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THE LEGAL STATUS OF RESEARCH INSTITUTES

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Abstract. *The present study aims to address and hopefully clarify some aspects regarding organization, function and most of all the legal status of research institutes. In practice, the problem of determining this legal status has been put in question: the serious consequences regarding their functioning, their control over public authorities, which are those public authorities, which are their control limits, the status of the staff, etc. This unclarity is also determined by the fact that the legislation is not sufficiently overlying and clear in regards to the legal solutions enshrined therein. The Administrative Code comes with a few provisions that can be seen as a starting point in our opinion and not as a solution in its entirety of the problem. It creates a constant confusion between the public institution status, which some research institutes have and other statuses, such as entities governed by public law, body governed by public law or legal entities of public utility.*

Keywords: research institutes, public institutions, bodies governed by public law, bodies of public utility, legal entity (moral personality) governed by public law, legal entity governed by private law, public establishments, establishments of public utility.

1. General considerations on research activity and the legal subjects that perform it

The term *scientific research*, which is also associated with the quality of being *national technological*, resulting in *national scientific and technological research* is **at its origins constitutional**, being enshrined by Article 135, paragraph (2), c) of the Constitution of Romania [1] revised [2] and republished [3]. By paragraph (1) of the Article 135 is proclaimed *the market character of the economy, based on free initiative and competitiveness* and by paragraph (2) a few **obligations of the State** are enshrined, which are in correlation with the specificity of the market economy, determined by the previous text, by which ***the stimulation of national scientific and technological research***, *of art and the protection of copyrights* must be insured, according to c)[2].

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[2] The text in its entirety is the following: *"The State must provide: freedom of trade and commerce, the protection of loyal competition, creating a favourable environment for capitalizing*

As an observation, which we find necessary and for which we take responsibility, in terms of "the risk" of being bantered as "nationalists" by other people, although for us the vocation of pure and enlightened nationalism is a title of nobility, which define our intellectual and moral self – we draw attention to the fact that in the constitutional text, that has **six** paragraphs, the word **national** is being used **three** times by association with ***national*** *interests*, ***national*** *scientific and technological research* and again – but this time the singular form – ***national*** *interest*. We believe that by using this attribute, the constituent legislator wished to transmit the pre-emption of national interest over all the other interests, when the State carries out all its obligations imposed by the fundamental law. In the explanation of this text, contained in the second edition of the valuable comment of the fundamental law, I discovered to my surprise, that **no reference is made to the term *national interest*** and that in fact **the phrase *national interest* is being replaced with the phrase *public interest*** [4].

We firmly state, that **the terms *public interest* and *national interest* are not synonyms. Any national interest is of course a public interest as well, but not vice versa. The *public interest* can also be targeted at a set community, not just the nation as a whole.**

Resuming the matter that makes the object of the present study, we notice that the term **scientific research and technological development** represents **a constitutional notion**, which reveals the important meaning that the constituent legislator has granted it since the original form of the Constitution, and this will attract as a consequence – as expressed by some authors before – the fact that it will be kept alive in our legal reality as long as there is a Constitution and its disappearance would be possible only by the partial or total abrogation of the Constitution.

The spirit of Constitution has been reflected since the first article of the Government Ordinance No. 57/2002 regarding scientific and technological research [5], whereby *"Scientific research, experimental development and innovation are the main knowledge-creating activities and the generators of economic and social progress encouraged and supported by the State, according to the **republished Constitution of Romania** and to the present ordinance."* We note from the interpretation of this text the following conclusions:

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all the factors of production; b) protecting the national interests in the economic, financial and foreign exchange business; c) stimulating national scientific and technological research, art and the protection of copyright; d) exploiting natural resources in compliance with the national interest; e) restoring and preserving the environment, as well as maintaining the ecological balance; f) creating the necessary conditions for improving the quality of life; g) implementing regional development policies in compliance with the objectives of the European Union."

