

## THE SYSTEM OF LOCAL COMPETENCES IN THE ROMANIAN PUBLIC ADMINISTRATION

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### Abstract

*The extension of administrative tasks, originally endowed with powers of supervision and maintain a social balance, it gradually became an engine that determines changes, a new level of transformation. Given the current status of local collectivities, through this research we intend to argue their tendency to become leading actors in the landscape of administrative, political, economic and social.*

*Our study will consider the effects of the successive transfer of powers upon local collectivities and its implications for the organization, mission and cooperation. These circumstances arise many challenges for state and local collectivity: changing relations between the institutions generated by the transfer of competences, redefining the maner of intervention and coordination, taking into account the economic imperative and upgrading administrative capacity at local level.*

*To understand the local collectivity administration system, we leave the general considerations about the new trends of public administration, and we will analyze the legal status of local competences set in terms of three dimensions: how they are defined, the extent of competences and how to modify the powers.*

**Keywords: local collectivity, competences, state, public service**

### Introduction

The theoretical construction of the notion of competence is differently analyzed by doctrine; from this perspective we notice the existence of a multitude of definitions, doctrinary debates and nuanced conclusions regarding this concept.

The Romanian administrative doctrine<sup>1</sup> has defined the notion of competence starting from the correlation competence - capacity, on the one hand and the concept of attributions on the other hand. It is estimated that the first two concepts are notions studied by the administrative law, while the concept of attributions of the administration is of interest for the science of administration.

The attributions of the public administration represent the objectives that the state authorities must undertake within the executive activity that they carry out<sup>2</sup>. These objectives are based on state interests or on interests of the local communities, according to real social needs. In order to perform its activity, the local community has legal powers, namely the complex of rights and attributions or the authority that it has been invested with, for such purpose.

The doctrine considers that there is a close connection between task and attribution,

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<sup>1</sup> Dana Apostol Tofan, *Instituții administrative europene*, C. H. Beck Publishing House. Bucharest. 2006, p.94.

<sup>2</sup> I. Vătu, M. Lepădătescu, I. Merlescu, M. Anghene, *Sfaturile populare, organe locale ale puterii de stat în R.S.R.*, Academiei Publishing House, Bucharest, 1964, p.91, apud. Ioan Santai, *op.cit*, p. 89.

showing that the latter represents the investiture conferred for achieving the first<sup>3</sup>.

The attributions of the administrative authorities are defined<sup>4</sup> as being the entirety of social needs, determined objectively, assessed politically and enshrined through juridical norms; needs that represent the very reason of being of these authorities. They represent both the object as well as the finality of fulfilling the attributions.

Romulus Ionescu used to define the competence of state authorities as being: “the right and also the obligation stated by law and other normative documents to carry out a certain activity”, understanding from this that by having a special determined competence, the authorities of state administration have the capacity of being subjects in juridical relations<sup>5</sup>.

According to professor Ilie Iovănaș, “capacity does not identify itself with the competence of administrative authorities, although practically, we can realize if a certain collective formation has or does not have the quality of subject of administrative law, only by researching its legal competence, established in the Organic Law”; “hence the capacity of administration designates the possibility of participating as an independent subject in relations of administrative law, while competence designates the entirety of attributions of some administrative authorities, departments or persons and the limits of their performance. Attribution is legal vesting with certain attributions.” The above mentioned author, after analyzing the differences between competence and capacity distinguishes the following aspects:

- Capacity is proper to administrative authorities, while their organizational and functional structures also have competence;
- Capacity assumes the possibility to act on own behalf, while competence does not assume such independence;
- Capacity can not be transmitted to another subject of law, unlike the entirety of attributions that make up the content of the category of competence that can be delegated or assigned to other authorities or persons.

Another opinion<sup>6</sup> supports that “competence determines the entirety of attributions of the authorities of public administration, of some departments within their structure or persons and the limits of their performance, stating that each authority of the public administration carries a certain competence, determined by its incumbent attributions and the purpose for which it has been established through juridical norms in accordance with constitutional principles. Competence must be determined and exercised specifically, in accordance to the legal dispositions by which it was established.

