Some considerations regarding the legal nature and the status of central autonomous public authorities

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Abstract:

Based on art. 116 and art. 117 par. (3) of the Constitution of Romania, as republished, which enshrines the establishment and organization of central autonomous administrative authorities, taking into account art. 73 par. (3) of the Constitution which decrees the scope and authorities that are regulated by organic law and having regard to the considerations expressed by the Constitutional Court in the contents of its case law, especially in relation to art. 115 par. (6) of the constitutional text according to which the emergency ordinances do not affect the regime of state fundamental institutions, we aimed in this article at analysing some distinctions concerning the legal nature, executive / administrative or not, of the central autonomous authorities in relation to their constitutional or legal status.
Keywords: central autonomous authorities, autonomous administrative authorities, constitutional status, legal status, legal nature.

1. Preliminary issues - Constitutional and legal grounds on central autonomous public authorities

The current constitutional grounds on "Specialized central public administration" are contained in Section I, entitled as such, in the contents of Chapter V - Public administration, Title III - Public authorities, of the Constitution of Romania, as republished [1].

Art. 116 of the Constitution of Romania, entitled "The structure" of specialized central public administration, establishes the following categories of bodies:

a) ministries, which are organized only in subordination to the Government;

b) other specialized bodies which can be organized: in subordination to the Government or ministries, or as autonomous administrative authorities.

Therefore, in terms of their status and relations with other public authorities, the specialized central administration comprises two categories of bodies:[2]

1) subordinate specialized central bodies, i.e. subordination to the Government or to ministries;

2) autonomous specialized central bodies, that are not subordinate to any other public authority.

Law no. 90/2001 on the organization and functioning of the Romanian Government and ministries,[3] as amended and supplemented, provides for in art. 29 that: “The Government is in collaboration relations with the autonomous administrative authorities.”

Art. 117 par. (3) of the constitutional text enshrines the establishment of autonomous administrative authorities by organic law.

Thus, the autonomous administrative authorities are not indicated in the constitutional text, the jurisdiction for their establishment belonging to the organic legislator.

Instead, as we know, we find in the constitutional text the grounds for the establishment of other autonomous central public authorities, such as the Ombudsman, the Legislative Council, the Court of Accounts, the Economic and Social Council, whose organization and functioning is developed by organic laws.

2. The guide marks of the literature concerning the classification of autonomous central authorities

The autonomous central public authorities are classified in the specialized doctrine into two categories:[4]

1) the autonomous central authorities of constitutional rank, whose organization and functioning is subject to organic laws subsequently passed, such as:

The Ombudsman [5] - with a role in defending the rights and freedoms of individuals - art. 58 par. (1) of the Constitution of Romania, as republished;

The Legislative Council [6] - Parliament’s specialized advisory body that approves draft legislative instruments to organise, unify and coordinate all legislation and keep the official record of the Romanian legislation - art. 79 par. (1) of the Constitution;

The Court of Accounts [7] - exercises control over the formation, administration and use of financial resources of state and public sector - art. 140 par. (1) of the Constitution;

The Economic and Social Council [8] - an advisory body of the Parliament and Government - art. 141 of the Constitution.

2) autonomous central authorities created by an organic law, such as:

National Supervisory Authority for Personal Data Processing - established by Law no. 102/2005[9], a public body with legal personality, autonomous and independent from any other authority of public administration (...), aims to protect the rights and freedoms of individuals, notably the right to intimacy, private and family life in relation to the processing of personal data and to the free movement of such data;

The Competition Council - established by the Competition Law no. 21/1996 [10], national competition authority, an autonomous administrative authority, respectively;

The National Audiovisual Council - established by the Audiovisual Act no. 504/2002 [11], autonomous public authority under parliamentary control, is the guarantor of public interest in the field of audio-visual communication and single regulatory authority in the field of audio-visual media services;

The Romanian Cultural Institute - established by Law no. 356/2003 [12], an autonomous administrative authority with legal personality, under parliamentary control, aims to represent, promote and protect the national culture and civilization in the country and abroad.

In our view, autonomous central authorities can also be classified according to other criteria, represented by the legal nature thereof, executive / administrative or not.

We consider that authorities such as the Constitutional Court [13] and Court of Accounts, both with a constitutional rank according to the classification established by doctrine of specialty, are considered to be outside the three branches of government, legislative, executive or judicial - as stated in art. 1 par. (4) of the Constitution of Romania, as republished.

In the specialty studies about the organization of the Constitutional Court it has been noted that:[14]

“The provisions of art. 142 of the Constitution, which enshrines the role and structure of the Constitutional Court, do not specify the nature of this public authority, or its position within the state authorities. However, the organization of our court of review of the constitutionality of laws by virtue of the Constitution and its organic law, is done in the spirit guaranteeing its independence in relation to the legislative, executive and judicial powers.”

About the place of the Constitutional Court in the Romanian political system, the same author showed that:[15]

"In Romania, the Constitutional Court was established as an authority which mainly provides the review of the constitutionality of laws and which is outside the three state powers - legislative, executive and judicial - with the task of ensuring that public authorities forming them respect the principles and rules of the Basic Law."

