SOME THEORETICAL AND PRACTICAL ASPECTS REGARDING PUBLIC SERVICE

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Abstract

We proposed in this article, based on the legal and scientific significance of the concept of public service and continuing with the analysis of features bearing value of principles thereof, enshrined in the doctrine, a wider definition of the concept, in that it designates the work carried out to meet the needs of legitimate public interest, circumscribed to the fundamental rights, freedoms and duties of citizens, a definition we laid down in the conclusions in relation to the provisions of the Administrative Litigation Law no. 544/2004, Art. 2 par. (1) m) concisely defining the term public service.

Focusing mainly on public services provided by central specialized autonomous bodies, we presented and commented in the paper Constitutional Court Decision no. 448/2013 regarding the objection of unconstitutionality of the provisions of Art. 40 par. (3) of Law no. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Corporation and the Romanian Television, whereby the Court found the constitutionality of these provisions, to the extent that the fee for public broadcasting and television services applies only to businesses that benefit from these services, and the Constitutional Court Decision no. 486/2014 on the same subject. Thus, we wanted to reveal the perpetuation of some unconstitutional/illegal administrative practices, having been sanctioned repeatedly by the Constitutional Court through the rulings and by the administrative litigation courts referred to by legal entities for payment of fees related to public services they did not benefit from.

Keywords: public service, public interest, principles, rights and freedoms of citizens, public services fee.

JEL Classification: K40.

1. Preliminaries

Etymologically, the word ***service*** comes from the Latin "*servitum*" which means "*slave*", hence the interpretation of "*being in the service of someone*", "*doing a service*" or "*putting into service*", which evokes the idea of "***public utility***" or "***public service***" (italics ours).[1]

The notion of public service in the current Romanian doctrine means:[2]

- in **the organic sense**, "*a group of officials and means a public person or a private agency authorized by a public person impacts to the achievement of a public interest need*";

- in **the functional sense**, "*a general interest activity conducted by the administration, which has as its mission the satisfaction of general interest*".

"*It is perhaps a paradox of history, whether in the West discussions are on the decline of public services, in Eastern Europe, including Romania discussions must be held on the development of public services. Therefore, public services appear to us as strictly necessary in our constitutional system, primarily because they evoke obligations of the state towards citizens' fundamental rights.*"[3]

2. Constitutional and legal bases regarding public service

Constitution of Romania republished "*makes expressed or implied references to the idea of public service, whether as activity or as a set of means (bodies).*"[4]

According to current doctrine of administrative law, ***the constitutional provisions applicable to public service can be grouped into several categories, as follows***:[5]

a) *regulations which establish* ***general principles***: *guaranteeing the rights and freedoms of citizens, Romanian state supreme values* [Art. 1 par. (3)]*; equality of citizens before the law and public authorities, without privileges and discriminations* [Art. 4 par. (2) and Art. 16 par. (1)]; *guaranteeing autonomy of public radio and television services* [Art. 31 par. (5)];

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[1] Verginia Vedinaş, *Drept Administrativ, Curs universitar*, 7th edition, revised and updated, Universul Juridic, Bucharest, 2015, p. 284 and footnote 1: Iordan Nicola, *Managementul serviciilor publice locale,* All Beck, Bucharest, 2003, p. 63.

[2] Verginia Vedinaş, *Drept Administrativ, Curs universitar*, 2015, works cited, p. 284.

[3] Antonie Iorgovan, *Tratat de drept administrativ*, Vol. II, All Beck, Bucharest, 2005, p. 185.

[4] Antonie Iorgovan, *Tratat de drept administrativ*, Vol. II, 2005, works cited, pp. 185-186.

[5] Verginia Vedinaş, *Drept Administrativ, Curs universitar*, 2015, works cited, pp. 285-286.

b) *regulations which establish* ***principles governing the organization and functioning of public administration in general, or public services specifically***: Art. 120 par. (1) enshrines the three principles governing local public administration, and "*decentralization, local autonomy, and deconcentration of public services*".

