Local Collectivity v. Administrative-Territorial Unit – a Legal-Semantic Perspective

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ABSTRACT

The paper topic is placed in the general context of implementing democracy at the local level by means of decentralization of public administration (PA). This interest requires the need of theoretical grounds for a series of new concepts, such as local power and subjects entitled to detain and exercise this power. The study is looking for an answer to the following research question: which is the scientific concept that describes the subject of local autonomy: the territorial-administrative unit or the local collectivity?

KEYWORDS: *local administration, decentralization, territorial administrative-unit, local collectivity, better regulation.*

1.Introduction

The paper at hand starts from the hypothesis that the legal language imposes accuracy and accessibility, that the legal institutions must be clearly, unequivocally expressed, in conditions that observe the good regulation standards.

A carelessly, unclearly drafted legal text, which is, thus unpredictable in its subsequent interpretation generates unpredictable, non-unitary enforcement.

Legal terminology finds itself in a paradoxical situation, determined by the heterogeneous nature of the receivers of the legal message: both law specialists and non-specialists – the group

of people whose conduct is regulated by law. Therefore, the text of the regulation must simultaneously satisfy the requirement of technical precision and the need for accessibility.

Legal language, preponderantly prescriptive and less descriptive, must complementarily ensure the balance between technicity, accuracy and accessibility.

"In order to ensure the accuracy of the terms used in the legal language, one usual modality is the terminological definition, addressed, first of all, to the specialists, and which must have a rigorous, unequivocal and prescriptive character, emphasizing the link between term and concept within the framework of the conceptual system of the respective field"[1].

The topic of the study at hand is placed in the general context of implementing democracy at the local level by means of decentralization of public administration. This process brings forth the need for the theoretical grounding of new concepts, such as those of *local power* and *subjects entitled to detain and exercise this power*.

The research question for which an answer is sought is the following: *Which is the scientific concept that describes the subject of local autonomy: the territorial-administrative unit or the local collectivity?* Does each phrase indicate a different legal reality or are we before synonymic concepts expressing the phenomenon of public power organization at the territorial level?

The answer to the question formulated requires an analysis from both the legal and the linguistic, legal-semantic, perspective. From the methodological point of view, the research requires a complex, interdisciplinary analysis, attached to documentary and comparative research.

2.Context and perspectives (internal, international, historical)

The matter of genre and species in the matter of the subject of local autonomy may be researched starting from fundamental regulations in the field, from the national or international legal regulations.

[1] Stoichițoiu – Ichim, A., 2014, *Observații privind semantica termenilor juridici*, in vol. *In memoriam Ion Coteanu*, Bucharest: Universității Publishing House, p.207.

According to art. 3 para. (3) of the Constitution of Romania, republished in year 2003: "The territory is organized, under administrative aspect, in communes, towns and counties. In the conditions of the law, some towns are declared municipalities."

We establish that the current constitutional lawmaker avoided to identify the category, the genre to whom the communes, towns and counties belong as species, as the Constitution of the Socialist Republic of Romania of 1965 established in art. 15: "The territory of the S.R.R. is organized in **administrative-territorial units (our emphasis)**: county, town and commune [...]".

Also in the current Constitution, art. 120, *Basic principles* – within Title III *The public authorities*, Chapter V *Public administration*, Section 2 *Local public administration* – operates with the expression *administrative-territorial units*, avoiding, though, to make an explicit connection to the commune, town, county, identified in art. 3 and, thus, leaving the interpreter to judge if they are the same entities or not.

The expression *administrative-territorial units* can also be seen in other texts of the current Constitution, such as art 136, *Property*, para. (2): "Public property is guaranteed and protected by law and it belongs to the state or to the administrative-territorial units". Thus, the idea of law subject for the commune, town, county is suggested, however, without bringing up the concrete forms of administrative-territorial units.

The Administrative Code of Romania, adopted by Government Expedite Ordinance no. 57/2019, formulates in article 5 several general definitions applicable to the public administration, among which the following are interesting for the present study:

j) local autonomy – the right and actual capacity of the local public administration authorities to solve and manage the public affairs, on behalf and in the interest of the local collectivities at the level of which they are elected, in the conditions of the law;

k) public authority – state or administrative-territorial unit body acting in regime of public power to satisfy a public interest;

l) public administration authority - public authority acting to organize the enforcement or to actually enforce the law, or to provide public services;

p) local collectivity – entirety of individuals with their domicile in the respective administrative-territorial unit

pp) administrative-territorial units - communes, towns, municipalities and counties;

The Administrative Code of Romania, by means of its general dispositions applicable to local autonomy, written in art. 84 para. (1) also establishes: *Local autonomy, defined in art. 5 letter j), is exercised by the local public administration authorities,* dispositions also found in the text of art. 105 para. (1) *Local autonomy is exercised by the local public administration authorities at the level of communes, towns, municipalities and counties.*

At the international level, we mention the adoption by the Council of Europe, in Strasbourg, on the 15th of October 1985, of the *European Charter of Local Self-Government*[2], legal instrument based on the idea that "[...] the safeguarding and reinforcement of local self-government in the different European countries is an important contribution to the construction of a Europe based on the principles of democracy and the decentralization of power".

