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"Public administration" - the importance of the notion in the present romanian society

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"PUBLIC ADMINISTRATION" – THE IMPORTANCE OF THE NOTION IN THE PRESENT ROMANIAN SOCIETY

Marta Claudia CLIZA[1]

Abstract:

The current study presents the importance of public administration reported to all our realities as citizens, law researchers or practitioners. We analyzed the idea of public administration starting with its primary basis in order to create the clear image of this huge bureaucracy all over the time. We came into reality by presenting this concept according to the great Romanian doctrinaires. The concept was not all the time set in the same frame so the analysis is very important. An analysis according to European doctrine has also been done in order to clarify the statute of public administration in Europe, its influences over Romanian doctrine and legislation. Personal conclusions show that public administration is present day by day in our lives; we have to fight or to accommodate with it. So, the place and the importance of the study are well understood.

Keywords*: public administration; administrative law, European countries; Romanian reality.*

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1. Introduction

This scientific approach aims to analyze in the most comprehensive manner the notion of "administration", in order to be able to understand who is, in fact, the bearer of this public power, power by virtue of which the administrative law relations are distinguished from the other public law relations. Moreover, through the fact that one of the subjects of the administrative law relation is a moral person of public law, this type of relation is individualized from the private law relation. That is why it appears so necessary an analytical presentation of the notion of public administration.

Administration is an ancient social fact which emerged from the need for the mutual interest social activities to be carried out by specialized bodies. This social fact will gain during time different names which will confer upon it a distinct significance (importance): it will be called, in order, "police", "administration", "bureaucracy", all these being, in fact, forms of manifestation of the administrative phenomenon. Thus, administration exists because it can be called, distinctly designated from other social facts. Law will contribute to the establishing of the administrative regime by instating norms according to which administration will run in fulfilling the specific duties due to it. That is why the administrative phenomenon is not outlined before the moment of representing what administration implies – the representation which produces real effects to whose fixing, "objectification", law contributes.

As all social sciences, administration can only be built starting from an ensemble of specific questions transposed in the social reality, or, in other words, depending on a problematic through which it constructs its object: that is why administration is not a mere social fact, but it becomes the object of science; that is why the science of administration can establish its autonomy in relation to other social sciences, which also intersect the administrative facts.

In order for a social group to exist and last, it must perform a certain number of mutual interest activities adhered to by the collectivity: here resides the problematic of the administrative science – which are these activities and who is exercising them? Starting from this idea, we can make possible the building of the object of "administration".

It is derived that the science of administration starts from a fundamental question regarding how the collective functions are exercised, functions indispensible for the existence of social groups:

* Functions performed in a conscious, voluntary, deliberate manner (religious beliefs);

* Functions involving a process of "social differentiation" (creation of specific social roles, which can be undertaken) and which lead to the "domination" phenomenon (distinguished through the most diffuse "social control" mechanisms);

* Functions whose exercising is classified in the most ample function of preserving the cohesion of the political nature group (administration presupposes

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political differentiation but also political direction, presupposing the launching of an administration);

* Functions that were "organized in a different manner", the emergence of the modern state being assisted by a process of achieving the exercising of these functions, doubled by the movement towards autonomy and institutionalization.

With the emergence of the modern state, these collective functions were concentrated in a sphere of specific activities - "public" sphere and related to the state. But the object of "administration" exceeded this frame: the collective functions existed prior to the construction of the state. Hence, the administrative science exceeds the simple study of state administration and, still, it preponderantly constituted its application point.

This point of view on social reality, supported also by Prof. Jacques Chevallier (Chevalier, 2007), allows the construction of the object of administration, considering the variations in the correct configuring of the administrative systems. It also allows the solving of the problems regarding the place of the administrative science in the area of social sciences.

2. The notion of "public administration" – doctrinaire opinions

The concept of public administration has its roots in the origin and evolution of the state. Even since Aristotle, we can say that three forms of expressing power were evoked. If we were to use modern terminology, these forms would materialize in the legislative power, the executive power and the judicial power.

