic-of-china-2015-amended-version>> accessed 1 March 2023.

22 Law no 554/2004 (n 20).

23 Cătălin-Silviu Săraru, *Tratat de contencios administrativ* (Universul Juridic 2022) 345-6.

litigation sections of the tribunals, and those with a value greater than 3,000, 000 lei are settled on the merits by the administrative and fiscal litigation sections of the appeal courts.

2. When the object of the administrative act does not concern fees and taxes, contributions, customs debts, as well as their accessories - the jurisdiction of the administrative litigation court is established 'depending on the central or local rank of the defendant public authority' (criterion of the positioning of the issuing authority in the system of public authorities). Thus, disputes regarding administrative acts issued by local public authorities are resolved in substance by the administrative-fiscal litigation sections of the tribunals, and those regarding administrative acts issued by central public authorities are resolved in substance by the administrative and fiscal litigation sections of the courts of appeal.

Appeals against judgements rendered by the administrative-fiscal litigation sections of the tribunals are heard by the administrative and fiscal litigation sections of the appeal courts. Similarly, appeals against judgements pronounced by the administrative and fiscal litigation sections of the appeal courts are judged by the section of administrative and fiscal litigation of the High Court of Cassation and Justice unless a special organic law states otherwise (Art. 10 para. (2) from Law no. 554/2004).

In China, the basic people's courts serve as the courts of first instance for administrative cases (Art. 14 ALL PRC). However, an Intermediate People's Court²⁴ assumes jurisdiction over the following administrative cases as a court of first instance:

- 1) a case filed against an administrative action taken by a department of the State Council or by a people's government at or above the county level.
- 2) a case handled by Customs.
- 3) a major or complicated case within its territorial jurisdiction.
- 4) other cases under the jurisdiction of an Intermediate People's Court as prescribed by the law (Art. 15 ALL PRC).

Unlike in Romania, where the court of first instance in the matter of administrative litigation can usually only be the administrative litigation section of the tribunal or the court of appeal, China allows the Higher People's Court²⁵ to act as the court of first instance over major and complicated administrative cases within its territorial jurisdiction (Art. 16 ALL PRC). Also, the Supreme People's Court holds jurisdiction as a court of first instance over major and complicated administrative cases nationwide (Art. 17 ALL PRC).

In China, the competent court to judge the dispute has greater freedom of action than the Romania court. Thus, in China, if a lower-level people's court deems it necessary for a higher-level people's court to handle an administrative case over which the people's court at a lower level has jurisdiction as a court of first instance or to designate jurisdiction over the case, it may report the case to the higher-level people's court for decision (Art. 24 para. 2 ALL PRC). In contrast, in Romania, the dispute can only be resolved by a higher court if an appeal is filed.

Regarding the establishment of territorial competence, in Romania, according to the provisions of Art. 10 para. (3) from Law No. 554/2004, 'the claimant, a natural or legal

24 The Intermediate People's Courts are responsible for adjudicating administrative litigation cases at the level of cities and special administrative regions. They usually act as appellate courts for cases tried by lower-level People's Courts.

25 The High People's Courts are higher-level regional courts that hear administrative litigation cases at the level of provinces, autonomous regions and municipalities directly subordinated to the central government. Each province and autonomous region has its own Higher People's Court.

person under private law, applies exclusively to the court of his domicile or headquarters. The plaintiff's public authority, public institution or similar to them applies exclusively to the court at the defendant's domicile or headquarters'.

In China, the jurisdiction of an administrative case is determined by the location of the administrative agency that took the original administrative action (Art . 18 ALL PRC). However, it is stated that a complaint against an administrative compulsory measure that restricts personal freedom falls under the jurisdiction of the people's court at the place where the defendant or the plaintiff is located (Art . 19 ALL PRC), and the administrative litigation involving real property shall be under the jurisdiction of the people's court at the place where the real property is located (Art . 20 ALL PRC).

In both systems, judicial review concerns the legality of the administrative act, not its appropriateness (Art . 6 of ALL PRC and Art . 1 ALL R).