- scientific research, experimental development and innovation are viewed as **the main creative activities**;

- **the finality of scientific research**, together with the experimental development and innovation consist in **creating knowledge** and **generating economic and social progress;**

- the three categories of activities – scientific research, experimental development and innovation – are **encouraged and supported by the State**, as provided in the Constitution and just as we have previously pointed out.

The legislator does not limit himself to stipulating only that they are **encouraged by the State**, but he also qualifies them by Art. 3(1), as being **a national priority**, specifying that **the research-development activity has a key role in the sustainable economic development strategy**. We draw attention to the fact that the law does not refer distinctly **to the research activity** and to **the development activity** respectively. **The way in which this term is built – from the linguistic point of view – the hyphen linking the words *research* and *development* leads to the conclusion, that they form a linguistic unity,** whose meanings, we believe, are based on the idea that **the purpose and use of research is development**. **Research cannot be conceived as an end in itself, as something sterile, it must bring progress to society and its members**.

Although the legislator enshrines them with such a purpose, finality and qualification, reality does not always reflect the spirit of the law. I stated this fact because, on the one hand, the State does not always show the **encouragement and support** it must show, according to the Constitution and other laws, and on the other hand, the normative framework itself is not sufficiently coherent and correlated in order to create the basis for developing this **national research-development system.** This takes its starting point in the legal status of the legal subjects that perform research-development activities, which are often expressed through imprecise and confusing terms, with all the consequences ensuing in the reports with the state authorities, in terms of their rights and obligations arising from these reports and in terms of the controlling methods exerted over them. We will exemplify by referring to one of the "research-development institutes", which have been created by law for more than 12 years and which continue to remain "non-working", namely the **Institute of Public Law and Administrative Sciences of Romania,** created by Law No. 246/2007 [6] with the amendments and additions brought to it by Law No. 155/2011 [7]. Although this institute has been established as early as 2007, as a result of the proceedings of our late Professor Antonie Iorgovan, who passed away that year, being the "swan song" of the illustrious professor, it hasn`t become functional not even to the present day, meaning that the state should provide **the support** it is otherwise obliged to give,

according to the law, namely the **logical resources** necessary for the activity it should perform, in its capacity as the *"carrier of the scientific tradition of the Insitute of Administrative Sciences founded in 1925, a tradition that has been resumed and promoted by the Association of the Institute of Administrative Sciences «Paul Negulescu»"*, as stipulated in the first article, paragraph (2) of the establishment law. It is hard to understand how an institute that carries such a "weight" in tradition and necessity hasn`t been able to begin exerting its role. It is just as hard to interpret the lack of interest of the public authorities, which have the competence to make it functional. Even more so as our public lives, the process of lawmaking, Romania's membership to the European Union raise so many problems and in solving these problems the Institute created by an **organic law** could be held responsible. In the same directory approach we also place the *odyssey* of the National Institute of Administration, created in 2001 [8], disbanded in 2009 [9], reestablished in 2016 [10] and disbanded again in 2019 [11]. This Institute had the mission *to elaborate strategies and to assure the forming and improving of professional training specialized in administration, for public functionaries and the staff employed with an individual employment agreement, for those appointed or elected in public demnitary functions, but also for other categories of people interested*. Given that at the basis of its creation was the need for an institution specialized in training the staff that performs its activities in the field of public administration, having as a reference point the model of the famous E.N.A. from France (Ecole Nationale d'Adminsitration) [12], we ask ourselves what are the reasons behind such solutions? Is the Romanian Administration so advanced that we don`t need specialized fields and specialists anymore?

We will try to "solve" some of these aspects in the following pages, confidant that our efforts will create a stream of reflection on this problem, which is extremely important for **our socio-economic evolution** as a State in the future.

