



Reflections Regarding the Concept of *Local Interest* within Public Law

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Abstract: Through this study we aim at performing an analysis of the concept of local interest, having as prerequisites the doctrinal debates regarding the general interest. The examination of this concept occurs in relation with the new trends, as concerns the exercise of competences at local level, respectively with the elements that define the interest of the community and its means of application within the life of the local community. Our research aims to establish theoretically the notion of local interest, an approach that we carry out within a difficult environment, whereas the notion of interest is fluctuating, being constantly modified under the pressure of the evolutions of social and economic needs. The results and the essential contribution of the material consist in the establishment of a framework that would offer to local authorities the practical possibilities for identifying the landmarks that surround this concept and that has to be harmonised with the values of modernity in order to respond better to the needs that are expressed.

Keywords: local community; local interest; community interest

1. Introduction

The general interest occupies an important place in the public debate; the doctrine (Truchet, 2010, p. 70) considers that it falls into the category of guiding principles of public law, together with fundamental notions such as public power, continuity of the state, the principle of legality and juridical security. However, the general interest is a difficult concept to be defined; identifying those needs corresponding from the juridical point of view to the general interest is a political procedure in the clearest sense of the term: this mission is fulfilled by national and local political authorities and alternatively by the administrative and judicial authorities. Therefore, distinction is being made between the national interest whose content is established by the legislator through the issuance of general and impersonal norms and the local interest or the local businesses whose solving is the responsibility of the local community. The difficulty of defining the content of the local interest is

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maintained, because it is a subjective notion that varies depending on the evolution of the local context.

2. Nature and Content of the Concept of General Interest

The debate on the nature and content of the concept of general interest is booming. The general interest is a leitmotif of law and jurisprudence within the national law of the states and especially within the European Union law. The administrative science considers that the general interest is a myth that legitimizes and limits the action of public administration, functioning as *a measure of the administrative power* (Truchet, 2010, p. 70).

The confrontation of the general interest with the philosophies that emphasize civil society and individual rights on the one hand and those that offer a central role to the common objectives formulated by the state on the other hand, continue toward a pragmatic discussion, which has in view the missions of the state, means to streamline and legitimate public action and finding the balance that reconciles the efficiency of markets with the requirements of general interests.

This approach is particularly noted at the European Union level. The authors of the Treaty of Rome were aware, at the moment when they set up the bases of the common market of the importance given to public services. Article 86 of the Treaty establishing the European Community mentioned them expressly by using the vocabulary of *services of general economic interest*. This text allowed the states to derogate from the rules of the market, when it was indispensable to fulfil a peculiar mission of general interest, connected to the management of a public service. We appreciate that it is sufficient to indicate that the European treaty spare the sovereignty in defining activities, having a character of general interest. In the same logic, the treaty also respects the principle of neutrality, according to which the states have the free choice of the means of management of such activities by public or private enterprises. The only issue is referring to the aspect that invoking the general interest should not become a pretext to annihilate the goals of the common market.

The treaty regarding the European Union imposes the strict application of rules within the field of competition to all the economic actors, including the services of general interest. Independently of the exigencies imposed by the European Union law, the administrative jurisprudence from the European space has admitted that there is no incompatibility between the provision of a public service and respect of the competition law: any derogation from the rules of the market is expressly and exhaustively regulated. It is estimated that within the context of free competition, the general interest is the expression of the values of solidarity, social cohesion, regional balance or environmental protection. Therefore, we find in this context the

objective of social interdependency that represents in Duguit's vision, *the very reason of being of the public service*.

The European Union knows two means of implementing the general interest. One of them consists in the creation of a *universal service*¹ that responds directly to the social concerns expressed during the establishment and maintenance of public services: ensuring access to essential services of good quality and at reasonable prices. The other application of the notion of general interest is a classic one. It is about reserving to the public power the possibility of restricting individual liberties for superior reasons of the general interest: assurance of the public order, public health, etc.

Consequently, one can notice a convergence between the national and European visions, thus leading toward the conciliation of the logic of market rules with the objectives of the general interest.

