



Comparative Study of the Local Collectivity in the European Administrative Space

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Abstract. In this paper we examine the need of an unitary research on the local collectivity issue with the objective of highlighting the necessity for standardization and adjustment to social and economic realities inside the European administrative space. The paper will be structured into three parts so that the study will begin to clarify the notion of competence, then determining the place and role of local communities—we will identify common features and criteria for their differentiation. Given this objective we propose to realise a comparative study of local collectivities skills in Europe, to identify their relationship with the State. The conducted research continues others concerning the timeliness of this research in the theoretical plan, therefore the following are necessary: establishing the place and role, definition and identification of its legal nature, emphasizing key features of the functions and criteria in relation with the State. The work may be useful to the Romanian authorities involved in the enforcement of local collectivities in the context of decentralization. The results and the essential contribution of the work, its originality, consist of the general examination of the categories of local collectivities elected for representation and the diversity of European experiences, regarding the local administrative device—organizational forms, in federal states, decentralized unitary states and unitary states partial or non-centralized.

Keywords: local collectivity; European administrative space; competences

1. Introduction

What we see in the last twenty years is that the legal and economic size of the local collectivities role is growing and has an important place in the European Union. In order to realise a comparative analysis of the current role of the State and development of local collectivity in the European administrative space we will lead our research towards *"the study of local collectivity competences which is essential to find out: what do these local authorities serve? How do they work? What is their*

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place and role in the states' administrative system-viewed as a whole?" (Tofan, 2006, p. 136)

The purpose of the comparison is to assess the degree of freedom of action available in the local communities and how do they exercise their role, taking into account the relationships established with the regional or central government (in case of federal states and regional autonomies).

This perspective will be based on the analysis of a concrete situation, on several countries, aiming to identify a set of common principles and criteria of differentiation. States¹ covered by this study were chosen for their representativeness and diversity of european experiences. Another criteria is represented by the diversity of local administrative unit organization in federal states; unitary decentralized states and little or non-centralized unitary states.

Thus, in theory the difference between a highly decentralized unitary state and a federal state is the *source of power*. In a decentralized state, the state delegates the power in favour of the local collectivity by law, while in a federal state this delegation of power (competence) is provided by the constitution and cannot be easily changed. In practice, states do not always follow this theoretical vision very well; they define and tend to design new models or intermediate organization, which can be described as *hybrid models*².

The European Union is experiencing a variety of concepts developed by each member state regarding decentralization relating the types of structures and powers exercised by local authorities.

Far from being a gap or generating any regretes, this diversity highlights the *mystic enlargement dimension of a Europe of regions*. (Kada, 2010, p. 26). This diversity is required in front of observers, member states, european institutions and it reduces the rigidity of existing state organization, inciting local authorities to experiment new forms of decentralization and cooperation.

¹ We mainly had in mind the following states: France, Poland, Germany, Italy, The United Kingdom, Spain. In our research we also mentioned other states as an example for common situations that we identified.

² As an example we mention Spain, which nominally remains an unitary state but that approaches to a federal state, granting broad autonomy to its communes, particularly to Catalonia and the Basque Country.

2 The Notion of Local Powers in the European Administrative Space

We will begin our study by analyzing the notion of local collectivity, a polysemous term, included in the legal vocabulary to identify the holder of such powers. The ambiguity of the noun "*competence*" in many European languages leads us to identify different meanings that are assigned to this word. It is commonly used to refer to power (legislative power), to designate the object to which it is applied (according to Art. 72 Align. 3 of the French Constitution, "local authorities have a statutory power to exercise their assigned powers") or *the authority to respond*.

In UK, legislation uses the concepts of "*function*", "*power*" and "*duty*" and indicates the object on which they apply this power, therefore British Local Institutions assign different meanings to the notions of "responsability" (material competence) or "*competence*" (assimilated capacity).

In Germany, the federal legislator distinguishes between power (*Befugnis*), skills (*Zuständigkeit*) and skills subject (*Gegenstand*) in the Constitution. This clarification is not only apparent, because what we are interested in, about local authorities and "local business" or "relative tasks to free administration" is regulated in the Lander Constitutions of legislation.