Consistent with the research objective set, we tried to identify the subject of local autonomy in the vision of this international legal instrument, and, therefore, we stopped at the text of art. 3 of the Charter, titled "Concept of local self-government". Surprisingly, we will notice differences between the English and French language versions of the text, as follows:

French language:

„Article 3 – Concept de l'autonomie locale

1. Par autonomie locale, on entend le droit et la capacité effective pour les collectivités locales de régler et de gérer, dans le cadre de la loi, sous leur propre responsabilité et au profit de leurs populations, une part importante des affaires publiques.
2. Ce droit est exercé par des conseils ou assemblées composés de membres élus au suffrage libre, secret, égalitaire, direct et universel et pouvant disposer d'organes exécutifs responsables devant eux. Cette disposition ne porte pas préjudice au recours aux assemblées

[2] Ratified by Romania through Law no.199/1997, except for art. 7 para. (2) (regarding the appropriate financial compensation for the locally elected officials – own note) and with a declaration on the interpretation of the notion of "regional authority", Official Gazette of Romania, Part I no. 331/1997.

de citoyens, au référendum ou à toute autre forme de participation directe des citoyens là ou elle est permise par la loi".

English language:

„Article 3 – Concept of local self-government

1. Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.
2. This right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute".

Romanian language (translation of the Charter in Law no. 199/1997):

„**Articolul 3 Conceptul de autonomie locală**

1. Prin autonomie locală se înţelege dreptul şi capacitatea efectivă ale autorităţilor administratiei publice locale de a soluționa şi de a gestiona, în cadrul legii, în nume propriu şi în interesul populatiei locale, o parte importanţă a treburilor publice.

2. Acest drept se exercită de consilii sau adunări, compuse din membri aleşi prin vot liber, secret, egal, direct şi universal, care pot dispune de organe executive şi deliberative care raspund în faţa lor. Aceasta dispoziţie nu aduce atingere, în nici un fel, posibilităţii de a recurge la adunări cetăţeneşti, referendum sau orice alta forma de participare directa a cetatenilor, acolo unde aceasta este permisa de lege".

Thus, according to the version in French, the right and actual capacity to solve and manage, within the framework of the law, on its own behalf and responsibility and in the interest of their

population, belongs to the local collectivities, while in the version in English they belong to the local authorities!

In both versions, as well as in the Romanian translation, local autonomy represents a right, an ensemble of prerogatives with a determined content. The legal dictionary defines the subjective common law right as "[..] the prerogative acknowledged by law to the individuals or legal entities by means of which they can ask the passive subjects to give, to do or to not do something using, when needed, the coercive apparatus of the state"[3].

If local autonomy represents a (subjective) right, then it must be understood as belonging to, and being a part of, the legal capacity of a determined person.

We return to the previously formulate research question, which we are attempting to complete with the elements subsequently brought into the debate: to which subject of law, to which person in the legal sense, belongs the right to local autonomy? To the local collectivity or to the local public administration authority? Who has (to whom belongs) and who exercises this right?

The answer can be found only after clarifying the concepts of local collectivity and administrative-territorial unit based on the doctrine and on objective law.

3.The local collectivity

A very useful instrument in research is the historical analysis, which can capture the evolution of the doctrine in a particular field, regarding a specific legal institution.

The Romanian inter-war doctrine is dominated by the personality of Paul Negulescu, distinguished researcher and practitioner of law, honorary member of the Romanian Academy, initiator of the Institute for Administrative Sciences of Romania.