The administrative litigation law in Romania identifies the parties who have active procedural status in these processes (the person injured in a right or legitimate interest by an administrative act, the third party injured by an administrative act addressed to another subject of law, the People's Advocate, the Public Ministry, the Prefect, the issuing public authority in the situation where the act can no longer be revoked, the National Agency of Public Servants, any subject of public law under the law).²⁶ In China, in most cases, the plaintiffs are the private parties involved in an administrative, legal relationship. In other words, they are those persons whose rights have been directly affected or infringed by administrative action or omission.²⁷

In China, the Administrative Litigation Law identifies the categories of administrative acts that can be the subject of administrative litigation: (1) A complaint against any administrative punishment, such as administrative detention, suspension or revocation of a license or permit, ordered suspension of production or business, confiscation of illegal income, confiscation of illegal property, a fine, or a warning. (2) A complaint against any administrative compulsory measure, such as restriction of personal freedom or seizure, impoundment, or freezing of property, or administrative enforcement. (3) A complaint against an administrative agency's denial of, or failure to respond within the statutory period to, an application for administrative licensing or any other administrative licensing decision made by the administrative agency . However, it is mentioned that 'in addition to those as set out in the preceding paragraph, the people's courts shall accept administrative cases which may be filed as prescribed by laws and regulations' (Art . 12, last paragraph of ALL PRC).

Both laws explicitly establish administrative acts that are exempt from the control of administrative litigation courts. In Romania, the following are exempted from the control of administrative litigation courts: administrative acts of public authorities that concern their relations with the Parliament (for example, the act by which the President of Romania appoints the Government, based on the vote of confidence granted by the Parliament), command acts of a character military (acts specific to the military organization that presuppose the right of commanders to give orders to subordinates in aspects related to troop leadership, in peacetime or war or, as the case may be, when performing military service) and administrative acts for the modification or abolition of which is provided for by law organic, another judicial procedure (these are the regulations that provide for the jurisdiction of common law courts for disputes that have as their object various administrative acts - thus, for example, according to the law, the complaint against the

26 Cătălin-Silviu Săraru, *Le droit administratif en Roumanie* (L'Harmattan 2022) 238-45.

27 Liu Jianlong, 'Administrative litigation in China: Parties and Their Rights and Obligations' (2011) 4 (2) NUJS Law Review 208.

report of the finding of the contravention and the application of the sanction is will submit to the court - common law court).

In China, the scope of administrative acts that cannot be subject to the control of administrative litigation courts is broader, including, according to Art. 13 ALL PRC: (1) actions taken by the state in national defence and foreign affairs, among others; (2) administrative regulations and rules or decisions and orders with general binding force developed and issued by administrative agencies; (3) decisions of administrative agencies on the rewards or punishments for their employees or the appointment or removal from office of their employees; (4) administrative action taken by an administrative agency as a final adjudication according to the law. Notably, in China, the normative administrative acts issued by administrative agencies, acts regarding disciplinary liability, and the appointment or revocation of officials cannot be contested in administrative litigation.²⁸ In Romania, these documents can be challenged without any restrictions.

In 2014, China made significant amendments to its Administrative Litigation Law. Following the 2014 amendment, Article 53 expressly entitles people to challenge and empowers the courts to review the lawfulness of normative documents (*guifanxing wenjian*) promulgated by certain administrative authorities. This article will refer to those documents as administrative normative documents, the most numerous administrative rules in China. This empowerment marks a step towards expanding judicial power, enhancing judicial supervision over administrative rulemaking, and improving public accountability and the rule of law²⁹. Prior to the 2014 amendment, there were debates surrounding the possibility of reviewing abstract administrative actions, including regulatory documents. Some scholars argued that courts and judges were incompetent to review abstract administrative actions. The arguments mainly focused on the following points. First, abstract administrative actions were viewed as collective products of discussions and government conferences. It was believed that the head of the government could not decide to issue it by themselves without any discussion with other administrative officials, especially roughly same-level officials. Hence, theoretically, since abstract administrative actions are decided by a group of people, it was improper for one judge or several judges to reverse them, or even review them. Second, judges were considered to lack the expertise needed to review abstract administrative actions compared to the expertise of the officers in the governments. Lastly, since reviewing specific administrative actions was already challenging for courts, it was deemed even more difficult for them to review abstract administrative actions. This debate ended after the revised of the ALL PRC was passed.³⁰

In both laws, the defendant is the public authority that issued the act, regardless of whether it has a legal personality (Art. 26 ALL PRC and Art. 1(1) ALL R).

Both laws recognise the possibility of the third party, who has been harmed by an administrative act intended for another subject of law, to address the administrative litigation court (Art. 29 ALL PRC and Art. 1(2) ALL R).