The distinction between these forms of expressing power was only theoretical in the period of the absolutist state, when all three were focused in a single hand. Illuminism is the period when, together with the notions of individual equality and freedom, the idea begins to outline that the forms of state powers must be differentiated, in order to guarantee, in fact, these supreme values of society for the citizens. In the new vision imposed by the historical context, administration has become a component of the executive power, which was separated from the legislative and judicial powers.

Starting with the 18th and 19th centuries, the principle of the separation of powers begins to find consecration in the Constitutions of Europe, but under different approach manners. Precisely this aspect generated different approaches of the notion of administration. As a general conclusion, we can say that the approaches of this concept were oriented into two approaches: a material and an organizational one.

Under functional aspect, public administration represents the activity of organizing of the execution and the actual execution of the laws, thus targeting the satisfaction of the public interest by means of ensuring the good functioning of the public services and by executing services between private parties (Apostol

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Tofan, 2008). Under organizational aspect, public administration consists of an ensemble of public authorities with the aid of which, in regime of public power, are carried out the laws or, within the limits of the laws, public services are provided (Apostol Tofan, 2008).

It must be noted that specialists in states such as France and Germany tried throughout time to define public administration in a manner as satisfactory and comprising as possible.

It is interesting to follow the evolution of the notion of public administration in the French doctrine, corresponding to the large currents that dominated this doctrine. These currents did not influence only singularly the notion of public administration, but they influenced generally and conceptually the entire French administrative law. Thus, we will see that the analysis of the notion of public administration is done be relating to other notions that became fundamental in the French administrative law: public service, public power, public order, public interest.

Thus, in the traditional French conception, by relating to the constitutional texts that regulated who was in charge of executing the law, an attempt was made to define what is administration. Thus, starting from art. 3 of the Constitution of 1875 (“the President of the Republic supervises and ensures the execution of the law”) and reaching art. 47 of the Constitution of 1946 (the President of the Council of Ministers ensures the execution of the law) {note that both quoted texts are prior to the Constitution of 1958}, it is noticed that neither the chief of the Executive, nor the governmental and administrative authorities depending on him had the monopole over the execution of the law. To the execution of law participated to an equal extent the courts, as well as simple citizens (Iorgovan, 2005). However, the tribunals were not part of the sphere of the executive power, especially that in the Constitutions to which we are referring, the principle of the separation of powers within the state had already found full consecration.

At the end of the 19th century, the concept of “puissance publique” (public authority) was predominant; a distinction begins to outline between the acts of the public authorities, which could be of two kinds: “actes d’autorite”, which were of the competence of puissance publique and “actes de gestion”, which also contained private law elements (Alexandru et all, 2007).

The notion of public service becomes the landmark of the French administrative law, as stated by prof. Iorgovan in the ample Treatise of administrative law. At the same time, starting from the theory of public service, other notions begin to gain significance, such as “administrative contract”, “public law mandate”, “administrative trusteeship”, “public property”, administrative law thus distinguishing definitely from private law, which had influenced it in concepts until that moment (the starting point was the idea that the public servant is the state representative, but he would be entrusted with a civil mandate).

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Not lastly, it should be mentioned that the notion of public service was also jurisdictionally founded through the "Blanco" decision, which separated the competence of the administrative tribunals from that of the common law tribunals, establishing the sphere of competence of the first, in relation to causes deriving from the provision of public services.

Thus, we can conclude that in the period of forming the traditional conception, the administrative law authors proposed the thesis of the public power in order to explain the notion of administration (Iorgovan, 2005).

The Constitution of France of 1958 brings a new perspective from the traditional one. This perspective allowed professor Vedel to state that the "President of the Republic is no longer a political referee or a supra-governmental authority, he is also a supreme administrative authority" (Vedel, Delvolve, 1988).

The same author speaks about the desuetude of the notion of public service. This author's opinions reflect the novelty elements from the French Constitution of 1958, which mainly consisted on the prerogative granted to the Government to issue regulations in the matters not reserved to the law. These norms founded an initial (primary) normative power for the Government. In this context, the administrative activity becomes state activity with the role of common law, while the legislative activity and the jurisdictional activity become activities of exception.