The concept of general interest needs a refresh, meaning that it should adapt to the contemporary economic and social challenges; it should harmonize with the values of modernity and respond better to the needs that are being expressed. The vitality of this notion is determined by the fact that it has not been framed within a rigid and preset definition, so that the notion of general interest can evolve depending on the social needs that have to be satisfied and with the new challenges that the society has to face. Thus, the representation of general interest does not cease to evolve, being an indicator of the stage in which the society is found. The evolving character of this concept brings no prejudice to the general principles of law as enshrined in constitutional texts; by contrast, it is a guarantee for the consensual values determined by the finality of general interest.

The importance of European regulations, enacted by institutions whose democratic legitimacy is imperfect, relativizes considerably the national juridical norm, so that the public interest is defined in a space without limits that corresponds to a national dimension. By its nature, the general interest is rarely consensual, but its definition results from inevitable clashes of interests, among which it must be chosen, in order to eliminate any blockages of the public decision. If the transactional conception of the public interest affects the notion of general interest, then the replacement of constraint procedures with convincing procedures may represent a solution that allows public decision to find a new legitimacy.

The doctrine (Truchet, 2010, p. 71) considers that this concept cannot be defined, since it constantly refers to the needs of the population or society. The general interest is contingent, its formulation being determined by temporal and spatial circumstances and also by political choice, this being the reason for which we observe as it varies depending on the evolution of society.

¹ Universal service applies to courier mail, telephone, gas and electricity, in particular.

3. The Issues of the Concept of Local Interest

The concept of local interest exceeds the principle of specialty that is traditionally imposed to public persons, who each benefit of their field of competences. For the local community we refer to local businesses or local interest. This specification allows us to distinguish between local interest and general interest, which remains under the competence of the state, leading us to the conclusion that the scope of local interest is limited to the specific needs of the inhabitants of the local community.

In the present context, the local cooperation is booming, a circumstance that generated alterations of the concept of local interest in relation with the new trends of intercommunity association of local communities.

In doctrine, the examination of local interest as the dividing line between local and community competence has become a particular problem in assessing local businesses. We shall analyze the theoretical construction of this concept in relation with the new tendencies as concerns the exercise of competences at local level, respectively the elements that define the community interest and the means of its application in the life of the local community.

3.1. Defining the Concept of Local Interest

Recognition in the favour of community of the idea of freedom, namely the autonomy of a local power implies the specific finding of the existence of own interests of local communities. In order to designate local interest, within the juridical vocabulary of doctrine, we find the notion of local businesses or local public issues, local public interest. In essence, the notion of local businesses means the existence of a local interest distinct from the national interest, an aspect explained in literature as follows: *the existence among local communities of a solidarity of interests that is peculiar to them and which ties between the inhabitants a special bond, own local needs and distinct from the common general needs of all the inhabitants of the national territory* (Laubadere, Venezia & Gaudemet, 2000, p. 99). From this perspective, the idea of own businesses is related to the legal personality and the institutionalization of the local community. Own businesses represent the object and aim of the legal personality, since we are talking about the idea of institution from Hauriou's theoretical perspective. If each local community is to manage their own businesses, then each institution is different: the commune solves communal businesses; the city solves city businesses, while the general businesses belong to the state.

This perspective on the notion of local businesses was abandoned, because administrative jurisprudence referring to the notion of local interest subordinated the action of community to an obligation of providing a public service.

Establishing a public service whether industrial or commercial is possible under certain peculiar circumstances of time and space, corroborated with the existence of a public interest that justifies the intervention of community.

The administrative doctrine took account of this evolution of the notion of local interest, but with the occasion of reformation of decentralization it was performed a new slide of terminology, which lead toward the usage of a new concept, the general clause of competence.

At the beginning of the century it was considered that the field of local businesses represented a concession granted by state to the local echelon, being accredited the idea that *decentralization has never recognized to the local community the right to determine freely the list of local businesses, to specify which were the local needs that she would meet by performing public services* (Laubadere, Venezia & Gaudemet, 2000, p. 99).