According to recitals expressed by the Constitutional Court in its case law[1], **constitutional principles of organization and functioning of local public administration** "***covers not only local public administration authorities, but also public services***" (italics ours).

c) *regulations which establish* ***public authorities which are responsible for providing public services*** *or exerts certain relations to the authorities providing public services:* Art. 123 par. (2) establishes the prefect, *the representative of Government locally,* who *"leads deconcentrated public services of ministries and other central public administration bodies in the administrative-territorial units*".

d) *regulations on* ***fundamental rights, freedoms and duties*** *of citizens, where we also find as regulated public services they involve: right to information,* achieved by *public or private means of mass communication, and public autonomous radio and television services* [Art. 31 par. (4) and (5)]; etc..

Throughout the *Administrative Litigation Law no. 554/2004*[2], as amended and supplemented, Art. 2 par. (1) m) is devoted to the **concept of < *public service*>** with the following meaning: "*Public service - activity organized or, where appropriate, authorized by a public authority in order to meet a legitimate public interest*".

Correspondingly, within the meaning of Administrative Litigation Law no. 554/2004, as amended and supplemented, Art. 2 par. (1) b) the notion **<public authority>** means: "*any body of State or administrative-territorial units acting as a public power, to satisfy a legitimate public interest; private legal entities which, according to law, have achieved the status of a public utility or are authorized to provide a public service, in public power regime, are treated as public authorities under this law*".

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[1] See: *Constitutional Court Decision no. 1 of January 10, 2014 on the objection of unconstitutionality of the Law establishing measures of decentralization of powers exercised by some ministries and specialized bodies of the central public administration and reform measures regarding public administration,* published in the Official Gazette of Romania Part I, no. 123 of February 19, 2014 (pt. 151).

[2] Published in the Official Gazette of Romania, Part I, no. 1154 of December 7, 2004.

3. Public service distinctive features

The doctrine highlighted the following **features** of public service bearing value of **principles**, according to most authors:[1]

a) ***The purpose of public service is to satisfy a need of general (public) interest;***

b) ***The provision of public service can be done by public officials or private officials authorized by a public official***;[2]

c) ***continuity of public service***, which is considered in the doctrine as one of "*the most important principles governing the public service, as a natural consequence of state continuance*";[3]

d) ***equality before the public service of its beneficiaries***, which implies "*equal and non-discriminatory treatment*" and "*common requirements for all categories of beneficiaries*";

e) ***the legal regime of public law*** which can be "***solely administrative*** *in the public services rendered by public officials or* ***mixed regime****, a combination between the power regime and common law regime for public services provided by private officials authorized by a public person*";

f) ***the competence of the administrative litigation courts***, which "*must cover all public services, irrespective of the public or private manner in which it is achieved*";[4]

g) ***public service adaptability***, starting from the idea that "*social need increases continuously, quantitatively and qualitatively*," which requires *adaptation of any public service to these requirements*;[5]

h) ***effectiveness and efficiency of public services*** - *effectiveness* involves meeting the objectives, standards, by comparing results obtained with the ones expected and *efficiency* involves the comparison of results with efforts made, the *citizen being in focus* "*as client*".[6]

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[1] Verginia Vedinaş, *Drept Administrativ, Curs universitar*, 2015, works cited, pp. 286-287. In the same vein: Iordan Nicola, *Managementul serviciilor publice locale,* 2003, works cited, pp. 94 et seq..; Iordan Nicola, *Managementul serviciilor publice locale,* 2nd edition, C.H. Beck, Bucharest, 2010, pp. 96 et seq..

[2] Verginia Vedinaş, *Drept Administrativ, Curs universitar*, 2015, works cited, p. 286.

[3] Iordan Nicola, *Managementul serviciilor publice locale*, 2003, works cited, p. 94 and footnote 1 on same page: G. Dupuis, J. M. Guedon, *Droit administratif,* 3-éme édition, A. Colin, Paris, 1991, p. 444.

[4] Verginia Vedinaş, *Drept Administrativ, Curs universitar*, 2015, works cited, p. 287.

[5] Iordan Nicola, *Managementul serviciilor publice locale,* 2003, works cited, pp. 100-103.