2. The scope of legal entities by which research-development activities are performed

The research-development activity is performed by an assembly of legal subjects that together form **the national research-development system**, as named by the legislator. In the composition of this **national system** are included **state subjects**, as well as **legal entities governed by public law** and **subjects governed by private law that have been authorized, according to the law, to perform a research-development activity**. First of all, we find the painted picture of **the national research-development system** in **Article 7 of the G.O. No. 57/2002**, which reveals that *"In the national research-development system are comprised the following **units and institutions governed by public law**: a) national research institutes; b) research-development institutes, centres or stations subordinated to*

*the Academy of Romanian Scientists or to other branch academies; c) other research-development institutes, centres or stations organized as **public institutions** or **governed by public law**, including research-development institutes with the legal personality of accredited state institutions of higher education; d) accredited state institutions of higher education, institutes or research-development affiliated structures, without legal personality, created in compliance with the Academic Book; e) international research-development centres, with or without legal personality, established on the basis of international agreements; f) research-development institutes or centres organized within the national societies, the national companies or the self-managed public companies, with or without legal personality; g) other **public institutions** or **governed by public law**, that also have research-development as an object activity or legally constituted affiliated structures, with or without legal personality.*

At first rendition of this article we find that it includes **those components of the national research-development system** in their capacity as **public institutions and also institutions governed by public law**. We draw attention to the fact that **the legislator makes a distinction between the two concepts**, but we will come back to this issue later on.

A second text defining the scope of the components of the national research-development system is represented by Article 8 of G.O. No. 57/2002, according to which we also have included here the following **categories of units and institutions governed by private law**: *a) acknowledged research-development institutes or centres of public utility and without patrimonial purpose; b) accredited private higher education institutions, research-development institutes or affiliated structures, with or without legal personality; c) other research-development institutes, centres or stations organized as legal entities governed by private law without patrimonial purpose; other non-governmental organizations without patrimonial purpose, that also have research-development as an object activity or legally constituted affiliated structures.*

By comparing these two texts we can see that in **Article 7 were encompassed the public components of the national research-development system, whereas in Article 8 were encompassed the components governed by private law of the national research-development system**. In other words, **the public form for realizing research-development is regulated in Article 7 and the private form for its realization is regulated in Article 8**.

Regarding one of the two forms, public or private, we can also find it in other texts of the G.O. No. 57/2002, such as Article 10, paragraph (1) addressing *"the research-development activity from the public or private domain."*

Another element, which is made out of the legal provisions previously cited, is the **research-development units**, *which can have legal personality* or *which don`t have legal personality*. Art. 8 b) of G.O. No. 57/2002 makes explicit reference to *research-development institutes or affiliated structures,* ***with*** *or* ***without legal personality***.

Recognizing the possibility that research-development units can be with or without legal personality is a statement we also find in Article 7 of G.O. No. 57, as well as in other of its' provisions.

In regards to the **public form**, we observe that the legislator – in a confusing and wordy enumeration – tries to equally encompass in Art.7 all the categories of subjects governed by public law, which can perform research-development activity. It is a well-known fact that any enumeration comes with a risk of making a few omissions and often creates confusion. This is why it is necessary to analize the previously mentioned legal provisions by reference to other ones encompassed in the framework-regulation and other normative acts and to the constants expressed in the specialized doctrine. The legislator uses for outlining the categories of entities – through which the reseach-development activity is realized – notions, such as *units* and *institutions governed by public law*. Therefore, we have two categories listed, on the one hand the *units* and on the other hand the *institutions governed by public law* linked together with the conjunction "and", which makes us come to the conclusion – in the literary interpretation of the text – that **the legislator had in mind two distinct categories of entities**.

We also notice that in Article 7 of G.O. No. 57/2002 the method of generic determination is combined with the identification of the type, the category of legal entity – as an editorial technique – whose object of activity encompasses research-development. Therefore, we find concepts invoking **the name, the type**, such as **research-development institutes, centres, stations, educational institutions** or **linguistic formulations by which their legal status is evoked** and also **their sort,** such as **public institutions** or **institutions governed by public law.** Art. 7, both c) and g), make reference to ***public institutions*** or ***institutions governed by public law***. The conjunction *or* that binds the two terms together makes us reach the conclusion that **the legislator himself makes the difference between them, acknowledging them as two legal categories**, namely the ***public institutions*** on the one hand and the ***institutions governed by public law*** on the other hand. Such a conclusion is supported by other provisions as well, such as **Art. 11, paragraph (1)** of G.O. No. 57/2002, which stipulates that *"The research-development units organized as* ***national or public institutes*** *are hereby established or reorganized by government decision, unless otherwise provided by law.****"*** The corroboration of the legal texts invoked shows at least two conclusions. The first one, which I have already expressed, is that of **the inexistence of mutual meaning between the**

concepts *public institution* and *institution governed by public law*. The second one, deriving from Art.7 in corroboration with Art.11, is that **research-development units can be organized as *national institutes* or as *public institutions***, from which we draw the conclusion that **national institutes are not necessarily public institutions**.