[3] Mihail G.H.,2002, *Inevitabilul Drept*, Bucharest: Lumina Lex, p. 215 - *The capacity or prerogative acknowledged by the law to the person, active subject of the legal relation, to ask the passive subject(s) to commit a certain action or to abstain from committing an action, being able to resort to the coercive force of the state, when needed, in order to ensure the materialization of the requested conduct. Subjective right represents the possibility, capacity, prerogatives of a legal subject to have and to use and defend against a third party a certain interest protected by law. Any subjective right exists only based on and according to an objective right establishing it and is going to be exercised in relation to positive law.*

Paul Negulescu uses the expression *political-territorial person*, including in this category the state, as well as the commune, the county and the town. "When we examine the *organism State*, we notice:

1) that the main attribution of the State is constituted by the right to command all and to use coercion against those who would not obey; therefore, the State is a *political person.*

2) that the State exercises this attribution to command over all persons living within its territorial limits; therefore, the State is a *political-territorial person*;

3) that it has an own patrimony, as any person.

Hence, in summary, the State is a *person* because it is a subject of rights and a *political-territorial person*"[4].

Regarding the commune, P. Negulescu shows that "[...] it appears, in the general organization of the State, as a territorial circumscription, which has, similar to the State, but secondary and within the limits recognized by the State, the right to command over the inhabitants of the circumscription, and has, similar to the State, a patrimony, namely the ability to have rights and duties. Therefore, the commune is also a political-territorial person"[5].

Paul Negulescu also includes the counties in the category of political-territorial persons, as territorial subdivisions to which the State acknowledged the right to command and their patrimonial rights.

Referring to the legal capacity of such subjects of law, Paul Negulescu emphasizes: "The right to order and its consequence, the right to coerce, make up the public power rights. The State has this right by nature; it is a native right of the State, which it does not take from anyone, while the commune and especially the counties gain these rights as concessions from the State and, therefore, cannot exercise these rights other than within the limits established by law"[6].

We believe that, from a doctrinaire perspective, the administration of public affairs in the modern, contemporary state, built on democratic grounds, must be seen as a co-administration

[4] Negulescu, P., 1925, *Tratatat de drept administrativ român,* vol. I, Bucharest: Tipografiile Române Unite, p.254-255.
[5] Ibidem.
[6] Negulescu, P., *op.cit*, pag.270.

process, provided by the state power – on the one hand, and the local administrative power, the local collectivity power – on the other hand.

Pre-existing human communities in different areas of the national territory, local collectivities are the result of an establishment mechanism decided by the political-legal will of the state and no result of an associative process. The legally established local collectivities must be acknowledged the right and the capacity to provide, on their own behalf and responsibility, administrative interests of their own community. The public law and private law legal personality confer the local collectivity the possibility to have patrimonial rights, as well as administrative command rights.

The local administrative power allows the collectivity to elect its own authorities by means of which to exercise this power, authorities which may adopt administrative acts mandatory for the respective collectivity. The state reserves the right to safeguard the observance of the legality of this administrative decentralization mechanism, by means of the tutelage provided by the prefect.

Inconsistencies and an improper manner of using the terminology related to the topic of local autonomy are also found in other national legal orders.

Thus, referring to the situation of administrative decentralization in the Republic of Moldova, Sergiu Cornea noticed: "The holders of the right and capacity to solve an important part of the public affairs, according to the definition of local autonomy in the *European Charter of Local Self-Government*, are the local collectivities. Even though the Republic of Moldova is signatory of the Charter, the domestic lawmaker assigns this right to the administrative-territorial units. It would have been logical, in the meaning of the Charter provisions, to assign the capacity of public and private law legal entities (persons) to the local collectivities"[7].

[7] Cornea, S., *Precizări terminologice privind noțiunile esențiale ale organizării teritoriale a puterii publice*, in *Administrarea Publică Magazine*, no. 4/2016, p. 22-30.

4.The administrative-territorial units

If the references to the administrative-territorial units are incidental in the Constitution of Romania, republished, this expression is explicitly used in the primary legislation with the sense of assigning the genre afferent to the species: commune, town, county[8]. Thus:

Law no. 2/1968 on the administrative organization of the territory (currently rescinded), established in art.1: "The territory of the Socialist Republic of Romania is organized in administrative-territorial units: the county, the town and the commune".

The Administrative Code of Romania, in art. 95, states:

(1) *The territory of Romania is organized, under administrative aspect, in administrative-territorial units, which are the communes, the towns and the counties.*

(2) *The communes and the towns are basic administrative-territorial units.*

(3) *Some towns are declared municipalities, in the conditions of the law. (...)*

Regulating legal personality, art. 96 of the al Administrative Code establishes: ***(1)*** *The administrative-territorial units are public law legal persons, with full legal capacity and own patrimony.*

(2) *The administrative-territorial units, as well as the administrative-territorial subdivisions are legal subjects of fiscal law, holders of the fiscal registration code and of the accounts opened with the territorial treasury units, as well as with banks.*