In the German doctrine, several modalities were tried for administration to be defined. A first attempt was that of Carre de Malberg who positively defined the notion of administration and negatively that of legislation, it being everything which does not imply the execution of the legislative and judicial activities, thus using the elimination method. Malberg's technique was taken completely opposed by Otto Mayer - *the activity of the State for the achievement of its objectives within its judicial system, except for the judicial power*" and Walter Jellinek - administration is "*the activity of the state or of any other bearer of public power separated from the legislative and the judicial power* (Alexandru, 2008).

All these attempts to define administration faced in Germany a major conceptual problem: the difficulty to define administration. This difficulty resides in the nature of administration, which "allows itself to be described, but not defined" (Forsthoff, 1969).

In this context, the German doctrinaires avoided to define administration, merely outlining its content elements and its extent, by means of what we indicated above as being the elimination method, related to the other two vital powers of the state, respectively legislative and justice.

The situation is different in United Kingdom, because there administrative law is a relatively young law.

At origin, the conception on administration is excellently illustrated by prof. A.V. Dicey: "In England, the idea of the equality of the subjects of all social classes, before the administrative and Court legislation was pushed to the

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extreme. For us, any official servant, starting from the prime-minister and until a tax collector, is under the same responsibility towards the acts performed without any legal justification, as any citizen.

The reports with the cases in which official servants broke the law are brought before the Courts, and the defendants are sanctioned, being obliged to pay the damages caused by the acts they performed, during the exercise of their function, with the breaching of the law.

A governor, a state secretary or an officer and all the other subordinated persons under their command as just as responsible for their acts; for each act committed they are not privileged compared to unofficial persons" (Dicey, A.V., 1885)

This quote is representative for understanding the representation that the English had on administration: public law and, implicitly, administrative law, were parts of common law, because the English did not know the administrative phenomenon.

The authors from the inter-wars generation capture, however, the emergence and development of administrative law in England, as a consequence of the enormous expansion of the administration's powers. However, as prof. Iorgovan noted, this extension was not so strong as to defeat British conservatism, such as at present administrative law is taught in Great Britain together with constitutional law, under the name "Constitutional and Administrative Law" (Iorgovan, 2005).

In the other member states of the European Union, the search for a conceptual understanding of public administration has lead to more or less comprising attempts to define it. Thus:

Belgium: As in the doctrine of the French administrative law, there is a distinction between the functional and the organizational concept of public administration.

Denmark: In the Danish administrative doctrine there can be found once more the "negative definition ", according to which public administration is described as that part of the state activities which are neither legislative, nor judicial.

Greece: Also current is the distinction between the formal and the material concepts of administration.

Ireland: Central administration, the local authorities and the bodies of the state resources are usually included in the concept of administration, in organizational sense, although it must be noted that these "bodies", from the functional viewpoint, fulfill not only executive duties, but also legislative and judicial tasks.

Italy: According to G. Landi and G. Potenza, (*Manuale di Dirrito Amministrativo*, 2002), the executive function can be distinguished from the legislative and the judicial functions through its limitation to targeting concrete

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objectives. In fact, from a conceptual point of view, there is a distinction between the activities of administration and public administration in a subjective sense.

Luxembourg: As in France, the concept of "(public) service" forms the core of the definition of administration: "public administration is the ensemble of public services which, under the general impulse of the bodies of the sovereign power, ensure multiple activities of the state for the achievement of the public good ".

The Netherlands: The concept of public administration describes both the entirety of the administrative bodies and the function of administration. The function of administration is described in negative terms with reference to legislation and justice, or in positive terms, as the "official performance of public problems through the public service ".

Portugal: It distinguishes between an organizational concept of public administration and the concept of public administration in material sense. The last of the two concepts is defined as the entirety of the decisions and measures through which the state and other public bodies, which act according to politically-determined guiding lines – directly or through the support, advice and coordination of the private activities – ensure the fulfillment of the community's needs for the individuals' welfare. For this purpose, proper measures are ensured at the national level.