[6] Iordan Nicola, *Managementul serviciilor publice locale,* 2003, works cited, p. 96 and footnote 1 on same page: Mihaela Vlăsceanu, *Organizaţiile şi cultura organizării*, Trei, Bucharest, 1999, p. 57.

4. Public services provided by the central specialized autonomous bodies

In the current doctrine of administrative law, public services are classified according to several criteria, one of them being the ***interest of work performed*** - a criterion according to which:[1] a) *public service of national interest* and b) *public services of local interest* have been identified.

Public services of national interest are provided by *state central public administration authorities*,[2] to which we refer to hereunder.

Art. 116 entitled "*Structure*", in the contents of Section 1 - *Specialized central public administration*, Chap. V - *Public administration* in the Constitution, republished[3] establishes the following **categories of bodies** that constitute this type of administration: *ministries which are organized only in subordination to the Government and other specialized bodies that may be organized in subordination to the Government or Ministries, or as* ***autonomous administrative authorities*** *(italics ours).*

Central specialized autonomous bodies provide ***public services of national interest*** in areas which do not fall in the jurisdiction of government / ministries or of other specialized central bodies under its subordination, properly completing the scope of jurisdiction of the specialized central public administration.

As we know, the autonomous specialized central public authorities are **classified** in the specialized doctrine[4] in two categories:

1) autonomous central authorities of **constitutional status**, such as: the Legislative Council - Art. 79, the Supreme Council of National Defence - Art. 119 Superior Council of Magistracy - Art. 133-134 of the Romanian Constitution, republished;

2) autonomous central authorities **created by an organic law**, such as: the National Audiovisual Council - set up by the *Broadcasting Act no. 504/2002*[5], Romanian Radio Broadcasting Corporation and the Romanian Television - established by *Law no. 41/1994*[6].

Romanian Radio Broadcasting Corporation and the Romanian Television are ***autonomous public services of national interest***, *editorially*

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[1] Verginia Vedinaş, *Drept Administrativ, Curs universitar*, 2015, works cited, p. 288.
[2] See: Ion Imbrescu, *Managementul serviciilor publice comunitare*, Second edition revised and enlarged, Lumina Lex, Bucharest, 2012, p. 36 et seq..
[3] *Constitution of Romania*, republished in the Official Gazette of Romania, Part I, no. 767 of October 31, 2003.
[4] Verginia Vedinaş, *Drept administrativ, Curs universitar*, 2015, works cited, p. 422.
[5] Published in the Official Gazette of Romania, Part I, no. 534 of July 22, 2002.
[6] *Law no. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Corporation and the Romanian Television,* published in the Official Gazette of Romania, Part I, no. 153 of June 18, 1994, republished in the Official Gazette of Romania, Part I, no. 636 of December 27, 1999.

independent, performing general objectives of information, education, entertainment [Art. 1 and Art. 4 par. (1) of *Law no. 41/1994 republished*].

5. Decisions of the Constitutional Court no. 448 of October 29, 2013[1] and no. 486 of September 25, 2014[2] concerning the objection of unconstitutionality of Art. 40 par. (3) of *Law no. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Corporation and the Romanian Television*

5.1. **Constitutional Court Decision no. 448/2013**

The object of objection of unconstitutionality was established by Art. 40 par. (3) of *Law no. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Corporation and the Romanian Television*, republished, as follows: "*Legal persons established in Romania, including subsidiaries, branches, agencies and representative offices, as well as representative offices of foreign legal entities in Romania are obliged to pay a fee for the public radio broadcasting service and a fee for the public television service, as beneficiaries of these services*."

The objection was raised by S.C. "P.C" – S.R.L. in the MC Court case file and formed the object of Constitutional Court Case File no. 417D/2013.

In **motivating the objection of unconstitutionality**, its **author** argued that the provisions criticized, by the fact *that it obliges the companies to pay fees for public radio broadcasting service and for the television regardless of whether they benefit from these services*, are contrary to the constitutional provisions of Art. 29 par. (1) and (2) on the *freedom of conscience*, Art. 31 par. (5) on the *right to information* and Art. 139 on *fees, duties and other contributions*.