China's Administrative Litigation Law provides an exhaustive review of the evidence that can be used in administrative litigation. Article 33 of the law specifies that that evidence includes: (1) documentary evidence; (2) physical evidence; (3) audio and video recordings; (4) electronic data; (5) witness testimony; (6) statement of a party; (7) opinion of a forensic identification or evaluation expert; and (8) survey transcripts and on-site disposition

28 Ji Weidong, 'The Judicial Reform in China: The Status Quo and Future Directions' (2013) 20 (1) Indiana Journal of Global Legal Studies 196, doi: 10.2979/indjglolegstu.20.1.185.

29 Xiao and Lin (n 12) 373.

30 Wang Jing, 'Judicial Review of Regulatory Documents in Administrative Litigation in China' (2021) 16 (2) University of Pennsylvania Asian Law Review 346.

transcripts. In Romania, the law does not expressly mention the means of evidence, thus, in principle, allowing the admission of evidence in line with the Code of Civil Procedure.

In Romania, the Administrative Litigation Law establishes the obligation for the issuing public authority to communicate the contested act accompanied by the entire documentation that was the basis of its issuance, as well as any other works necessary for the resolution of the case. The court can ask the issuer for any additional work necessary to resolve the case (Art. 13 para. (1) from Law No. 554/2004). This regulation takes into account the fact that, in practice, most of the documents that serve as evidence are in the possession of the defendant's public authority, which holds the entire administrative file based on which it issued the act or the unjustified refusal and therefore through the court the public authority may be obliged to their communication³¹. In jurisprudence, it was shown that the legislator instituted this measure for reasons related to the speed of the process and the good administration of the act of justice to protect the individual in the litigation with the public administration.³² Also, in China, the Administrative Litigation Law expressly states that the defendant shall have the burden of proof for the administrative action taken and provide evidence for handling the administrative action and regulatory documents based on which the administrative action was taken (Art. 34 ALL PRC). The plaintiff can ask the court to subpoena some documents kept by state bodies that they cannot collect independently (Art. 41 ALL PRC). Although, in both systems, in the case where the plaintiff requests compensation, they must prove the damage suffered by the implementation of the administrative act.

In Chinese administrative litigation, unlike in Romania, the judge has a more pronounced active role, having the power to request a party to provide evidence or additional evidence (Art. 39 ALL PRC).

In China, filing an administrative appeal before administrative litigation is optional. The plaintiff is generally free to file an administrative complaint to request the revocation of the harmful act or to go directly to the people's court (Art. 44 ALL PRC). Suppose the aggrieved person exercises the administrative appeal by requesting a reconsideration decision. In that case, the aggrieved person may file a complaint with a people's court within 15 days of receiving the written reconsideration decision. The public authority is obligated to respond to the re-examination request within two months (Art. 47 ALL PRC). If the aggrieved person chooses to go directly to the administrative litigation court, the complaint shall be filed within six months from the day on which they knew or should have known that the administrative decision was made, except in cases where any law provides otherwise (Art. 46 para. (1) ALL PRC). However, a people's court shall not accept a complaint involving real property filed more than 20 years after the alleged administrative action was taken or a complaint involving any other dispute filed more than five years after the alleged administrative action was taken (Art. 46 para. (2) ALL PRC).

In Romania, the Administrative Litigation Law establishes the obligation to exercise an administrative appeal before initiating a legal action in the administrative litigation court. This appeal can be made either gracefully to the issuing authority of the act or hierarchically to the authority hierarchically superior to the issuing one (Art. 7 ALL R). The public authority has an obligation to respond within 30 days to the administrative appeal. If the person is dissatisfied with the response, they will be able, within 6 months from the date of communication, to request the administrative litigation court to cancel the harmful act

31 Anton Trăilescu și Alin Trăilescu, *Legea contenciosului administrative: Comentarii și explicații* (4th edn, CH Beck 2018) 213.

32 See Decision no 4261/2008 (High Court of Cassation and Justice of Romania Administrative and Fiscal Litigation Section, 21 November 2008) <<https://www.scj.ro/en/736/Search-jurisprudence>> accessed 1 March 2023.

(Art. 11(1) ALL R). For well-grounded reasons, in the case of the individual administrative act, the request can be submitted beyond the 6-month deadline but by no later than one year from the date of communication of the act (Art. 11(2) ALL R). Normative administrative acts may be challenged at any time at the administrative court.