When the legislator wished some research-development units to be public institutions in their legal status, he explicitly stated this in the content of the the normative act on organization and functioning. For example, Art.1 (1) from the G.O. No. 15/1998 [13] stipulates that *"The European Institute of Romania shall be established as a **public institution** with legal personality under the authority of the Romanian Government and managed by the Department of European Affairs."*

In other cases, the legislator did not qualify as being *public institutions* certain entities created by law or other categories of legal acts. For example, Art.1 of the Law No. 246/2007 stipulates that *"The Institute of Public Law and Administrative Sciences of Romania, hereby referred to as Institute, shall be established as a national scientific forum, **with legal personality, governed by public law and under parliamentary control**."* We can see that the legislator qualifies the Institute of Public Law and Administrative Sciences of Romania as an **institute governed by public law**.

The notion of public institution is currently defined in legislation, but the legal provisions, disjointed in different normative acts are not likely to enshrine a homogeneous character to this concept. The Administrative Code adopted by G.E.O. No. 57/2019 [14], distinctively defines the notions **public authority** and **public institution**. By **public authority** we understand – according to Art.5 k) of the Administrative Code – *any state organ or territorial administrative unit acting under public power to satisfy a public interest.* The **public institution,** according to w) of the same text, is a *functional structure operating under public power and/or provides services to the public and is financed by budget revenues and/or from own revenues, in accordance with the public finance law.*

As far as we are concerned, we believe that the notions **public authority and public institution are not synonyms**. Better yet, there are cases when the meanings of these two concepts are different, depending on the field we report to. For example, we find the notion of **public authority/authorities** in several legal texts of the fundamental law. The first of these, of significance, is Title III of the fundamental law, which actually bears this name and the contents of which conclude that **it is used to evoke the authorities through which the prerogatives of the three classic state powers are achieved, regulated by the Fundamental Law.** It is also used in Art.16 (1), whereby is proclaimed *equality*

of all before the law and public authorities, without privileges and discrimination. It is unquestionable that the term is used in a broader sense in the second direction, which includes all public authorities, understood as legal entities, which provide certain public services through their activity, by which they satisfy general interests.

Art. 52 of the Constitution regulated *the right of the injured party to a **public authority***, the latter concept being defined in Art.2 b) of the Law No. 554/2004 of Admistrative Procedure [15], as *"any state body or territorial administrative units acting under public power; they are treated as public authorities within the meaning of this act, legal entities governed by private law, which according to the law have obtained the status of public utility or are authorized to provide a public service, under public power."*

In regards to the notion of **public institution,**[1] this notion is defined differently in legislation [16], as well as in legal doctrine. In legislation we remember the definition given by the Law No. 500/2002 on public finances [17] in Art. 2 pt. 30, according to which public institutions are represented by *the generic name, including Parliament, Presidential Administration, ministries, other specialized public administration bodies, other public authorities, autonomous public institutions, as well as institutions under their subordination, no matter how they are financed.* By the Law No. 273/2006 on local public finances [18], **the local public institution** is defined in Art. 2 pt. 39, as *"generic name, including townships, cities, municipalities, the sectors of Bucharest Municipality, counties, Bucharest City, the public institutions and services under their subordination, with legal personality, no matter how they are financed."*

Again it is quite obvious that the definition of public finances by the two laws is a broad one, that encompasses the fundamental public authorities of the State, starting with the country's sole legislator, namely the Parliament, but which paradoxically does not mention in its content the important public authorities, such as the courts of law or the Government, which most of all use public money. The term *other public authorities* is generically mentioned to which it is added *autonomous public institutions*, an unacknowledged term by the Constitution, which uses *autonomous public authorities.* Speaking about the laws of public finances, it was desired for them to encompass all the legal subjects that have an activity aimed at providing public services or with a public finality, in order to establish the premises for exercising control over them.