M.C. **Court** held that the *obligation under the text of the law criticized pertains only to businesses that benefit in different ways from these public services and, consequently,* ***none of the objections raised can be accepted*** (italics ours). The court held that the fees imposed by Art. 40 *guarantee the autonomy of public radio broadcasting service due to their establishment from own revenues of financial resources providing them with financial autonomy, as a prerequisite for their autonomous organization*.

The Court,

Examining the objection of unconstitutionality, found the following issues (taken from the Constitutional Court Decision no. 448/2013)

[1] Published in the Official Gazette of Romania, Part I, no. 5 of January 7, 2014.
[2] Published in the Official Gazette of Romania, Part I, no. 794 of October 31, 2014.

pt. 1. The provisions of Art. 40 par. (3) of Law no. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Corporation and the Romanian Television were previously subject to constitutional review.[1]

The Court held that "*the obligation under the text is only pertaining to legal persons who benefit in various ways from these public services and, consequently, none of the objections raised can be accepted*".

pt. 2 The Court noted that High Court of Cassation and Justice, referring to the jurisprudence of the constitutional litigation court, held that *the obligation to pay the fee for the public radio broadcasting service and of the fee for public television public service is incumbent only upon legal entities actually benefiting from these services*.[2]

pt. 3 The Court also noted that, although *it established by its case law on the matter the landmarks of a constitutional behaviour, in practice they are disregarded* and therefore *the decisions of the Constitutional Court are disregarded,* which, according to Art. 147 par. (4) of the Constitution, *they are binding erga omnes.*

Moreover, the Court found that, *in practice, in addition to ignoring the Constitutional Court decisions, a disregard of decisions of the administrative litigation courts is shown, which has resulted in the creation, for legal persons which won their case on payment of fees set by the text of the law criticized, of an additional burden, requiring they refer to the court again in order to compel public institutions and their agents to not invoice said fee*[3].

The Court held that the ***diversion of legal regulations from their legitimate purpose, through their systematic interpretation and misapplication*** *by courts or by other subjects called upon to apply the law,* ***may determine the unconstitutionality of that regulation*** (italics ours) . In this case, the Court held that *it had jurisdiction to eliminate the unconstitutional flaws created thereby,* ***essential in such situations being to***

[1] Constitutional Court Decision no. 159/2004 published in the Official Gazette of Romania, Part I, no. 426 of May 12, 2004; Constitutional Court Decision no. 297/2004 published in the Official Gazette of Romania, Part I, no. 756 of August 19, 2004; Constitutional Court Decision no. 331/2006 published in the Official Gazette of Romania, Part I, no. 412 of May 12, 2006.

[2] Decision no. 2.102/2009 of the High Court of Cassation and Justice - Department of Administrative and Fiscal Litigation published in the Official Gazette of Romania, Part I, no. 691 of October 14, 2009 and: Decisions no. 442/2011, no. 2/2011, no. 317/2011 and no. 607/2011 of the High Court of Cassation and Justice - Department of Administrative and Fiscal Litigation.

[3] Civil Sentence no. 9682/2012 of Oradea Court, remained irrevocable by Decision no. 88/R/COM/2013 of Bihor Court – 2nd Civil, Administrative Litigation and Fiscal Department.

ensure that rights and freedoms are complied with and the supremacy of the Constitution (italics ours).

pt. 4. The Court further stated that, according to Art. 2 par. (1) pt. 40 of *Law no. 500/2002 on public finances*[1], the fee represents "*the amount paid by a natural or legal person, usually for services rendered to it by a trader, a public institution or a public service*".

The Court considered that the *interpretation and application of the law criticized in the sense that the obligation to pay fees for public radio and television broadcasting services rests on all legal persons, whether or not there is a consideration of the public institution in question, come to disregard the provisions of* Art. 56 par. (2) of the Constitution, according to which "***The legal taxation system must ensure a fair distribution of the tax burden***."

Finally, the Court found that, prior to that decision, it held, bearing value of principle that *both recitals and its decisions are generally mandatory and are imposed to all subjects of law with the same force*[2], following to find by said decision the *unconstitutionality of any other interpretation the administrative or judicial practice could assign to legal texts subject to criticism as opposed to that established by previous decisions of the Constitutional Court* [3] (pt. 6 of Court Decision no. 448/2013).