Likewise, the legal doctrine reveals that: "The fact that judges of the Court are appointed by the legislative and executive powers (President of Romania) does not create a relationship of subordination of the Court to them."[16]

About the Court of Accounts it has been stated that "it was organized like the Constitutional Court for a term of 9 years for account advisers, with the renewal of one third of advisers every 3 years" and "it does not come within any of three powers - legislative, executive and judiciary, but contributes to their functioning and balance."[17]

Also, the Ombudsman "is difficult to fit into one of three traditional powers" and strict classification "is practically impossible.[18]"

The Constitutional Court, the Ombudsman, the Court of Accounts and the Legislative Council are considered by the established constitutional doctrine as "state organizational structures with the role of guarantees, counterweight and support of the balance of powers and of the balance between public authorities and citizens"[19], an opinion which we agree upon, as stated above.

However, some authors said that "state bodies which cannot through their duties be included either in the category of legislative bodies or in that of the courts, should be classified, with all their specifics in the category of executive, administrative bodies, because what is essential to these bodies is that all of their activities are undertaken based on the law and to the execution of the law"; "the fact that some of these bodies submit annual reports to Parliament on their activities and that their governing bodies are appointed by the Parliament are not arguments to change their legal nature, i.e. autonomous administrative authorities, which are established by an organic law, according to art. 117 par. (3) of the Constitution [20]."

In agreement with most of the opinions expressed in this matter, we consider it necessary that due nuances and distinctions between the two categories of central

autonomous public authorities be taken into consideration, according to the second criterion, i.e. their legal nature, as previously identified, “the strict classification within the executive branch of such structures with control responsibilities and constitutional origin, being questionable ”[21].

“To the traditional classifications and qualifications in the literature, they usually occur as domain bodies, which in turn can be three categories: a) synthesis bodies, b) coordination bodies (typical example: the Country Defence Supreme Council) and c) control bodies (typical example: the Ombudsman, the Court of Accounts, etc.). (...). The category to which we refer is not to be confused with bodies similar in terms of their type of activity (synthesis, coordination or control) that are organized in a structural dependency to ministerial administration or, where appropriate, to the Government.”[22]

Between central autonomous constitutional authorities and autonomous central authorities created by organic law “the essential differences exist in terms of dependence”: [23] the autonomous central authorities with constitutional status “obey the Government only to the extent that it adopts ordinances or normative judgments which are binding and enforceable against them as against any other subject of law”; for the central autonomous authorities with legal status “the rule established by art. 102 par. (1) that the Government exerts the general management of public administration has a greater extension and application” - they “exert jurisdiction made up of attributions of complementarity with the Government (...) without being regulated by the Government,” but acting within the framework created by the Government by the legislative instruments it passes.[24]

3. Aspects of the Constitutional Court’s case law regarding the legal nature and status of autonomous central public authorities

To illustrate the criterion of the legal nature of autonomous central public authorities, we will further render the example of the Romanian Cultural Institute, which has legal status, is organized and operates as an autonomous administrative authority, according to Law no. 356/2003, [25] republished, as amended and supplemented, in contrast to the example of the Court of Accounts which has constitutional status, it is organized operates according to Law no. 94/1992, republished, as amended and

supplemented through the considerations expressed by the Constitutional Court in the contents of its case law.

3.1. By Decision no. 737/2012, [26] the Constitutional Court rejected as unfounded the exception of unconstitutionality of the Government Emergency Ordinance no. 27/2012 regarding certain measures in the cultural field, objection directly raised by the Ombudsman.

The Court examined the relevance of the reasons invoked by the Government in adopting the emergency ordinance criticized in the light of its case law, as we will show in excerpt below.

The Court held that: Romanian Cultural Institute was established by Law no. 356/2003 as a public institution of national interest, with legal personality, under the authority of the President of Romania.

In the recitals expressed, the Court held that: the objective of the adoption of Government Emergency Ordinance no. 27/2012 is justified by the provisions of art. 116 of the Constitution.

Examining the reason invoked by the Government, the Court found that: the constitutional provisions of art. 116 provide that specialized bodies may be organized in subordination to the Government or ministries, or as an autonomous administrative authorities, and according to art. 102 par. (1) in conjunction with art. 111 the Government exerts the general management of public administration, except the autonomous authorities under parliamentary control. As a result of these constitutional provisions, Law no. 47/1994 on services subordinated to the President of Romania, republished in the Official Gazette of Romania, Part I, no. 210 of April 25, 2001, as amended and supplemented, does not contain any provision that public institutions of national interest having the legal nature of autonomous public authorities can be organized in subordination to the President of Romania.

Given the above, the Court considered that: the regulation of the legal framework for the operation of the Romanian Cultural Institute contained a defect of unconstitutionality.

