INSOLVENCY OF ADMINISTRATIVE-TERRITORIAL UNITS

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Abstract

This paper aims to carry out an analysis of the regulation of insolvency procedures applicable to the administrative-territorial units. It addresses, in terms of content, three major issues. The first is related to the current constitutional status regarding the manner of administrative-territorial organization of Romania, and the organization and functioning of public administration in the administrative-territorial units.

The second issue concerns the analysis of the legal regulations regarding the local public administration, and the last deals with, by reference to the constitutional and legal rules, the constitutionality of the regulation, by emergency ordinance of the procedure of insolvency of administrative-territorial units.

The conclusion is that such a procedure established by the Government Emergency Ordinance N°.46/2013 is contrary to the letter and spirit of the fundamental law.

Keywords: administrative-territorial organization, administrative-territorial units, communes, cities, counties; insolvency, deliberative bodies; executive bodies; principles of organization and functioning of local public administration;

I. General considerations

The administrative-territorial organization of the Romanian state is governed by article 3, paragraph (3)[1] of the Constitution of Romania, revised and republished[2], methods by which we identify the **communes** and the **cities as**

[1] Article 3 paragraph (3) of the Constitution has the following content "the territory is organized, administratively, into communes, cities and counties. Under the law, certain cities are declared towns/municipalities".

[2] Constitution of Romania was revised by the Law N°.429/2003 published in the Official Gazette N°.669 of 22 September 2003 and republished in the Official Gazette N°. 767 din 31 octombrie 2003

administrative units of intermediate level, mentioning that, under the law, certain cities may be declared towns/ municipalities.

The notion of "*organization of the territory*" represents the delimitation of the territory in administrative-territorial units[1] and it is evoked, in the doctrine of other countries, as "*territorial cutting*"[2]

The constitutional text refers, through the expression "under the law" to a law meant to regulate the administrative organization of the territory of the Romanian state, currently represented by the Law N°.2/1968[3]. Through its manner of administrative and territorial organization, Romania falls in the category of countries having a single intermediate level represented by **counties, between the basic level** (communes, cities) and the **central level**[4].

The manner of organization of the public administration in the administrative-territorial units and the principles governing it can be found regulated in the Chapter V of the Title III of the Constitution, called "*local public administration*".

According to the article 120 of the fundamental law, at the basis of the organization and functioning of the public administration in the administrative-territorial units are **four principles**, respectively **decentralization**, **local autonomy, devolution of public services** and **the right of national minorities** to use their native language in written and oral, in the relationships with local public authorities and with the de-concentrated public services of ministries and of other bodies of the specialized central public administration.

These principles of constitutional rank are supplemented by the principles of **equality of the authorities of the local public administration**, **legality** and **consultation of citizens in solving issues of local interests**, as provided for by the Law N°.215/2001 of the local public administration, as subsequently amended and supplemented, republished[5].

[1] Dana Apostol Tofan – "*European Administrative Institutions*" - CH. Beck Publishing House, Bucharest, 2006, p.129

[2] Corneliu Liviu Popescu – *Local Autonomy and European Integration*, CH. Beck Publishing House, Bucharest, 1999

[3] Law N°. 2/1968 on the administrative organization of the territory, republished in the Official Bulletin N°.54 of 27 July 1981

[4] Extensively on these issues, Verginia Vedinas in I. Muraru, E.S. Tanasescu – "*Constitution of Romania – comments on articles*", CH Beck Publishing House, Bucharest, 2008, pages 34-37

[5] Republishing was made in the Official Gazette N°.123 of 20.02.2007

In our opinion, the following provisions of the organic[1] Law N°.215/2001 are relevant for the addressed topic, respectively the insolvency of the administrative-territorial units:

The rule sanctioned by the article 2, paragraph (2) according to which "*the application of the principles of local autonomy cannot affect Romania's character of national, unitary and indivisible state*".

From this rule it results, on the one hand, the conclusion according to which the **administrative-territorial units are components of the Romanian state** and, on the other hand, the local autonomy, **together will all other principles, cannot affect Romania's character of national, unitary and indivisible state**.

2. Granting by the legislator[2] of **legal personality of public law**, with all the attributes deriving from it, respectively **full legal capacity**; **own patrimony; the quality of subject of fiscal law, holder of a tax registration code** and **of the accounts** opened with the territorial units of the Treasury and of the banks.

3. Recognition[3] for the administrative-territorial units of the right to own financial resources, managed and used by the authorities of the local public administration, according to the duties incumbent on them, under the law. Granting of such financial resources is not random; it must be correlated with the duties that the law provides to the authorities of the local public administration. In the content of the article 9 we find the wording, objectionable in our opinion, "competences and duties" given that **the duties are the content of the competence** or **the competence is a sum of duties**.