In both systems, the requests addressed to the court are generally judged in open session, except those involving any state secret or individual privacy or as otherwise provided for by any law.

Both systems ensure the objectivity of judicial activity, allowing the recusal of judges when there are suspicions of personal interest (Art. 54 ALL PRC and Art. 44 of the Romanian Civil Procedure Code).

In both countries, the introduction of the action in administrative litigation does not determine the legal suspension of the contested administrative act. Suspension can only operate on request and under certain conditions. Thus, in China, the suspension of the execution of the administrative act may be ordered by the court if:

- 1) The defendant deems it necessary to suspend execution.
- 2) The plaintiff or an interested party files a motion for suspending execution, and the court deems that the execution of the alleged administrative action will result in irreparable losses and that its suspension will not damage the national interest or public interest.
- 3) The court deems that the execution of the alleged administrative action will cause any major damage to the national interest or public interest.
- 4) Suspension is required by any law or regulation.

In Romania, Law No. 554/2004 enshrines the possibility of the court to order the suspension of the execution of the administrative act in well-justified cases and for the prevention of imminent damage. This can be done upon the request of the injured person made either with the introduction of the preliminary administrative complaint (Art. 14 of Law No. 554/2004) or together with the main action or a separate action until the resolution of the action is reached (Art. 15 of Law No. 554/2004).³³

The suspension of the execution of the administrative act is an exception to the rule of *ex officio* execution of the administrative act,³⁴ it can only be ordered under the conditions expressly provided by law, the exceptions being of strict interpretation and application³⁵ (*exceptio est strictissimae interpretationis*).

The object of the request for suspension submitted to the court is always an administrative act; if it is requested to suspend another document having the legal nature of an administrative operation (references, notices, certificates, etc.), the action to suspend it will be rejected as inadmissible.³⁶

The measure of suspending the execution of the administrative act pronounced by the court decision is ordered until the judgment of the substantive court, thus having a limited duration in time. However, the institution of the suspension of the execution of the administrative act plays a crucial role in the administrative litigation processes because it is an effective means

33 For a detailed research of this legal institution, see Cătălin-Silviu Săraru, 'Suspendarea prin hotărâre judecătorească a executării actului administrativ' (2019) 3 Dreptul 116.

34 See Decision no 44/2006 'Referitoare la excepția de neconstituționalitate a dispozițiilor art 14 alin (1), (2) și (4) din Legea contenciosului administrativ nr 554/2004' (Constitutional Court of Romania, 24 January 2006) <<https://legislatie.just.ro/Public/DetaliiDocument/69301>> accessed 1 March 2023.

35 Vedinaș (n 7) 286.

36 ibid 288.

of protection established by law, which aims to prevent the occurrence of damage through the execution of an administrative act on which there are doubts of legality.

Unlike Romanian legislation, the Administrative Litigation Law in China establishes the possibility for the court to order, in certain cases, anticipated execution of the payment obligations by administrative agencies, which serves to protect fundamental human rights. Thus, if an administrative agency fails to pay and fulfil its payment obligations, according to the law, any consolation money, minimum subsistence, or social insurance benefits for work-related injury or medical treatment, a people's court may enter a ruling to grant advance enforcement if the plaintiff files such a motion, the rights and obligations between the parties are clear. A denial of advance enforcement will seriously affect the subsistence of the plaintiff (Art. 57 ALL PRC).

In principle, **mediation in administrative disputes** is not allowed in both legislation.

Mediation is regulated in Romania by Law No. 192/2006.³⁷ This law defines mediation as a way of resolving conflicts amicably, with the help of a third person specialised as a mediator, under conditions of neutrality, impartiality, confidentiality and with the free consent of the parties (Art. 1 para. (1) from Law No. 192/2006).

According to the provisions of Art. 2 para. (4) from Law No. 192/2006, strictly personal rights cannot be the subject of mediation, such as those regarding the status of the person, as well as any other rights that the parties, according to the law, cannot dispose of by convention or in any other way allowed by law. Or, in the administrative dispute, the issuing authority and the injured person cannot rule by convention on the legality of the contested administrative act. The doctrine showed that the public interest and the legality of administrative acts cannot be negotiated. Compromise solutions are incompatible with the precision and rigour that public authorities must demonstrate in carrying out their activities.³⁸

Mediation in administrative litigation may be used with regard to the civil side of the administrative litigation process respectively, to determine the amount and methods of payment of compensation for the material and moral damages requested by the injured party as a result of the annulment of the harmful administrative act by the court of judgment.