This terminology is found in the 1997 Polish Constitution which uses the notion of tasks (*Zadania*) regarding local authorities and the word "competence" (*kompetenzja*) is used to define the concept of "conflict of competences" (*spory Kompetencyjne*) which might occur between authorities holding free administration and the government.

Spanish law reserves the term "*competencias*" regarding domains in which local collectivities are involved and establishes a clear distinction to the notion of power (*potestades*). In Italy, the new constitutional text was improved with the expression of power as to the old regulation which referred only to legislative functions. In terms of local collectivities art 18. clearly distinguishes, but rather obscure the difference between function and competence. The text formulation suggests that *the functions form the content or the subject of competences*.

The European Charter of Local Self Government uses the notion of competence in two ways: as material skill (responsibility) as it results from Art. 4 Align. 1 "*core competences of local public authorities*"..and capacity under Art. 4 Align.2 *-the ability to exercise initiative in all areas that are not excluded from their frame of competence*. Examining the vocabulary used in each state and in the Charter, we

can conclude that in legal terms, the role of local collectivities is evaluated using skill *competences (functions) and powers* (tasks, duties). The importance of the distinction between competence and power consists in the degree of liberty of the local authorities. Therefore, *competences* can be defined by the *object* (material competence), the powers under which these powers are exercised, the means necessary for their implementation and through the *holder* of this power.

3 Common Features of the Local Collectivities in the European Administrative Space

The diversity of local collectivities does not prevent us to identify some of their common features regardless of the states nature (unitary, federal or regional autonomy type). Thus the local collectivities role is assessed on the following principles: the degree of local autonomy or decentralization of local communities; the general vocation of local power granted by law; the local authorities have legislative power to exercise their competences; local tax power; the existence of legal control; regulating the procedure which guarantees the right to a free administration of local collectivities.

3.1. The Degree of Local Autonomy or Decentralization of Local Collectivities

The principle of local autonomy is known under a varied terminology, it expresses the political will to leave a degree of freedom in the exercise of power- for local collectivities. This principle forms the basis for recognition of political and administrative dimensions in favor of local communities. In the European legislation we identify the following dimensions: *institutional*- which expresses through electing a council and a deliberative body, endowed with moral personality and freedom of decision; *material*- regarding competences (functions, exercised on behalf of this autonomy); *financial*- expressed through the existence of budgetary powers and a certain *liberty* in the internal organization.

We notice, however that using the notion of autonomy varies by state, thus is the word autonomy used in Spain, Portugal, Italy- while in other countries we find the free expression of *administration or self-management (UK-self government, Germany and Austria- selbsrverwaltung, Poland- samorzad terytorialny)*.

In France, the State Council assimilates the principle of free administration to a fundamental freedom, so that any violation can trigger an emergency procedure that will end the situation. This does not mean that in other states, the local autonomy is less protected.

The legal content of these formulations is identical and similar to the notion of local autonomy as defined by the European Charter of local autonomy. By examining the content of this principle and the terminological differences we can conclude that local autonomy is at the basis of *the general competence clause*, currently accepted by almost all European countries.

3.2. The General Competence Clause of Local Collectivities

The general competence clause of local collectivities is regulated in almost all states either in the Constitution or through other laws. Regardless of the formulation of this principle, we see that the general competence clause is not always determined, whereas it is a freedom clause rather than a principle under which competences are assigned. Therefore, the general competence clause allows local collectivities to intervene in any matter provided that the intervention will respond to meeting a local interest and that they act with the powers that belong to other communities or to the state.

In the United Kingdom is applied the doctrine of "*ultra vires*" of local authorities. The provisions contained in the *Local Government Act 2000*, recognize in favor of local authorities a general competence which manifests in maintaining an economic, social and environmental climate of their territory. Therefore, we notice that there are no regulations that rule a general competence in favour of the local government under which it would resolve the communities local interest issues, *but only special powers conferred on them, on activity fields in the basis of written law or local custom (habit)*, or even of its own regulations in matters of purely local interest issues, unforeseen in the content of the laws, but recognized by the central power.