According to the opinions of the academic literature[4], in order to exist an authentic autonomy, guaranteed or "*self-government*", as we find in other states, it is necessary "*the existence of an economic and financial basis managed by the local governments"*. Hence, the conclusion we adhere to, that *"if a local community lacks the resources required to implement the decisions of its governing*

[1] According to the article 73, paragraph (3) letter a) among the matters reserved to the organic laws it is also the "organization of the local public administration, and the regime of the local autonomy"

[2] Through the article 21, paragraph (1) of the Law N°.215/2001, having the following content: "*The authorities of the public administration through which it is realized the local autonomy in communes and cities are the local councils, communal and municipal, as deliberative authorities, and town halls, as executive authorities. Local councils and town halls are elected under the conditions provided for by the law on local elections*"

[3] Through the article 9 of the Law N°.215/2001, having the following content "*within the national economic policy, the communes, the cities and the counties are entitled to own resources, that the authorities of the local public administration manage according to the duties incumbent on them under the law. Financial resources of local public authorities must be pro rata with the competences and responsibilities provided for by law*"

[4] Madalina Voican – Framework principles of the local public administration, Universul Juridic Publishing House, Bucharest, 2008, page 63

bodies, we cannot speak of an authentic local autonomy, because the existence of material resources at local level limits the right to decide what is in favor of the community[1]"

II. Legal framework of insolvency in case of administrative-territorial units

The situation created by the economic and financial problems faced by the countries of the world, in general, and by Romania in particular, have determined the Government of Romania to **territorial**, in the global context of the financial crisis. In the reasoning of the urgency of this normative act, required by the article 115 (paragraph 4) of the Constitution, it is invoked on the one hand the significant volume of assets recorded by the administrative units, subdivisions, towards the suppliers of goods, services and works", which attracts the "necessity to unblock the activities of such suppliers, and on the other hand the provisions of the Stand By Agreement between Romania and the International Monetary Fund on reducing arrears of administrative-territorial units".

Beyond these reasons, the conclusion it results is that it was necessary the regulation of this procedure, irrespective of the fact that we share or not, in principle, its existence. As a professor of public law it is difficult to understand and accept that an administrative-territorial unit, part of the Romanian State, can enter into insolvency. From here to accept that slowly the State itself can enter into insolvency, or more exactly, enter partially into insolvency, is no more than a step. That it is difficult for us to make, in the context in which the fundamental law of Romania provides, on the one hand, the local, administrative and financial autonomy, under the law, decentralization and de-concentration of public services, and on the other hand that[2] "*the authorities of the public administration through which it is achieved the local autonomy in communes and cities are the local councils and the mayors elected under the law.*"

Or, according to the Article 14 of the Government Emergency Ordinance N°.46/2013, the subjects of law applying the insolvency procedure are the **main credit release authority, namely the mayor, or the president of the county council, the deliberative authorities, including local or county councils, Courts, syndic judge, creditors' meeting, creditors' committee and the official receiver**.

Putting face to face the article 14 of the Government Emergency Ordinance N°.46/2013 and the articles 120, 121 of the Constitution, we can ascertain that through the Emergency Ordinance other public authorities are added, or subjects of

[1] In the article 121 of the Constitution, op.cit. page 63

[2] The article 121 of the Constitution has the following content: "(1) "the authorities of the public administration through which it is achieved the local autonomy in communes and cities are the local councils and the mayors elected under the law. (2) Local Councils and Mayors operate, under the law, as autonomous administrative authorities and they solve public issues in communes and cities. (3) the authorities provided for by the paragraph (1) can be also established in the administrative-territorial subdivisions of municipalities.

law in general, which are competent in managing the interests of an administrative-territorial unit, ultimately in exercising the local autonomy.

Therefore, in our opinion, the procedure of entry into insolvency, as it is regulated by the Government Emergency Ordinance N°.46/2013, lacks of constitutional legitimacy.

This normative act regulates the entire procedure of performing the insolvency as subjects of law involved, with their correlative rights and duties, that we do not intend to analyze in this paper.

However, we want to draw attention to the consequences that the recognition of this procedure could have. Thus a commune in the county of Tulcea has entered into a contract for the exploration and exploitation of an area of land which had the destination of lawn/grassland, for the purpose of identifying any existing marble deposits and operation thereof, in case in which they exist. Due to certain legal issues related to the legal regime of the land which turned out to belong to the public domain of the State, and not to the public domain of the commune, the contract could not be performed. In such case, the statutory undertaker, a private company, sued the concession provider, respectively the administrative-territorial unit, and the Courts, by final and irrevocable judgments, have granted to the company **damages** consisting in the **budget of the commune for a period of 11 years**. In such a situation, it is obvious that it was started the insolvency procedure of such commune. Note that in order to pronounce this damage in an amount so large, it was taken into account an expertise in which it was also included the **equivalent value of the works of art which would have been made from the marble which had to be exploited if ascertained that it existed**.

CONCLUSIONS

We ascertain that a legal situation, settled in a manner that could make the object of a doctrinal analysis, has triggered the entry into insolvency of that administrative-territorial unit.

In our opinion, the current regulation of the insolvency procedure is unlawful in relation to the provisions of the fundamental law and to the constitutional legal status.

It is unlawful even in relation to the alleged necessity which determined the adoption of the emergency ordinance as it results from the reasoning.
"*the necessity to unlock the activities of the suppliers of goods, services and works which have to recover from the authorities of the local public authorities amounts representing arrears.*"

First, the arrears are of the **administrative-territorial units**.

Second, we do not believe that the "unblocking of the activity of such supplier" justifies the blocking of the activity of a local community and of the authorities of the autonomous public administration.

And last but not least, the institutions themselves, the financial crisis, and insolvency of the administrative-territorial units are important, complex issues, and it was necessary their regulation thorough a law, and not through an emergency ordinance.

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