(3) *The administrative-territorial units are holders of the rights and obligations deriving from contracts regarding the administration of assets belonging to the public and private domain they are part of, as well as from the relations with other individuals or legal entities, in the conditions of the law...*

It must be mentioned that on the territory of Romania, with a view to higher efficiency, certain administrative circumscriptions may also be organized, according to the law, entities which

[8] See also Vasilescu, B., 2019, *Repere istorice privind organizarea administrativ-teritorială a României*, in vol. *100 de ani de administrație în statul național unitar român – între tradiție și modernitate*, Bucharest: Wolters Kluwer, p. 63-70.

are not administrative-territorial units, and which have no legal personality[9]. For example: the free zones, established on the grounds of Law no. 84/1992 as geographical areas of the territory of Romania, where the operators may perform activities and the merchandise, means of transport and other assets are subjected to the Customs Code of Romania. Also, in this category we can include the development regions, which are regulated by means of Law no. 315/2004 and which are established based on agreements concluded between the representatives of the county councils and, as the case may be, of the General Council of the City of Bucharest.

The development regions constitute the framework for the elaboration, the implementation and assessment of the regional development policies, as well as for the collection of specific statistical data, according to the European regulations issued by EUROSTAT for the second territorial classification level NUTS 2, present within the European Union.

In our opinion, the administrative-territorial unit is an administrative circumscription, a territorial boundary destined to allow a rational, deconcentrated organization of the public services of the state throughout the national territory. Thus, the administrative-territorial units are parts of the national territory serving as framework, support for administrative deconcentration[10].

The administrative-territorial units correspond to a centralized administrative system, in which the state administration is rigorously hierarchized, the decisional right being concentrated at the top of the administrative hierarchy. "The centralized state acknowledges the existence of local human collectivities, which have specific needs, but it appoints and leads the public servants and institutions administering these human collectivities"[11].

In a decentralized administrative system, we witness a sharing of competences for the provision of public services at the level of the administrative-territorial units, between the interests of the state, ensured through a deconcentrated administration, and the local interests, ensured through the administration of the local collectivities.

[9] Vasilescu, B., *Organizarea administrativ-teritorială şi evoluţia legislaţiei în domeniul administraţiei publice locale*, in *C.L.R. Buletin de informare legislativă*, no. 4/2013, p. 4-12.
[10] Bălan, E., 2008, *Instituţii administrative*, Bucharest: C.H.Beck Publishing House, p.54-55.
[11] Ibidem.

5.The topic of local autonomy in jurisprudence of the Constitutional Court of Romania

As previously indicated, the local collectivities have the right to establish, by means of an elective mechanism, public authorities through which to exercise the legal capacity they were invested with. The definition of local autonomy, contained in art. 3 of the European Charter of Local Self-Government – and especially the translation of the text into the Romanian language – generated confusion regarding the topic of autonomy: the collectivity or the representative authorities of the local collectivities?

Having to render an opinion on an unconstitutionality exception raised with respect to the dispositions of art. 13 of Government Expedite Ordinance no. 115/2003 on the privatization of S.C. "Roman" – S.A. Brașov[12], regulation by which the transfer of S.C. "CAF"- S.A. to the Brașov Local Council was ordered, the Constitutional Court of Romania established the improper manner of using the terminology of the legal text subjected to the control. Thus, the dispositions of art. 23 para. (1) and art. 36 para. (2) letter c) of Law no. 215/2001 were reiterated, according to which "[...] the local council is a deliberative body with collegial character, by means of which local autonomy is achieved in communes, towns and municipalities. In this sense, as authority of the public local administration, the local council exercises attributions regarding the administration of the public and private domain of the administrative-territorial units, respectively the communes, towns and municipalities." At the same time, the Constitutional Court, referring to the local collectivities, stated that they "[...] are public law legal persons, with full legal capacity and own patrimony, holders of the rights and obligations deriving from contracts regarding the administration of assets belonging to the public and private domain they are part of".

Referring to the relation the local authorities have with the respective local collectivities, the Constitutional Court of Romania decision withholds: "[...] in its capacity of deliberative authority of the local public administration, the local council has no legal personality and,

[12] Decision of the Constitutional Court of Romania no.341/11.05.2017, published in the Official Gazette, Part I, no. 577/2017.

therefore, cannot have an own patrimony, meaning that it cannot exercise own rights and obligations within the legal relations. On the contrary, the administrative-territorial unit, in its capacity as subject of public law, holder of patrimony, in the sense of rights and obligations which it exercises with respect to the assets in its public or private domain, is represented by the local council in the legal relations, the latter exercising the rights and undertaking to obligations existing in the patrimony of the administrative-territorial unit".