Provisions of Art. 118 of the Italian Constitution regulates the concept of "administrative functions", specific to local collectivities that were interpreted as fundamental functions defined by the national law. This regulation recalls in question the general competence clause which was admitted into Italian Law by Law 142 of 1990.

In some states, all local collectivities benefit of the general competence clause (France, Sweden), in other states intermediate level local collectivities do not exercise other powers than the ones assigned or delegated by the State, we mention Germany, Spain and Poland.

In Germany, the Land Law regulated the districts competences along with what was provided under Art. 28 of the Constitution.

Thus, we can conclude that *the activities exercised by the local authorities on behalf of the general competence clause have a residual character related to the frame of material competences (tasks) performed, these being regulated by law and representing the workload essential*. We observe that **local material competences** are not defined in any state, their determinations in the field of the law. In Constitutions we find general phrases that characterize the nature of local competences; having as a reference the nature of local autonomy or the local collectivity- business management.

3.3. Local Legislative Power

The regulatory power attributed to an administrative authority represents the right to lay down general and impersonal rules that establish or change legal relations (rights and obligations) that occur between law subjects within its jurisdiction; their powers respecting the law. This power is regarded by many countries as local legislative power, a derived power that is never the original or initial power.

If we analyse the place where the documents were issued under the legislative power in the national legal system, we notice that the common points are far greater than terminological differences which define this concept.

In Spain the legislative power exercised by local authorities is regulated by the provisions in Art.4 of the Constitution on local collectivities and appears as a legal consequence to the principle of local autonomy enshrined in the Constitutional provisions. This legislative power is exercised in order to apply the national or regional laws, but also to regulate the operation or use of the local facilities or public services, or on behalf of the general competence clause, to the extent that it doesn't prejudice the competences belonging to other administrative authorities.

The situation in Italy is comparable to the Spanish model. If the 2001 Constitutional revision confused the legal relations between the state and regions,

we observe that in terms of local authorities-changes have not had the same incidence. According to Art. 114 Align.2 of the Constitution, municipalities and regions may regulate their own status, but the power to legislate on the bodies and fundamental functions of municipalities, cities and metropolitan areas belongs exclusively to the State. Provisions of Art. 118 of the Constitution, state that the legislative and executive powers are distributed exclusively between the state and regions, local authorities (communes) *only exercise administrative functions to ensure uniform minimum requirements*. Therefore, we conclude that local legislative power is subordinated to the regional regulatory power and to the law.

We notice that federations as well as regional states grant a legislative power to the *intermediate level*. For example, in Belgium, *regional decrees* are legislative documents to which the principle of equivalent standards is applied: a regional decree has the same legal value in the hierarchy of standards, as the Belgium Law.

In France, the legislative power of local authorities is mentioned a very long time ago; *Loyseau* citing it in a work that dates back to 1608. The french doctrine considers that free management should signify legislative autonomy in exercising the local powers, which shouldn't oppose to the states unity. (Chavier, 2011, p.105). Therefore, legal legislative power is subordinated to the law and residual against the states regulatory power.

A particularity of the local french system represents the regulation of the experimental law on which the Constitutional Council stated that *"the organic law relative to local experiment is aimed to trying new local regulations in perspective of a possible integration into the national law"*. This reform aimed to meet the needs of adaptation of the national regulations to the particular local, by the local legislative power extension. However the provision has generated much debate about the legal nature of this right to experiment, because it is correlative to the right to free administration, but the organic law does not expressly provide that it is a legislative initiative of the right of local authorities. Nonetheless, the formulation of Art. L.O. 1113-CGCT *implicitly admits this initiative*, without regulating on actual legal status. We ascertain that the law authorizes local collectivities to derogate from legislative rules, it sets the subject of testing this right.

This project that wanted to prepare the local authorities for exercising an extensive legislative power in the area of law, remains at a goal, since, in the present the procedures and practice are strictly regulated by the organic law.