Spain: It distinguishes between the concepts of subjective, objective and formal of public administration. Also, F. Garrido Falla, *Tratado de derecho administrativo*, vol. I, in the first chapter, starting from the etymological meaning of the expression and using comparative means, attempts a detailed explanation of the concept of public administration. In France, Germany and the United Kingdom of Great Britain, the difficulties in achieving a single concept of public administration were largely the result of the fact that the administrative bodies, which matured as a consequence of the separation of powers, exercised not only executive functions in narrow sense, but they were simultaneously active in the quasi-legal field (Alexandru, 2008).

The notion of *administration* has its roots in the Latin language - *ad minister* translating by: agent, helper, servant.

The explicative dictionary of the Romanian language defined the verb *to administer* as follows: "to lead, to rule, and for *administration* the entirety of the administrative authorities existing in a state, section or service, which manage the administrative problems of an institution or economic agent".

In the traditional Romanian administrative law – and we talk here about the administrative law which knew a plenary development in the inter-wars period – the notion of „public administration" was deeply analyzed.

We cannot fail to notice that the notion of administration was seen by reporting to the great concepts that dominated the doctrine of the time at the international level: public service, public power, public interest, as we shall detail

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hereinafter by means of presenting the doctrinaire approaches of the notion, both in the inter-wars period, and at present.

- **The opinion of Prof. Paul Negulescu**. Professor Paul Negulescu was exceptionally outstanding in administrative law, being, we can say, the creator of the modern administrative law. Under his great coordination was created the Royal Institute of Administrative Sciences. Although to a large extent we can notice an influence of the French administrative law on the Romanian one, surprising is the manner in which prof. Negulescu synthetically defines administration, after the model of thought of the German authors: administration comprises the entire activity of the state which is neither legislation nor justice.

Also, prof. Negulescu outlines the sphere of administration related to the sphere of the acts that make the object of the administrative contentious.

We also find in prof. Negulescu an analytical definition of administration: "a complex institution which reunites all public services destined to satisfy certain general, regional or communal interests", indicating that there are public administrations the "state, county and commune" (Negulescu, 1934).

Interesting for our topic is the conclusion reached by prof. Iorgovan, when he briefly presents prof. Negulescu's work: "It is underlined, at the same time, that these public administrations, meaning the state in its entirety or the county or the commune as personified, meaning that they have initiative, responsibility and legal capacity to perform both acts of public power (commandment), and patrimonial acts.

This reason makes the author (Paul Negulescu) conclude that public administrations are legal, politico – state persons, meaning legal entities that have the right to command, thus being able to apply constraint within the limit of a territory.

Without other comments, it must be noted that the notion of public administration, as defined above, in reality evokes the concept of subject in the public law relations" (Iorgovan, 2005).

- **The opinion of Prof. Anibal Teodorescu**. *Public administration fulfills its role with the help of bodies made up, in the last analysis, of natural persons or groups if individuals who are: the ministers, the prefects, the police commissioners, the county council, the communal councils* (Teodorescu, 1929). As circumstantial element, we capture the fact that Professor Teodorescu assimilates the expression „administrative authority" with the notion of administration.

Interesting is the vision prof. Teodorescu has on the division of powers and, implicit, the names given to the authorities carrying out these powers. Thus, prof. Teodorescu appreciates that the state sovereignty is expressed through two functions: the function to will, to command, to create rules of law, and the function to execute its command acts. To the two functions correspond two categories of bodies: the lawmaking body and the executive body.

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Also, under the name of executive body are understood, in reality, two bodies, and not only one: the judicial authority and the administrative authority (Teodorescu, 1929).

* Leaving the inter-wars period, we draw attention to the subject matter with the **thesis no non-concordance (School of Cluj) and the thesis of concordance (School of Bucharest).** Under these names we find the scientific circles in the two university centers, grouped under the illustrious leadership of prof. Tudor Draganu (School of Cluj) and of professors Mircea Lepădătescu, Romulus Ionescu, Nistor Prisca (School of Bucharest).