Regardless of the differences of opinion expressed in connection with the notion of competence, the doctrine<sup>7</sup> has identified unanimously a series of characters of competence:

- the legal character evokes the fact that each authority of the public administration has a competence determined by law;
- the compulsory character, meaning that a failure to exercise the competence that it was endowed with attracts the responsibility of the authority of public administration;
- the autonomous character consists in the right of the authorities of public administration to accomplish their attributions and accordingly the obligation of other authorities to assure the necessary independence;
- the permanent character, meaning that it is performed continuously, repeatedly and unconditionally by the authorities of public administration.

The examination<sup>8</sup> of the competence of the authorities of public administration is carried out taking into consideration various criteria:

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<sup>3</sup> Ioan Santai, *Drept administrativ și Știința Administrației*. vol. I, ALMA MATER Publishing House. Sibiu, 2011, p. 56.

<sup>4</sup> Antonie Iorgovan, *Tratat de drept administrativ*, vol. I, IV-th edition, All Beck Publishing House, Bucharest, 2005, p.271.

<sup>5</sup> Romulus Ionescu, *Drept administrativ*. Didactical and Pedagogical Publishing House, Bucharest, 1970, p.110.

<sup>6</sup> Rodica Narcisă Petrescu, *Drept administrativ*, Hamangiu Publishing House, Bucharest, 2009, p. 35.

<sup>7</sup> Ibidem.

- depending on the nature of social relations entered within the activity field of an authority, we identify a material competence (*ratione materiae*), which after its degree of spreading can be general or special, as the respective authority may decide about all essential problems of the executive activity (for example the local council or the county council) or strictly about certain problems that are regulated rigorously.

- related to the spatial or geographical boundaries in which the material competence of a certain authority is manifested, we distinguish territorial competence that after its degree of stretching can be central or national territorial competence (in case of the government or ministries) or a local territorial competence (the local council or the mayor);

- in relation with the quality of the person depending on which it is triggered the incidence of the action of norm and authority, we identify the personal competence of the subject of law;

- in relation with the time limits between which an authority exercises its attributions, we identify the temporal competence.

Usually this competence is unlimited, yet beside the fact that most of the authorities of public administration have elective bodies, the time limitation occurs in accordance to the mandate with which they were vested. The temporary character of an authority does not prevent the issuing of a document of a permanent nature (as an example we mention the local Commission for establishing the right of private ownership over agricultural lands and forests, founded for the application of dispositions of Law no. 18/1991, which in the exercise of its attributions issues titles of property, which order the restoration of property rights in favour of the persons entitled), as it is also possible that a temporary document is issued by a permanent authority (the mayor's institution issues building permits, which by their nature are documents of authority with a validity determined in time).

Depending on the extent of attributions established by the law maker in favour of local authorities, the law maker<sup>9</sup> distinguishes three categories of competences:

*Delegated competences* – competences assigned by law to the authorities of local public administration, together with adequate financial resources, by the central public authorities, in order to exercise them on behalf of and within the limits established by them;

*Exclusive competences* – competences assigned by law to the authorities of local public administration for whose accomplishment they are responsible. The authorities of local public administration have the right to decide and also have the resources and means needed for the fulfilment of competences, with the observance of norms, criteria and standards established by law;

*Shared competences* – the competences exercised by the authorities of local public administration, along with other levels of public administration (county or central), with a clear separation of funding and power of decision for each responsible party.

In order to establish the juridical configuration of the statute of local competences we will examine the normative documents in which they are regulated, the extent or limitations of competences assigned to local authorities and the means for their alteration.

### **Regulation of competences**

The constituent legislator consecrates in article 3, paragraph 3, the principles on which it is established the local public administration, without mentioning expressly the exercise of certain competences attributed for the settlement of local public issues.

Therefore, the basis for the regulation of the competences of local authorities is represented by Law no. 215/2001, concerning the local public administration. Under the dispositions of article 3 from the above named normative document, the deliberative authority is

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<sup>8</sup> Ioan Santai, *op.cit.*, p. 95 and the following

<sup>9</sup> According to the provisions of article 2, paragraph 1, letters d), e) and f) from the Framework Law of decentralization no. 195/2006, published in the Official Gazette of Romania, Part I, no. 453 from the 25<sup>th</sup> of May 2006.

vested to solve and manage on behalf and in the interest of local communities that it represents, the local public issues<sup>10</sup>.