Also, mediation can be used in administrative litigation in cases where it is expressly mentioned by law. Such a case is represented by the possibility of resorting to mediation in the procedure for forced execution of administrative-fiscal acts (see Art. 230¹ of the Fiscal Procedure Code and the Order of the President of the National Fiscal Administration Authority No. 1757/2019 *for the approval of the procedure of mediation, as well as the documents that the debtors present, to support the economic and financial situation*).³⁹

In China, the Administrative Litigation Law states that in the trial of an administrative case, a people's court may not conduct mediation unless the case involves administrative compensation or indemnity or an administrative agency's exercise of discretionary power prescribed by any law or regulation. Mediation shall be conducted under the principle of free

37 Law of Romania no 192/2006 On Mediation and the Organization of the Mediator Profession 'Privind medierea și organizarea profesiei de mediator' of 16 May 2006 <<https://legislatie.just.ro/Public/DetaliiDocument/71928>> accessed 1 March 2023.

38 Verginia Vedinăș și Vasile Cătălin Gentimir, 'Poate fi utilizată procedura medierii în litigiile generate de activitatea administrației publice? Aspecte rezultate din activitatea Curții de Conturi a României' (2017) 1 Dreptul 152.

39 Order of the President of the National Fiscal Administration Authority no 1.757 'Pentru aprobarea Procedurii de mediere, precum și a documentelor pe care debitorii le prezintă în vederea susținerii situației economice și financiare' of 28 June 2019 <<https://legislatie.just.ro/Public/DetaliiDocument/215678>> accessed 1 March 2023.

will and legality, without detriment to the national interest, public interest, or lawful rights and interests of others (Art. 60 ALL PRC).

In China, the defendant's non-presentation of the defence does not affect the judgment of the case by the People's Court (Art. 67 ALL PRC). In Romania, the judge will order according to the provisions of Art. 201 para. (1) of the Code of Civil Procedure, the communication of the summons request to the defendant, noting that they have the obligation to file a response, under the penalty provided by law, within 25 days from the communication of the request. The mandatory nature of the meeting is also specified by Art. 17 para. (1) from Law No. 554/2004. Failure to file a response within the time limit set by the law entails forfeiture of the defendant's right to propose evidence and to invoke exceptions, apart from those of public order, if the law does not provide otherwise (Art. 208 para. (2) of the Code of Civil Procedure).

In Romania, the court has a wide margin of appreciation of the illegality that is the basis of the pronouncement of the decision to cancel the administrative act, not being limited to the aspects that the court can investigate and that fall under the dome of legality. In China, the court can annul the administrative act where the alleged administrative action falls under any of the following circumstances, according to Art. 70 ALL PRC:

- 1) Insufficiency in primary evidence.
- 2) Erroneous application of any law or regulation.
- 3) Violation of statutory procedures.
- 4) Overstepping of power.
- 5) Abuse of power.
- 6) Evident inappropriateness.

Both systems give priority to the public interest in the adjudication of administrative disputes. The Administrative Litigation Law of China expressly states that the court can find the illegality of the administrative act but will not be able to annul it if the annulment will cause any significant damage to the national interest or public interest (Art. 74 ALL PRC). In Romania, although the priority of the public interest is a corollary of the entire administrative law, the Administrative Litigation Law seeks to find more of a balance between the public interest and the private interest, shown in Art. 28 (1) that *'The provisions of this law are supplemented by the provisions of the Civil Code and those of the Civil Procedure Code, to the extent that they are not incompatible with the specific power relations between the public authorities, on the one hand, and the persons injured in their rights or their legitimate interests, on the other hand'*.