In Germany, local legislative power is exercised with the *statutes*. This legal concept is very old, it dates back to 1808. In this circumstance we appreciate that it is worth mentioning Weimar's Constitution which recognized the free administration (*Selbverwaltung*) in favour of local authorities (municipalities, according to art. 127).

Currently, this local legislative power is the consequence of the right to free administration guaranteed by Art. 28.2 of the Constitution which provides for „*the municipalities right to solve, under their own responsibility and within the laws, all local community issues*”. Local collectivities have many exclusive powers enshrined by the Lands Constitutional texts, found under the control of the Federal Constitutional Court. As an example, we admit that municipalities, may intervene when preparing the texts, capable of changing their status, especially in financial matters.

The British Parliament discretionary regulates the relations between central power and the territorial power, recognizing the existence of a "local government" at the same time with a states' right to control through administration and justice, upon the acts of local authorities. In the UK, local authorities exercise regulatory powers (*byelaws*) in order to accomplish their powers (*functions*) provided that they are under dispositions contained in special laws and governmental regulations (Secondary Legislation) – entry into force of local regulations is subject to the Ministers confirmation (*Secretary of State*), a requirement imposed by the White Paper-October 2006, "*Strong and prosperous communities*".

British local authorities can resort to the old procedure which stated that they can obtain from the Parliament, a vote on laws they initiate and that regulate areas for which the general legislation did not conferred powers –under which they can act directly.

We can conclude that in countries where the local administrative systems are still very different, the *local legislative power is fundamental similar in terms of its' legal nature, its place in the rules hierarchy within the internal legal order and it's object*.

3.4. Local Fiscal Power

In all European states the financial autonomy of local authorities is regulated either by law or by the Constitution (Germany, France, Italy, Poland). This way of regulation represents a diversification of media associated with the actors' accountability; actors which intervene in financial matters.

Local fiscal policy submits three main features: it is an effective mean to *develop the funding*; it represents the way to *responsible public management* and it is a *key element of proximity democracy*. (Bouvier, 2011, p. 108)

The particularities of the tax system, with the multiple decision makers in this area make one of the major problems - the *inequalities* between communities, a situation which leads to queries about their eventual specialization in tax matters.

Examining the states' legislation - states that were subject to our study lead us to conclude that the local finance reforms are oriented towards reducing the fiscal power of local authorities, even where constitutional and legislative provisions are favorable to fiscal reforms. This development is based on the local collectivities' fiscal resources, but neglects assigning tax powers. In Germany, municipalities do not exercise any influence on income tax collection, in UK - we note, "business rate" in the local authorities tax resources, but this tax is collected at a national level and redistributed to local collectivities according to their population.

In France, after the basis of professional taxation was reduced, other local taxes were also removed, the total of fiscal resources of local communities is presented by the integration of departments to collect internal taxes on petroleum products (also the price of fuel), a tax upon which the Department does not exercise any influence. Any reduction of the variety funding sources will make the local collectivities more and more independent on investors, and of course on the state that has a key role.

This presentation masks a reality, the financial autonomy of local authorities highlights the progressive pressure of direct local taxes, which we are witnessing in recent years.

In many states, the power to tax remains at the basis of the local authorities' financial autonomy (Sweden, Belgium, France, Italy), in other states it represents only a complementary resource (Germany, Spain, UK). The fact that local tax power is constantly asserted, allows us to consider that it is a significant attribute of local autonomy.

3.5. The Control of Legality

In all states there are procedures that allow the control regarding the respect for legality of local authorities. Judicial control did not remove the opportunity control, which is exercised in certain states, depending on sectorial policies.