In order to confer efficiency to constitutionally consecrated principles, the organic law maker has regulated<sup>11</sup> a general clause of competence in favour of the *local council that has initiative and acts, within the conditions of the law, in all issues of local interest, except for those granted by law to the competence of other authorities of the local or central public administration*.

The general clause of competence is defined generically by the concept of *public issues*, which must be solved by the local deliberative authority by exercising the attributions it has been vested with.

It has been born a controversy in doctrine<sup>12</sup>, concerning the existence of the general clause of competence in favour of local communities. There is a trend that argues that communities have only those competences which have been conferred to them by Constitution or laws and that by introducing the principle of subsidiarity in the administrative organization this issue is not regulated and on the contrary the debate remains open, motivated as well by aspects connected to faulty drafting – for example the significance of the notion of *vocation* is insufficiently explained – of this principle that functions as a regulator of competence.

We notice that the law maker establishes certain categories of attributions in favour of local authorities through the regulations stated in the organic law, which are filled in by using norms of reference<sup>13</sup>, which leads us to the conclusion that the defining of attributions is disseminated in several texts of legislation, so that we do not have a complete picture of the attributions.

In this context the question arises whether local administrative documents can represent a source for the regulation of the attributions of local authorities. French literature shows that through administrative documents (unilateral or administrative contracts) concerning the establishment of local public institutions (public services/intercommunity associations), certain competences are statutory delegated in favour of these entities for performing the attributions with which they were endowed. In this circumstance the question arises whether the local administrative documents for the establishment of public institutions can be classified in the category of sources for the regulation of attributes or not.

*The extent and nature of competences* of local communities constitute a complex debate in doctrine, since their boundaries can not be identified precisely.

It is considered that on the ground of decentralization, local communities benefit of a general clause of competence, according to which the local authorities solve the local public issues.

In another view it is appreciated that given the inability to define precisely the concept of local public issues, local communities do not have the competence to manage local public issues, unless these are defined expressly and limitatively through law. This position is based on the idea that the attributions of local authorities are regulated in a disparate manner and that constantly the law maker transfers competences from the state in favour of local communities.

In the French doctrine<sup>14</sup>, we find the following statements concerning the definition of competences of local communities: it is distinguished the object (as it is defined by the territorial element), the sphere of activities of local communities and their competence, namely the type of act it can perform as concerns solving a certain local problem.

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<sup>10</sup>According to the provisions of article 3 from Law no. 215/2001.

<sup>11</sup> According to the provisions of article 36, paragraph 1 from Law no. 215/2001.

<sup>12</sup> Didier Truchet, *Droit administratif*, PUF, Paris, 2010, p.95.

<sup>13</sup> As an example we quote the provisions of article 36, paragraph 9 from Law no. 215/2001 that state: “The local council performs any other attributions prescribed by law”.

<sup>14</sup>Jean-Bernard Auby, Jean-François Auby, Rozen Noguellou, *Droit des collectivités locales*, 5-a edition mise à jour, PUF, Paris, 2009, p. 217.

Depending on the object of competences we distinguish two categories of attributions: some of them defined expressly and limitatively by law and a category of attributions by which it is granted to local authorities a certain liberty of appreciation in the administrative action; in this sense we mention: the possibility to defend in justice the local public interest, the possibility to establish public services of local interest, the possibility to set certain taxes, etc.

The importance of classification lies in that the legal definition of attributions is likely to eliminate the risk of *excessive power of local public authorities*<sup>15</sup>, *endowed with a general material competence*.

Another debate refers to the resolution of problems that appear from the *distribution of competences between state and local communities and between local communities themselves*.

A first solution is to be found in the constitutional norms<sup>16</sup> that state the basic principles of local public administration, respectively local autonomy, devolution of public services, decentralization and prohibition of subordination between local communities, them being *autonomous administrative authorities*.

Delimitation of competences by listing the attributions is likely to limit the local normative power to certain hypotheses regulated by the law maker, being a transfer of competences in favour of local communities yet pretty rigid<sup>17</sup> within the present social and economical context. We appreciate that decentralization and division of competences between state and local communities constitutes a classical planning within our legislation, taking into account the tendency from the European space where we find a decentralization that allows *the construction of a less uniform local system by integrating a new concept, namely the right to experiment in favour of local communities*<sup>18</sup>.