This position is justified by the circumstance that by enumerating the categories of competences regulated in favour of the local community, it has been appreciated that a transfer operating vertically is in antithesis to the notion of local businesses. The key of the system that permitted the introduction of the notion of local businesses in law was the general clause of competence. This gliding of terms allowed the doctrine to use a much more objective notion, namely that of competence, in order to demonstrate that there is a legal ground that authorizes the local community to act.

The general clause and the principle of specialty are interdependent, meaning that the clause of competence is never completely general; the specialty of the texts does not limit firmly the local action. Therefore, the action is not defined by the local community, but by the state, which sets its competence and in consequence determines the extent or scope of the notion of local interest. For example, in France, the principle of subsidiarity was enshrined in the fundamental law¹, as theoretical justification of the division of competences between the state and local community. On this occasion, the Constitutional Council ruled on the notion of subsidiarity, by enshrining a definition in favour of the state. It was appreciated that *from the terms detained by the constituent, it resulted that the choice of the ordinary lawmaker of assigning a competence in favour of the state rather than in the benefit of territorial communities, could not be questioned, unless it is clear that in relation with the characteristics and object of the interests, these competences could be better exercised by the territorial community*².

¹ Art. 72 from the Constitution of the French Republic, revised in 2003.

² CC no. 2005-516 DC from the 7th of July 2005 referring to the Law relative to the establishment of political orientations in matter of energy, Rec. p. 140, apud. Henri Oberdorff, *Les institutions administratives*, 6 édition, DALLOZ, Paris, 2010, p. 43.

The Romanian constituent legislator devoted in article 3, paragraph 3 the principles underpinning the local public administration, without mentioning expressly the exercise of certain competences attributed for solving local public affairs.

The general framework governing the notion of local interest is represented by Law no. 215 / 2001 on the local public administration. According to the dispositions of article 3 from the above named document, the deliberative body is invested *to solve and manage in the name and on behalf of the interest of local communities that it represents, the local public affairs*¹. Therefore, the legislator has regulated² a general clause of competence in favour of the local council, which has *initiative and shall decide in the conditions of the law, as concerns all problems of local interest, except for those that are given by law in the competence of other authorities of the local or central public administration*.

Thus, the local community has the capacity of limiting what it appreciates it falls within the notion of local public affairs, with the obligation not to violate the competences that belong to other communities or to the state. It is obviously a notion difficult to be explained, rather subjective and that is susceptible of variations depending of the local context. For example, it is appreciated (Auby, Auby & Noguellou, 2009, p. 222) that the establishment of a local public service capable of competing private initiative is allowed only if local needs and the gaps of private initiative make it correspond to the local interest.

The guarantee of the existence of a real local interest is ensured by the judicial control that limits the local action in different hypotheses, by examining its scope, observance and implementation by the local authorities.

3.2. The Content of the Concept of Community Interest

The notion of community interest has appeared in the European administrative space after the year 1990, with the occasion of the establishment of communities of cities or communes. Later, this notion has been used within the intercommunity cooperation; with this occasion it began to shape the means of defining, which vary depending on the type of intercommunity association, thereby gaining a new dimension. The community interest allows us to draw the axis of intervention of the community. The analysis of the concept starts from the division that intervenes between the fields of action and that is transferred in favour of the intercommunity and those that remain at the level of community. By this method, certain statutory competences remain at the level of the local community, while another category of missions that due to the costs generated, their technical nature, extent or structural

¹According to dispositions of art. 3 from Law no. 215/2001.

²According to dispositions of art. 36 paragraph 1 from Law no. 215/2001.

character are registered in the intercommunity logic, as it is for example the elaboration of a development project within pertinent perimeters.

The scope of community interest cannot be defined in relation to certain compulsory or optional competences provided by law in a limitative manner. Consequently, in certain states, the law imposes a transfer of competences as concerns local urban plans, water, waste and the organization of urban transport. Regarding the Romanian model, the legislator has adopted a series of normative documents that regulate the competences¹ of associations, however it does not impose the obligation of their establishment for certain scopes.