Due to the importance they have for the fundamental rights of citizens, administrative disputes require speedy judgment. Unfortunately, following the amendment in 2018 of the Administrative Litigation Law in Romania, the emergency trial was abandoned, especially for these disputes. We assert the urgent adjudication of the requests addressed to the administrative litigation court was justified due to the dual nature of administrative acts, which involve both the pursuit of the general interests of a community and the protection of the individual interests of its members.⁴⁰

Therefore, the expeditiousness of judging the causes of administrative litigation is imposed by the fact that, on the one hand, it is necessary to urgently repair the dysfunctions within

40 Antonie Iorgovan si altii, *Legea contenciosului administrativ: Legea nr 554/2004 (cu modificările și completările la zi): comentariu și jurisprudență* (Universul Juridic 2008) 294-9.

the public authority due to non-compliance with legal powers and, on the other hand, the operation of the public authority unilaterally by issuing illegal administrative acts can cause serious damage to the rights and legitimate interests of citizens. Indeed, even in the old regulation, the legislator did not establish guarantees to ensure compliance with the principle of urgent adjudication of administrative disputes established by Art. 17 para. (1) from Law No. 554/2004, rendering the principle ineffective in practice. As a result, the new regulation should have established guarantees of compliance with this principle in the form of sanctions instead of completely removing it from the adjudication of administrative litigation requests.⁴¹

Under the empire of the old regulation, even if the request was resolved urgently and with priority, this did not affect the procedural guarantees of constitutional rank.⁴² Thus, the trial of the request was done with the summons of the parties who could, in this way, exercise their right to defence guaranteed by Art. 24 of the revised Constitution, and the litigation court could administer, upon request or ex officio, any evidence it considers necessary, conclusive and useful to realise the parties' right to a fair trial guaranteed by Art. 21 para. (3) of the Constitution.

In China, we note that the administrative litigation process's speed is guaranteed by the Administrative Litigation Law expressly providing that 'a people's court of first instance shall enter a judgment within six months from the day when a complaint is docketed. Any extension of the aforesaid period as needed under special circumstances shall be subject to the approval of a Higher People's Court. Where a Higher People's Court trying a case as a court of first instance needs to extend the aforesaid period, the extension shall be subject to the approval of the Supreme People's Court' (Art. 81 ALL PRC).

Unlike the administrative litigation procedure in Romania, in China, it is possible to use a simplified procedure with a much shorter trial period. Thus, Article 82 ALL PRC shows that in trying the following administrative cases, a people's court of first instance may apply the summary procedure if it deems that the facts are clear, the rights and obligations between the parties are clear, and the dispute is minor:

- 1) The alleged administrative action was taken on the spot according to the law.
- 2) The amount involved in the case is not more than 2,000 yuan.
- 3) The case involves the disclosure of open government information.

For administrative cases other than those mentioned in the preceding paragraph, the summary procedure may be applied with the consent of all parties.

The process in which the simplified procedure is applied is judged by a single judge within 45 days from the date of registration of the complaint (Art. 83 ALL PRC).

In both systems, against the decision of the administrative court that ruled in the first instance, only one way of appeal can be exercised at the higher court in the degree - in Romania, the exceptional way of recourse and in China, the ordinary way of appeal. In both countries, the right of appeal can be exercised within 15 days of the decision's communication (Art. 20(1) ALL R and Art. 85 ALL PRC). Unlike Romanian law, the speedy trial of the

41 For a discussion of specific principles at the international level, see Cristina Elena Popa (Tache), 'Administrative Review and Reform Movements from the Perspective of International Investment Law' in J Cazala and V Zivkovic (eds), *Administrative Law and Public Administration in the Global Social System: Contributions to the 3rd International Conference 'Contemporary Challenges in Administrative Law from an Interdisciplinary Perspective'*, Bucharest, 9 October 2020 (ADJURIS 2021) 212.

42 Cătălin-Silviu Săraru, *Drept administrative. Probleme fundamentale ale dreptului public* (CH Beck 2016) 532.

appeal is ensured by the provision that 'a people's court trying an appeal case shall enter a final judgment within three months of receipt of a written appeal. Any extension of the aforesaid period as needed under special circumstances shall be subject to the approval of a Higher People's Court. Where a Higher People's Court trying an appeal case needs to extend the aforementioned period, the extension shall be subject to the approval of the Supreme People's Court' (Art. 88 ALL PRC).

In both systems, it is possible to request the review of the administrative litigation decision if it is erroneous due to the discovery of new evidence, the court ruled on things that were not requested, the legal instrument based on which the original judgment or ruling is entered has been revoked or modified, the judge was definitively convicted of a crime related to the case being tried, etc. (Art. 91 ALL PRC and Art. 509 of the Civil Procedure Code of Romania).