In terms of legality control there is certain heterogeneity. Thus in Spain, Portugal, France *a posteriori* legality control is regulated, only the Judge has the jurisdiction to call an illegal act. In Germany and Poland, judicial review is exercised by the administrative authorities on the acts adopted by local authorities, which after this preliminary proceeding have the right to a judicial review against the act of tutorship. In Italy, the 2001 Constitutional revision suppressed the judicial review/control exercised by the Regional Committee of control, annulment of acts-given in the competence of administrative courts. An exceptional procedure is foreseen, one through which the government may cancel with its own motion any administrative act likely to endanger the states unity. There are also some domains in which the *opportunity control* is regulated, a control that regional authorities exercise on town planning regulations and landscaping. This reform brings Italy closer to the UK, where this control has been regulated a long time ago.

3.6. The Local Collectivity Free Administrative Guarantees

In all states mechanisms of judicial protection of the right to a free administration are regulated. This protection is more or less developed, depending on the state, a fact in which we distinguish three situations: countries where this legal protection is given to a Constitutional Judge, states where the protection is ensured by administrative judicial order and states in which this competence is regulated in favour of common law Courts.

The states in which municipalities have a direct or collective appeal to the Constitutional Court are Germany, Austria and Spain. In other countries (Italy, Portugal, Romania) local authorities feature an indirect appeal regulated through the objection of unconstitutionality procedure. These means of defence can be invoked before a civil or administrative jurisdiction that advises the court as regarding the control of constitutionality. In France, there is an indirect constitutional protection that is achieved through a notification sent to the Constitutional Council by the Parliament. The most interesting judicial protection systems guaranteed by the Constitutional Judge are in Germany and Spain.

Provisions of art. 93.4B of the German Constitution regulate a direct appeal of local collectivities (arrondissement- *Kreise*) to the Constitutional Court in the situation in which the right to free administration is violated by a federal law or by a law of the Land. The system is built so that each land has a constitutional jurisdiction, but local authorities may notify the Constitutional Federal Court if the violation of their freedom of administration may be attributed to a federal law. In a situation of abstract rules control, the constitutional appeal for the protection of this right is comparable with the appeal for protection of the fundamental rights.

In Spain the 1999 Constitutional reform was regulated in favour of the local collectivities right to petition the Constitutional Court, but under different conditions. Although the model is inspired from the German one, the Spanish constitutional appeal is a collective redress, a procedure of the rules abstract-control. The requirements of meeting the quality of appeal holder are restrictively examined by the White Paper (2005) which proposed approval of local collectivities associations, viewed as the most representative in the territory; approval to appeal for the local autonomy.

In states where the constitutional appeal is regulated, the legislator does not exclude the recourse to the administrative Judge. Thus in Germany, local authorities may appeal to the Administrative Court, against acts of guardianship. The situation is similar in Spain, where local authorities can request the administrative contentious Judge to annul an administrative act.

In countries where the jurisdictional protection of the right to free administration is ensured by the administrative Judge (Belgium, France, Finland) or by the Civil Judge (UK, Denmark; Romania), common law regulation is present. Although there are many inequalities regarding these procedures and their effectiveness, the tendency to strengthen the capacity of this local autonomy judicial guarantees is certain.

4. Conclusions

The Local authorities role in Europe is estimated, compared to the degree of local autonomy and decentralization, by examining material competences, resources, constraints and the control of the central authorities, in particular. In order to facilitate the understanding of this analysis, we will structure our research results as follows:

We appreciate that a strictly institutional approach is not able to capture in detail the system of local government in a particular state, such an analysis would lead us to identify situations quite different from one sector to another, depending on each state, characterized by increased centralization or decentralization. A full view of the role of local collectivities –a more complex one is the *analysis of their competences* which leads us to the conclusion that the classification methods of material competences are numerous, the means available to local authorities are well identified as the factors that determine their frame of action.

The interest of our analysis is not a local collectivities-comprehensive description in a particular state, but understanding their role, taking into account the relations that establish with the State or the Regional powers. To achieve the objective we have set the most relevant features from different fields of the local authority-competence, in order to identify the most significant variations of their place and role in the European Administrative Space.

The comparative analysis of material competences varies in each state depending on the administrative system, and it evolves over time in relation to sectorial reforms that can generate sector centralization or decentralization. The informations on the notion of competence are very high and the possibility to identify the local autonomy's role within a state can be determined by sectorial differences.

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