In the opinion of the first school, non-concordance would start from the lack of perfect correspondence between the fundamental forms of state activity and its categories of bodies. Precisely that is why the notion of state administration would have two meanings: a formal-organic and a material–functional one, which is wider and, sometimes, implies the formal-organic one, because we meet situations in which the administrative activity is performed also by other bodies than those within the sphere of the state administration (Draganu, 1965)

As can be easily imagined, the opinion of the second school focused on the perfect identity between the fundamental forms of achieving state power and the categories of bodies regulated by the Constitution, in the sense that each form is fulfilled by only a certain category of bodies (Iorgovan, Gilescu, 1986).

- **The opinion of Prof. Ioan Alexandru**. *Public administration is a wider term than public management, because it does not limit itself to management, but it includes the political, social, cultural and legal circumstances affecting the management of public institutions* (Alexandru, 2002).

Also, prof. Alexandru notes that in the current language the word "administration" can signify numerous and diverse realities, being used in several senses. Thus, by administration is understood:

- The main content of the activity of the executive power of the state;
- The system of public authorities achieving executive power;
- The management of an economic agent or of a social – cultural institution;
- A compartment (direction, section, sector, service, office) in the directly productive units or in social – cultural institutions, which does not directly perform a directly productive activity.

The definition that prof. Ioan Alexandru gives administration exceeds the usual patterns. Thus, administration could be defined as follows: *the use of managerial, political and legal theories and processes in view of achieving the mandated of the legislative, executive and judicial governance, in order to ensure the regulations and services for society, as a whole, as well as for its segments* (Alexandru et all, 2005).

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- **The opinion of Prof. Antonie Iorgovan**. We present the opinion of professor Iorgovan at the end of the doctrine notes analyzed for a single reason: as sign of the deep gratefulness which we owe to the teacher and then the mentor who succeeded, through the scientific example provided, to make possible for the author to draft a doctorate thesis. The definition that professor Iorgovan gives public administration is surprising because of the concentrated and clearly structured character, such as it succeeds in comprising all necessary components (subjects, activity, manner of running, object, circumstances). Thus, Public administration is defined as being *the ensemble of the activities of the President of Romania, of the Government, of the central autonomous administrative authorities, of the local autonomous administrative authorities and, as the case may be, of the structures subordinated to them, by means of which, in regime of public power, are fulfilled the laws or, within the limits of the laws, public services are provided* (Iorgovan, 2005).

The conclude this chapter with a quote that seems eloquent to us: "Public administration, in any society, be it classical, be it modern, represents in essence an instrument of the state, indispensible in reaching certain desiderates, major objectives determined by it, in fact, of achieving political values established through legal acts, for the purpose of satisfying the general interest, through the action of the public power.

Public administration is, through its very nature, subordinated to purposes exterior to it; it derives its legitimacy, obviously, from the system of dominant values, from the political power. This system of values of also the one that sets for public administration, in general, the purposes and means it must use in order to reach them.

Therefore, it is currently said that public administration is permanently placed under the political level, underlining the fact that, in the sphere of public administration, above the administrative institutions, there are political institutions which facilitate the existence of the state and the satisfaction of the common needs of the collectivity according to the decisions of the political institutions" (Imbrescu, 2008).

3. The bivalence of the concept of public administration – "organization" *versus* "activity"

From the definitions and doctrinaire approaches detailed above, it derives the approach of the concept of public administration from two perspectives – public administration with the sense of organization (organizational sense) and public administration seen as an activity (material sense).

In the approach of the first analysis, we start from the idea according to which *public administration represents the ensemble of authorities that, on the basis of and in the execution of the law, perform a specific activity*. Seen as an organization system, it can be established that public administration has in its composition certain structures precisely identified as existence and duties, found in certain relations (some of

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collaboration, others of subordination) - for example: the President of Romania, the Government, the authorities of the central specialty public administration, the decentralized services, the autonomous authorities of local public administration.

In the approach of the second analysis, we come down with the definition to the material level – the *activity performed by the components of public administration which have as object the activity of organizing the execution and of the actual execution of the laws*. Administration appears as an activity performed by the public authorities, making use of the public power prerogatives, for the purpose of satisfying the public interest needs. The goal of this activity is represented by the satisfaction of the general needs and interests of the human collectivities, and the modality is represented by the assurance of a good functioning of the public services and by the execution of services by private individuals (execution achieved either exclusively by the state bodies, or together with them, by certain selected autonomous authorities).