Concerning the execution of the judgments issued by the administrative litigation courts, both systems recognise that the obligations to make included in these judgments involving the personal fact of the debtor public authority (for example, the obligation to issue or modify an individual administrative act) do not can be enforced directly. Other persons cannot fulfil these obligations, and it is not possible to ask the court for the authorisation of the creditor to execute the obligation instead of the public authority as in common law.

The execution of these judgments cannot be carried out through the bailiff under the conditions of the common law regulation of the Code of Civil Procedure because they cannot compel the public authority to execute an obligation to which belongs to its exclusive competence.⁴³ To determine the public authority to enforce the court decision establishing these obligations, both procedures provide a system of fines and penalties applicable to the public authority and its leader (Art. 96 ALL PRC and Art. 24 ALL R).

In both countries, it is recognised that administrative litigation laws are special laws derogate from common law provisions and are supplemented by the provisions of the Code of Administrative Procedure to the extent that the latter are compatible with the specifics of public power relations (Art. 101 ALL PRC and Art. 28(1) ALL R).

4 CONCLUSIONS

The two systems of administrative litigation present many aspects resolved by the legislator in a similar way. Thus, both are states with administrative jurisdictions included in the judicial system; in both systems, the judicial review concerns the legality of the administrative act, not its appropriateness; the defendant is the public authority that issued the act, regardless of whether it has a legal personality or not; both laws recognise the possibility of the third party injured by an administrative act intended for another subject of law to address the administrative litigation court; provision of the contested administrative act and other evidence by the defendant public authority; the prohibition of principle to use mediation in administrative

43 Anton Trăilescu și Alin Trăilescu, *Legea contenciosului administrativ: Comentarii și explicații* (5th edn, CH Beck 2021) 319.

Jurisprudence states that "From the normative content of art. 24 para. (1) from Law no 554/2004, it is noted that the obligations whose non-execution leads to the application of the fine sanction, are obligations to "do", that is, obligations to issue an administrative act, to modify such an act, to issue a certificate or a registered or to carry out an administrative operation, obligations that cannot be enforced by force, due to their specificity, also taking into account the issuer of the act who always has the quality of public authority" – see Decision no 3470/2014 (High Court of Cassation and Justice of Romania Administrative and Fiscal Litigation Section, 25 September 2014) <<https://www.scj.ro/en/736/Search-jurisprudence>> accessed 1 March 2023.

disputes; both systems give priority to the public interest in judging administrative disputes; in both states, against the decision of the administrative court that judged the merits of the dispute, only one appeal can be exercised to the higher court in the degree, etc.

On the other hand, there are also issues resolved differently by the legislators in the two systems. Thus, the scope of administrative acts that cannot be subject to the control of administrative litigation courts is wider in China; China's Administrative Litigation Law provides an exhaustive review of the evidence that can be used in administrative litigation; the administrative appeal before exercising the action in administrative litigation is optional in China, while in Romania it is mandatory; in Romania, in principle, any normative administrative act can be challenged at any time at the administrative court, while in China, although the legislator has shown a great openness in the last decade, there are still some aspects of interpretation discussed in doctrine and in jurisprudence; the speed of the administrative litigation process is ensured in China by imposing by law a maximum duration of the substantive litigation of 6 months and the appeal litigation of 3 months, while in Romania such terms are not fixed, which unfortunately leads to a very long process time, etc.

The regulation of administrative litigation must provide specialised courts with clear rules of procedure capable of establishing the procedural rights of the litigating parties, with the ultimate aim of protecting the substantial rights violated by illegal administrative acts.⁴⁴

In both systems, a vital tool that can increase the speed and ease of administration of evidence in administrative litigation is the computerisation of the courts. By creating an online file system, both parties could submit and consult all the documents electronically using personalised access codes. Additionally, the utilisation of videoconferencing technology for hearing witnesses' testimonies and expert hearings can further streamline the process.

Finally, we emphasise the remarkable progress that administrative litigation systems have achieved in recent decades, which currently provides a guarantee for the protection of fundamental human rights in the adoption of administrative decisions and in their judicial control.

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44 Verginia Vedinaş, Liliana Vişan şi Diana-Iuliana Paşăre, 'Argumentare juridică europeană în favoarea necesităţii modificării Legii contenciosului administrative: Succintă prezentare a Legii nr 262/2007' (2007) 3 Revista de Drept Public 77-8.

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