The Court therefore found the ***constitutionality of Art. 40 par. (3) of Law no. 41/1994 insofar as the fee for public radio and television broadcasting services applies only to legal entities that benefit from these services***.

5.2. **Comment**

We reckon that the view of M.C. **Court** which referred the objection of unconstitutionality to Court, according to which - fees for public television service, established by Art. 40 of Law no. 41/1994 *ensure the accomplishment of broadcasting public service autonomy, due to establishment from own revenues of financial resources the financial autonomy ensures* - cannot be accepted, since **autonomy does not mean**

[1] Published in the Official Gazette of Romania, Part I, no. 597 of August 13, 2002.
[2] Decision of the Constitutional Court Plenum no. 1/1995 regarding the compulsoriness of its decisions given in the constitutional review, published in the Official Gazette of Romania, Part I, no. 16 of January 26, 1995, and:
Decision no. 1415/2009, published in the Official Gazette of Romania, Part I, Decision no. 414/2010 published in the Official Gazette of Romania, Part I, no. 291 of May 4, 2010.
[3] In the same vein: Constitutional Court Decision no. 536/2011 published in the Official Gazette of Romania, Part I, no. 482 of July 7, 2011.

independence from law and providing public services must circumscribe the limits and conditions stipulated by law.

The fact that an autonomous authority requires financial resources for setting up from own revenues ensuring its financial autonomy does not justify the imposition of a fee established by the legislator as a consideration of public service without providing that service.

However, Art. 56 par. (2) of the Constitution states that "***the legal taxation system must ensure a fair distribution of the tax burden***," and the doctrinal and jurisprudential marks on the matter are consistently in the same sense, given that "*public administration only pursues to meet general needs of the community, profitability being outside its scope*"[1].

The **Court** ruled correctly that we are dealing, in this case, with a "*diversion of legal regulations from their legitimate purpose, through their systematic interpretation and misapplication*," considering that in such situations it is essential to ensure that the ***rights and freedoms of people and the supremacy of the Constitution are observed***.

Finally, the Constitutional Court decision analysed reveals, as the Court itself stated in recitals exposed, a "*disregard*" of its settled case law and of the decisions of the administrative litigation courts.

Moreover, in our opinion, this situation could be described as an "***abuse of power***" in relation to Art. 2 par. (1) n) of the Administrative Litigation Law no. 554/2004, as amended and supplemented, which enshrines the meaning of that term: "*abuse of power – exerting the right of assessment by public authorities in violation of competence limits prescribed by law or in violation of rights and freedoms of citizens*".

5.3. **Constitutional Court Decision no. 486/2014**

On December 20, 2013 prior to the publication of Decision no. 448 of October 29, 2013 in the Official Gazette of Romania, Part I, on January 7, 2014, the Constitutional Court has been referred to again, this time by the C.N. Court, with the objection of unconstitutionality of Art. 40 par. (3) of Law no. 41/1994 objection raised by S.C. "D.S." – S.R.L. (pt. 17 of Court Decision no. 486/2014).

In the recitals, the Court stated that: (...) *although the Court will deliver a dismissing solution of the objection as becoming inadmissible, those enacted by Decision no. 448 of October 29, 2013 are to find application at the time of its publication in the Official Gazette of Romania, Part I, and in the pending case under which the objection of unconstitutionality was raised, since through that decision the method of*

[1] Corneliu Manda, Cezar C. Manda, *Dreptul colectivităților locale*, Third edition revised and enlarged, Lumina Lex, Bucharest, 2007, p. 427.

text constitutional interpretation which is the subject of the objection[1] *was finally determined and made generally compulsory* (pt. 18 of the Court's decision no. 486/2014).

6. Conclusions

Considering the normative and doctrinal landmarks presented in the paper, we propose the following **definition of <public service>**:

Public service designates the activity of the central and local public authorities and institutions and of legal entities of private law which, by law, have obtained the status of a public utility or are authorized to provide a public service, acting in a public power regime to meet the needs of legitimate public interest, generally circumscribed to fundamental rights, freedoms and duties of citizens, in terms of continuity, efficiency, effectiveness and equality of beneficiaries.