However, this division of competences between state and local communities it is not settled and the tipping from side to side is frequent; the groping of the law maker being discovered with the overlapping of competences or the contest of competences.

This is the hypothesis in which there are exercised both national and/or county competences as well as local competence concerning the regulation of a certain situation. *An example would be the management of primary and secondary education that belongs to local communities, under the considerable reserve that the state is responsible for teaching and human resources. That being, one gets to the situation in which local community has the competence to decide the building of a new educational institution, yet it is conditioned by the power of state to allocate human resources. Examples may continue especially because recently there have been registered worse situations, in which the local community has spent important amounts of money for the rehabilitation of educational or medical institutions, while the state ordered the restructuring of these units by closing them and dismissing teachers or medical staff.*

We notice as well a category of *competences whose membership varies*. An example in this sense is represented by competences as concerns planning (building permits, landscaping plans, etc.) that are assigned either to the state, either to local communities (county council or local council), *depending on how it operates the incidence of legislation in matter of historical monuments or depending on the existence or non-existence of local planning*.

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<sup>15</sup> Dana Apostol Tofan, *Puterea discreționară și excesul de putere al autorităților publice*, All Beck Publishing House, Bucharest, 1999, p. 328.

<sup>16</sup>We appreciate that another incidental principle in this circumstance is *the principle of subsidiarity*, although as concerns us this is established only in doctrine; the importance lies in the fact that in some member states of the E.U. we find it regulated in the very constitutional norms.

<sup>17</sup>Local communities have discretionary powers and a margin of appreciation; in this sense please consult Dana Apostol Tofan, *Puterea discreționară și excesul de putere al autorităților publice*, All Beck Publishing House, Bucharest, 1999, p.327-342.

<sup>18</sup>In France the concept of experimentation has been introduced during the revision of Constitution in 2003. The Law concerning the development of local liberties and responsibilities from the 13<sup>th</sup> of August 2004 has organized a new transfer of competences in favour of local communities.

In doctrine<sup>19</sup> it is appreciated that there are no local competences through their nature. As a consequence, the competences are exclusively legal, the determination of their content, sphere of intervention or margin of appreciation of the local authorities are very well delineated by juridical norms.

The examination of general limitations of the competences of local communities<sup>20</sup> is performed through the prism of two criteria:

The areas of intervention that the law maker granted exclusively to the competence of state. In principle, in case of diplomacy and international relations only the state intervenes, yet we notice a certain capacity of action granted to local communities<sup>21</sup> by the regulation of the attributions *referring to internal and external interinstitutional cooperation*;

Definition of local public interest. The concept is difficult to define as it is subjective and susceptible to variations depending on the local context. Jurisprudence asks itself if a certain initiative of the local community complies or not with the local public interest. In this case, the debate has in view the situation in which local public services are being established that are capable of competing private initiative. It is estimated that such action can only intervene to the extent if the importance of local needs and the lack of private initiative make it correspond to a local public interest.

### **The transfer of competences**

Through decentralization it is realized the transfer of administrative and financial competence from the level of central public administration to the level of local public administration or the private sector. The rules of the process of decentralization respect the principle of subsidiarity, economies of scale and geographical area of beneficiaries.

The transfer of competences takes place in stages, so that the government, ministries and other specialized authorities of the central public administration observe the following procedures:

- Develop the strategies concerning the transfer of competences to the authorities of local public administration and the projects of normative documents for their implementation;
- Identify necessary resources and the integral costs related to the competences that are being transferred and also the budgetary sources based on which they are financed. The resources identified as such are transferred to the authorities of local public administration, under the law;
- Ensure in collaboration with the associative structures of the authorities of the local public administration, the correlation on the long-term between the transferred responsibilities and the related resources, in order to cover the variations of cost in the provision of public services and decentralized services of public utility.

Referring the issue of transfer, in doctrine it is discussed whether there is or there is not a threshold that must be taken into account, namely if the competences considered as “royal” can be transferred to local communities.

The traditional vision of constitutional law converges to the *indivisibility of sovereignty*. This internal sovereignty consists of those *royal competences* which are according to tradition, reserved only for the state. In the context of recent developments in the structure of

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<sup>19</sup>Jean-Bernard Auby, Jean-François Auby, Rozen Noguellou, *Droit des collectivités locales*, 5-a edition mise à jour, PUF, Paris, 2009, p. 220.