The Court also noted that: the intention of the delegated legislator as resulting from the adoption of the legal rule criticised and from the motivation of this measure has

been to react to defend the public interest, and (...) the extraordinary situation that requires urgent measures to protect the public interest may demand the establishment of rules of the organic law by emergency ordinance that, if it could not be adopted, the public interest in mind would have been affected, which is contrary to the constitutional purpose of the institution. [27]

That being so, the Court found that: in this case the emergency ordinance criticized contains no unconstitutionality extrinsic defect, as, they are, by the nature and purpose of their measures on the functioning and organization of the Romanian Cultural Institute provided for in the emergency ordinance criticized, necessary and urgent in nature and are taken to protect a major social and institutional interest.

Therefore, the Court found that: adopting the regulation criticized by way of an emergency ordinance meets the constitutional requirements imposed by art. 115 par. (4).

By presenting the excerpt statement of the Constitutional Court Decision no. 737/2012 we wanted to point out the following:

In line with the considerations expressed in the Court's decision, we note that there are no institutions and public authorities with legal personality, in general, and much less public institutions of national interest given the legal nature of autonomous public authorities, according to Law no. 47/1994, republished, as amended and supplemented, organized under the President of Romania. Moreover, in our view the status of an autonomous administrative authority of the Romanian Cultural Institute would have been inconsistent with the administrative authority status subordinated to it.

The presidential administration is represented by the public services available to the President of Romania to fulfil his duties [art. 1 par. (2) of Law no. 47/1994] and establishes cooperation relationships with public authorities (our emphasis) (art. 6 of Law no. 47/1994).

3.2. By Decision no. 544/2006 [28], the Constitutional Court upheld the exception of unconstitutionality raised by the Ombudsman directly and found that the Government Emergency Ordinance no. 43/2006 on the organization and functioning of the Court of Accounts, published in the Official Gazette of Romania, Part I, no. 525 of June 19, 2006, is unconstitutional.

Examining the exception of unconstitutionality raised, the Court held that: Through its role, the Court of Accounts is part of the fundamental institutions of the state, and its activity is essential to ensuring the financial support of the operation of all state bodies. The nature of the Court of Accounts as state fundamental institution is equally underlined by its constitutional status, as well as by the fact that the organization and functioning, i.e. its legal regime, are regulated under art. 73 par. (3) l) of the Constitution, by organic law.

Thus, regulating the organization and functioning of the Court of Accounts by the Government emergency ordinance contravenes the provisions of art. 115 par. (6) of the Constitution, according to which emergency ordinances "cannot affect the status of state fundamental institutions".[29]

3.3. By Decision no. 55/2014 [30], the Constitutional Court upheld the objection of unconstitutionality formulated and found that the provisions of the Law approving Government Emergency Ordinance no. 77/2013 for measures to be taken in order to ensure the functionality of local public administration, the number of jobs and a reduction in expenses in the public institutions and authorities subordinated to, under the authority of or in coordination with Government or ministries are unconstitutional as to the criticisms made, relating to the art. 115 par. (6) of the Constitution.

Examining the objection of unconstitutionality, the Court found that it already established in its case law that: "fundamental state institutions are those expressly covered by the Constitution in detail or at least in terms of their existence, explicitly or just generically (institutions under Title III of the Constitution, as well as public authorities under other titles of the Basic Law). Therefore, the fundamental state institutions have "constitutional status" (section VII, 3.4. of the Court's Decision no. 55/2014).

4. Conclusions

As shown throughout this article, the autonomous central authorities with an administrative legal nature may be established by an organic law [art. 117 par. (3) of the Constitution of Romania, republished] and are not specifically mentioned in the constitutional text, while the autonomous central authorities without legal administrative nature are explicitly mentioned in the constitutional text and are recognized in the

literature as being outside the three traditional powers of the state and are enshrined in the case law of the Constitutional Court as a fundamental state institutions.

By colligating the recitals expressed by the Constitutional Court in its case law, which considerations, like the set of decisions of the Constitutional Court, are generally mandatory and are imposed with the same force upon all subjects of law (see Constitutional Court Decision no. 55/2014) [31] , we opine that: on the one hand, the central autonomous authorities with constitutional status, such as the Court of Accounts, have a legal regime which cannot be regulated by emergency ordinance as these ordinances do not affect the status of state fundamental institutions under art. 115 par. (6) of the Constitution, and on the other hand, autonomous central administrative authorities with legal status, such as the Romanian Cultural Institute have a legal regime that can be regulated by emergency ordinance, in compliance with the constitutional requirements imposed by art. 115 par. (4) (see Constitutional Court Decision no. 737/2012), although the establishment of both categories of autonomous central public authorities are regulated by an organic law, according to the constitutional text.

We believe that the distinctions mentioned may serve as many arguments for placing central autonomous authorities with constitutional status, such as the Constitutional Court or the Court of Accounts, outside the three branches of state, both through their legal nature and their role as enshrined in the Basic Law.

Another aspect we want to reveal by presenting some of the considerations expressed in the Decisions of the Constitutional Court, is that the legal status as autonomous central public authority with or without an executive / administrative nature, may not be compatible with the organization and operation of such authority subordinated to another institution or public authority, regardless of its rank (see Constitutional Court Decision no. 737/2012).

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