In the system of the public authorities regulated by the Romanian Constitution of 1991, revised in year 2003, Public administration is depicted in a distinct manner (Chapter V of Title III of the Constitution), namely as a system of public authorities performing exclusively an activity of administrative nature. Therefore, Public administration is presented as a professional body destined for the permanent execution of public services and order, under the authority of the executive power (Government – especially).

We must not lose sight of the sphere of public administration, as it derives from art. 52 of the Constitution. The text regulates the right of the person injured by a public authority by means of an administrative act. Given the wide manner of formulating the constitutional text, the question was raised as to what authorities art. 52 refers and what is the sphere of public administration, according to this constitutional text? Without doubt, the constitutional text speaks of administrative acts, regardless of whether they originate from administrative authorities or from other public authorities, others than the administrative ones.

In an eloquent manner on the subject spoke prof. Iorgovan, who showed: "We must make a distinction between the public administration, performed by state structures, respectively by structures of the local communities, managed or, as the case may be, supervised, directly or indirectly, by one of the two chiefs of the Executive – the chief of state and the Government – and the administrative activity performed by the other state bodies (public authorities): Parliament, courts of law, Constitutional Court, People's Attorney" (Iorgovan, 2005).

The conclusion is that the administrative authorities make purpose-public administration, since this is their very reason for being, while the other public authorities means-administration – because through this they achieve certain prerogatives, but which do not pertain to their reason for being.

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4. The ideal of the European public administration model

The notion of European model is grounded by dr. Ion Imbrescu, because it really appears necessary to know if, at present, when the problems raised at the internal level in the field of public administration by Romania's accession to the European Union are more actual than ever, we can speak of a European public administration model we should follow.

The problem is even more of actuality as each of us is confronted or was confronted with clerks in public administration sometimes too bored, other times too disinterested, who delayed works or not solved petitions or out-stepped their tone in the relationship with the citizens.

This image of the public servant, which we faces or of which we were informed, most times through the mass media, is not compatible with the ideal of European public servant, efficient and meant to promptly satisfy the citizens' wishes.

As also indicated by dr. Ion Imbrescu, we should first define an ideal public administration, a type-administration, which could become reality only to the extent to which it would hold all advantages – desiderates for any administration: rationality, efficacy, optimum serving of the citizens. However, such a thing does not exist (Imbrescu, 2008).

At present, the European model of administration is dominated by two theses, apparently antagonistic, but which finally manage to neutralize Each other. It is a matter of the subordination of administration towards the political power and the separation of politics from administration.

The conclusion according to which administration would be subordinated to the political derives from aspects taken from the manner of recruitment of high public servants and of their revocation, which are done more on political criteria or by appointing former Parliamentarians or ministers in administrative positions. Still, the powers remain separated, this being a fundamental element of the Western model. At the same time, the European concept of administration is dominated by two dimensions borrowed from Max Weber's sociological theories, respectively personalization and neutrality. Administration is considered an instrument susceptible of serving the Government, whatever would be the parliamentary majority of the moment. Thus, it gains certain autonomy in relation to political power. This autonomy is strengthened by continuity, which is itself related to the administrative career of the public servants and to the guarantees they have to resist political pressures (Imbrescu, 2008).

The subject at hand gains valences even newer and of major social importance as we currently witness essential transformations in the manner of approaching the idea of organization of public administration.

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5. The research results and conclusions

This study aimed to reflect from the legislative and doctrinaire viewpoint the evolution of the idea of public administration, both in Romania, and in other countries of the European Union. We insisted on what should be our mutual concern, whether we are researchers or practitioners in the field of law, or simple citizens: at present, however we were to define administration, any concept we were to accept, reality convinces us that we are far from an ideal model. To fight for such a model, to try to impose such a concept, there must be desiderates we should not deviate from. It is important to know who we are as system, in order to continuously improve the world in which we live. The effort made by one of the most important authors of administrative law, the effort of the courts of law, the lawmakers' effort, must reflect also in a better system, for which we must create, perfect and monitor it.

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