To the regulation, practice and case law of public services provision in general and provision of autonomous public service of national interest in the area of audiovisual/radio broadcasting and television, in particular, following the analysis made in the content of this paper, we may reckon that both legislative power in the process of adopting incident normative instruments and the executive power, in its public service providing component, to prevent any unconstitutional conduct, abuse or excess of power, must put above other possible reasons, the observance of *rights and freedoms of citizens*, to make the intervention of constitutional and administrative litigation courts no longer necessary, repeatedly, in the correct interpretation and application of the same provisions regarding the provision of public services.

This is necessary, given that the Constitutional Court itself found that, in practice, in addition to "*disregard*" of its decisions, there is also "*disregard of decisions of the administrative litigation court*" so that legal entities which have won cases on the subject are essentially "*forced to again refer the court in order to compel public institutions related*" to comply with the legislation on the matter and with the decisions applicable *erga omnes* passed by the Court, not only in terms of the device, but also regarding the recitals stated within them.[2]

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[1] Pt. 18 of the Court's Decision no. 486/2014 (...) *in cases where the objection of unconstitutionality was raised to above date, (...) if the matter has been resolved, decisions of the Constitutional Court are grounds for review under Art. 322 pt. 10 of the Civil Procedure Code of 1865 or Art. 509 par. (1) pt. 11 of the new Civil Procedure Code, as appropriate.*

[2] Constitutional Court Decision no. 448/2013 (pt. 3) - discussed in the paper.

Selective References

1. Courses, treatises, monographs

Antonie Iorgovan, *Tratat de drept administrativ*, Vol. II, All Beck, Bucharest, 2005.

Corneliu Manda, Cezar C. Manda, *Dreptul colectivităţilor locale*, Third edition revised and enlarged, Lumina Lex, Bucharest, 2007.

Ion Imbrescu, *Managementul serviciilor publice comunitare*, Second edition revised and enlarged, Lumina Lex, Bucharest, 2012.

Iordan Nicola, *Managementul serviciilor publice locale,* Second Edition, C.H. Beck, Bucharest, 2010.

Iordan Nicola, *Managementul serviciilor publice locale,* All Beck, Bucharest, 2003.

Verginia Vedinaş, *Drept Administrativ, Curs universitar*, 7th edition, revised and updated, Universul Juridic, Bucharest, 2015.

2. Legislation

Constitution of Romania, republished in the Official Gazette of Romania, Part I, no. 767 of October 31, 2003.

Administrative Litigation Law no. 554/2004 published in the Official Gazette of Romania, Part I, no. 1154 of December 7, 2004.

Law no. 500/2002 on public finances, published in the Official Gazette of Romania, Part I, no. 597 of August 13, 2002.

Audiovisual Law no. 504/2002 published in the Official Gazette of Romania, Part I, no. 534 of July 22, 2002.

Law no. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Corporation and the Romanian Television, published in the Official Gazette of Romania, Part I, no. 153 of June 18, 1994, republished in the Official Gazette of Romania, Part I, no. 636 of December 27, 1999.

3. Case law

Constitutional Court Decision no. 486 of September 25, 2014 concerning the objection of unconstitutionality of Art. 40 par. (3) of Law no. 41/1994, published in the Official Gazette of Romania, Part I, no. 794 of October 31, 2014.

Constitutional Court Decision no. 1 of January, 10 2014 on the objection of unconstitutionality of the Law establishing measures of decentralization of powers exercised by some ministries and specialized bodies of the central public administration and the reform measures on public administration, published in the Official Gazette Part I, no. 123 of February 19, 2014.

Constitutional Court Decision no. 448 of October 29, 2013 concerning the objection of unconstitutionality of art. 40 par. (3) of Law no.

41/1994, published in the Official Gazette of Romania, Part I, no. 5 of January 7, 2014.

Decision of the Constitutional Court Plenum no. 1/1995 regarding the compulsoriness of its decisions given in the constitutional review, published in the Official Gazette of Romania, Part I, no. 16 of January 26, 1995.