The Court jurisprudence supports, thus, the opinion regarding the constitutional and legal statute of administrative authority of the local council, which cannot be the holder of rights and obligations on the domain assets, but only the subject exercising them on behalf of the administrative-territorial unit it represents.

Through Decision no. 25/16.01.2019[13] on the unconstitutionality objection of the law on the approval of Government Expedite Ordinance no. 56/2018 for the completion of Law no. 15/1990 on the reorganization of the state-owned economic units as national companies and trading companies, the CCR expressed an opinion on the legislative solution, according to which "[...] the authorities of the local public administration may become single shareholders within the trading companies resulted from the reorganization of the national companies".

The Court withheld the fact that "[...] the constitutional texts clearly distinguish, both from the conceptual and from the legal regime viewpoint, between the administrative-territorial unit and the public administration authority. Thus, the public administration is achieved within the administrative-territorial units by means of the expressly nominated public authorities: the local councils and mayors, the county council, the communal and town councils. The constitutional texts do not distinguish, under the aspect of the constitutional role, between the above-mentioned public authorities, generally called public administration authorities [art. 121 para. (1) of the Constitution]. *Local autonomy is achieved* through these authorities; the solve *the public affairs in communes and towns*".

As pertinently mentioned by the Court, the legal regime of these public authorities "[...] is characterized by administrative legal capacity with a special character, conferring them the

[13] Published in the Official Gazette, Part I, no. 128/2019.

capacity to take part in the administrative relations and to perform, by means of the attributions exercised, the executive activity of the state. The material assets and the financial resources belong to the administrative-territorial units, and the public administration authorities administer them, dispose of them. In fact, referring to the public property, art. 136 para. (2) of the Constitution expressly establishes that it belongs to the state or to its administrative-territorial units.

It is noticed that the Constitutional Court of Romanian consistently uses the arguments established in Decision no. 574/2014[14], according to which the local council has no legal personality and cannot have an own patrimony, these belonging to the local collectivity where the council works.

Even though the Constitutional Court established several times the improper manner of using the terminology in a legal text, in the situation analyzed, it does not raise the issue of the conceptual coherence in the matter of the correct name of the subject of local autonomy, preferring to use the notion of administrative-territorial unit. However, the Court clarifies the relation between the subject of autonomy and its bodies, between the town and the town council, for instance, retaining the rational conclusion of the existence of the legal personality only for the holder of local autonomy.

6. Conclusions

Taking the text of the European Charter of Local Self-Government as basis, we argue for the use of "local collectivity" as concept defining the subject of local autonomy. The notion of administrative-territorial unit represents a territorial confinement, a "piece of the map" allowing the deconcentrated organization of the centralized state power.

In a historical perspective, the concept of administrative-territorial unit precedes the current organization, based on the principle of decentralization of the Romanian public administration. As previously shown, the notion of administrative-territorial unit is found in the Constitution of the Socialist Republic of Romania of 1965, in the Law no. 2/1968, in other regulations prior to the

[14] Published in the Official Gazette, Part I, no. 889/2014.

current Constitution. The use of the same notion, but with a completely different meaning, seems to be the result of an interpretation process which can easily create confusion.

Unlike the administrative-territorial unit, which is merely an administrative circumscription, in the case of the local collectivity, we identify as constitutive elements, next to the territory, the following:

- their own legal personality of public and private law, which makes the local collectivity subject of administrative autonomy;
- the possibility to establish, through democratic means, on elective basis, its own administrative authorities through which the local power is exercised.

In our opinion, a new political reality, such as the new constitutional regime after year 1991, and the new legal order built based on it, call for the use of a new, adequate concept and not a recycled notion, impregnated by the meanings of hyper-centralism.

The term of local collectivity suggests the diversity of processes occurring within: political, economic, social, cultural, as well as the intracommunity connections based on common local public interests, which bring the members of the collectivity together.

We are facing a natural, independent form of self-organization of the population, in order to promote the local public interests. Even though the administrative-territorial unit and the local collectivity have territory as a common element, there are essential qualitative differences between them, with respect to their role and functions fulfilled. Unlike the administrative-territorial unit, which is an administrative circumscription, the local collectivity is invested with the power to manage public affairs related to the interests of its members, on its own behalf and responsibility.

Clarifying the terminology and the meaning of the concepts used by the legal language in the matter of subjects of local autonomy can only support the good regulation desire as means to ensure a higher quality of the law and to protect the legal stability and certainty.

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