Defining local and community interest is essentially a practical exercise, belonging to the local community or to each institution of intercommunity cooperation. In the absence of a legal or theoretical definition of the community interest, we are incapable of determining an objective criterion that outlines the scope of this notion. The community interest is defined by the local counselors of local communities, members of these institutions, with the occasion of the establishment of the intercommunity. In this situation, the interest is a constitutive element of the articles of incorporation of the association, adopted by the member local communities. Concerning the transparency of these procedures of defining interest, it is the prefect's duty to perform the administrative control.

As far as determining the community interest, it requires a deliberation of the authorities of local communities; as well for choosing competences, we consider that it is allowed the association of the procedure of modifying the definition of community interest with a procedure of modifying the competences.

The balance of these debates reflects two findings: one is referring to maintaining the principle of specialty as a consequence of the lack of a legal definition of the community interest, while the second finding is rather a reflection on how the competences are divided at local level. The imprecise definition of the concept of community interest determines the application of the principle of specialty, a circumstance involving at least temporarily the exercise of competence at local community level. *The community interest* (Benchendikh, 2002, pp. 267-297) *can be analyzed as a guarantee that allows local communities to be protected by an*

¹ The associations of intercommunity development of public utilities assume and exercise in the name and on behalf of member local communities, their attributions and responsibilities specific to the service for which they have been mandated through decisions of the local deliberative authorities. The regulations concerning competences are to be found in the following normative documents: Law no. 215/2001 on local public administration; Law no. 51/2006 on public utilities services; Law no. 101/2006 on the sanitation service of localities; Law no. 241/2006 on the service of water supply and sewage; Decentralization framework law no. 195/2006; Law no. 273/2006 on local public finances; Government Ordinance no. 26/2000 on associations and foundations approved with alterations by Law no. 246/2005; Government Decision no. 855/2008 on the approval of the framework articles of association and articles of incorporation of the associations of community development with the object of activity - services of public utilities, etc.

integral transfer of local competences in favour of intercommunity institutions, a situation in which the community is not prevented to exercise a competence that has not been qualified as being of community interest.

This dimension of community interest reminds of the terms of ambivalent usage of the notion of subsidiarity, in order to illustrate the division of competences between the local community and intercommunity. In the first sense we may notice the diminishing of the role of community in relation to urban agglomerations or metropolitan areas that become gradually an autonomous level of administration; the second perspective considers the community interest as expression of subsidiarity, namely the identification of the best echelon between community and intercommunity for the exercise of competences.

4. Conclusions

The examination of the concept of general interest leads us to the conclusion that it is required to refresh the criteria defining the concept, meaning that it should adapt to the contemporary economic and social challenges, it should also harmonize with the values of modernity and last but not least it should respond better to the needs that are expressed. As a result, we appreciate that it is relevant for the construction and definition of the general interest the convergence between the national and the European visions that would lead toward the conciliation of the logic of the market rules with the objective of general interest. However, we note that the evolving character of this concept does not affect the general principles of law enshrined in constitutional texts; in contrast it represents a guarantee for the consensual values determined by the finality of general interest. Thereby, the representation of general interest ceases to evolve, thus constituting an indicator of the state in which the society finds itself.

As concerns local action, we observe that it represents the activity due to which local public affairs are being solved and consequently it is circumscribed to the local interest that is satisfied through the exercise of the competence with which the local community has been endowed. In the present context, the local cooperation is booming, a circumstance that generated alterations of the concept of local interest in relation with the new trends of intercommunity association of local communities.

In this regard, Jean-Bernard Auby expressed an optimist vision concerning the community interest, considering that we are witnessing the absence of calling into action the traditional echelons and a reform of the territorial administration.

We appreciate that the community interest can provide to our local space, local community and our territories, a kind of key for experimenting a system that is

emerging. This concept becomes a way to experiment a new organization, resulting in particular in negotiations between the various levels of communities.

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