<sup>20</sup> *Ibidem*, p. 222.

<sup>21</sup> The provisions of art. 36, paragraph 7 from law no. 215/2001 state: “In exercise of the attributions referred to in paragraph (2), letter e), the local council: a) decides under the law, the cooperation or association with Romanian or foreign juridical persons, in order to commonly finance and perform actions, works, services or projects of local public interest; b) decides under the law, the twinning of the commune, city or municipality with administrative-territorial units from other countries; c) decides under the law, the cooperation or association with other administrative-territorial units in the country or from abroad and also the adherence to national and international associations of the authorities of local public administration, in order to promote some common interests.” We find similar dispositions in article 91, paragraph 6 from Law no. 215/2001.

state and emphasizing the role of local communities and implicitly the transfers of competences to these communities, we can ask ourselves which are those royal competences reserved to the state that ensure the exclusivity of internal sovereignty.

One of the principles coordinating this system of distribution of competences is the *principle of subsidiarity*. It allows at first to justify those competences granted to public communities, other than the state. Secondly, this principle justifies the separation of competences between state and local communities and also the significant number of competences conferred to those communities. This principle however does not allow us to determine in an exact manner which are the competences<sup>22</sup> to be withdrawn from the state in order to be given to local communities.

The consolidated version of the Treaty on the European Union, under article 5, paragraphs 1 and 2 provides that: *“The delimitation of the competences of the Union is governed by the principle of assignment. The exercise of these competences is regulated by the principles of subsidiarity and proportionality. (2) Under the principle of assignment, the Union acts only within the limits of competences that have been attributed to it by the member states through treaties in order to attain the objectives set out therein. Any competence that it is not assigned to the Union in the treaties remains to the member states.”*

From the analysis of the texts mentioned above, it results that the transfer of competences is performed at several levels:

1. The assignment of competences to the Union for achieving the objectives specified in treaties;
2. The transfer of competences to local communities for achieving local autonomy.

In essence, through this method of transferring or assigning competences, it is desired the implication or association of local communities for the elaboration and implementation of EU policies.

The principles that structure this fundamentally political concept, *multilevel governance*, seek to ensure the participation of local communities to the functioning of the Union. In order to achieve this objective, *three cumulative conditions must be met: partnership, participation and effectiveness. In the White Chart on multilevel governance it is provided that: good European governance involves cooperation for accomplishing the common welfare between the elected authorities and the actors of civil society. Regional and local authorities are invested with an indisputable democratic legitimacy. Being directly accountable to the citizens, they represent a major part of democratic legitimacy in the European Union and exercise an important part of political power.*

Legitimacy, effectiveness and visibility of the functioning of the Community are guaranteed by the contribution of all actors. They are assured if regional and local authorities are genuine partners and not mere intermediaries. Partnership means more than participation and consultation.

## Conclusions

1. The very place that local communities occupy within the system of public administration is determined by the means of establishment, organization and operation, as well as by the incumbent competences for the performance of specific attributions, in comparison to other powers or systems of authorities of the public administration. It is considered that on the ground of decentralization, local communities benefit of a general clause of competence, according to which the local authorities solve the local public issues.

2. *Our study reveal that given the inability to define precisely the concept of local public issues, local communities do not have the competence to manage local public issues, unless these are defined expressly and limitatively through law. This position is based on the*

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<sup>22</sup> Didier Truchet, *Le droit public*, PUF, Paris, 2010, p. 15, shows that royal functions designate the prerogatives of sovereignty. An exhaustive list including such rights is: printing currency, the right to justice, enactment, amnesty, etc.

*idea that the attributions of local authorities are regulated in a disparate manner and that constantly the law maker transfers competences from the state in favour of local communities.*

3. Therefore the examination of general limitations of the competences of local communities was performed through the prism of two criteria: the areas of intervention that the law maker granted the competence of state and the definition of local public interest.

4. We appreciate that through decentralization it is realized the transfer of administrative and financial competence from the level of central public administration to the level of local public administration or the private sector. The rules of the process of decentralization must respect the principle of subsidiarity, economies of scale and geographical area of beneficiaries.

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