In an analysis of the defining elements of public institutions, to which we adhere, these are assessed as follows [19]:

[1] Etymologically, the word derives from *institutio, institutionis,* which means establishment, foundation, creation, and often good skill rule.

a) they are established, reorganized or terminated by law or according to the law by the Parliament, the Government, the specialized central administration or the local self-government bodies;

b) they are established to satisfy the general interests of society determined as "specialized";

c) the financial means necessary for the operation of the business are usually provided by the state or local budget. Those which achieve extra-budgetary revenues get only the difference from the state or local budget;

d) the activity is carried out either free of charge or against payment;

e) they are assigned with specialized staff according to the work performed, such as doctors, artists, etc, plus auxiliary staff necessary for the functioning of the institution (administrative office, security, human resources);

f) some of them issue/adopt administrative acts;

g) they perform an ongoing and rythmic activity, based on a program accessible to those interested;

h) as a general rule, the activity is performed at the request of any interested parties, such as compulsory education.

Other authors have also joined in this conception, with some nuances. For example, one of them adds that *public institutions, unlike public authorities, cannot use the right to command* due to the fact that such right stems from the exercise of state sovereignty [20].

As far as we are concerned, we adhere for the most part to the previous statement, which we believe can be summed up in the following definition: the **public institution** represents **the legal entity that creates, reorganizes or is terminated by law or according to the law, which provides it the status of public institution, to meet the social needs of public interest by using public funds alone or in addition.** We consider that **the notion of public institution is not synonymous with the notion of institution governed by public law**.

In order to evoke categories of legal subjects, which perform research-development activity, the legislator uses three concepts: **units**, **public institutions** and **institutions governed by public law**. If he had given them an identical meaning, it would have been one and the same concept, as being stipulated otherwise by the framework law, in the field of legislative technique No. 24/2000,[1] according to which *in normative language the same notion must be expressed in the same terms.* **The institution governed by public law** represents

[1] Republished in the Official Monitor No. 260/21 April 2010.

a legal subject, which creates, reorganizes or terminates by law or according to the law in order to satisfy a specific public interest.

Therefore, we believe that **the essence of the qualification of a legal entity as a public institution is the method of financing, which leads to the conclusion that a legal entity, whose financial resources are self-created and managed as such cannot be given such a legal qualification.**

On the other hand, the contemporary western doctrine is not very rigorous either in respect to the used terminology, using concepts, such as *organism, institution, public service, public establishment, public enterprise, organ etc*. [21].

During the interwar period the concepts *public establishments* and *establishments of public utility* have been used and are still found today in the contemporary western doctrine, but the constituent legislator as well as the primal legislator show reluctance in using them due to the derogatory connotation of the word *establishment*. With respect to the first concept *"the public establishment is a public service and therefore it is part of the organization of public administration (state, county, township), it exercises certain rights of public power; it is created by the initiative of the state, the county or the township, with public means"* [22]. On the other hand, *"the establishments of public utility are created from private initiative, with private funds, with a non-profit making structure in order to ensure the general interest by private individuals"* [16].

Another term used in that period was *moral entity governed by public law* or *political-territorial entity*, namely the state, the county, the township and the public establishments intended, through their activities, to serve the public interest [22].

Given the occasion to demonstrate, we can see that in the previous period, as in the present one, in our country as well as in other states there has been a variety of terminology and it continues to persist, with negative consequences for the functioning of some legal entities, which provide a public-service activity, namely the research institutes.

Conclusions

In this web of definitions, it is obvious, first of all, that the acception given by the laws on public finances cannot constitute a benchmark for determining the legal nature of national research institutes and even less so, a basis in their qualification as public institutions. Secondly, we acknowledge that the terms used evoke legal realities. As previously shown, Art.37 of the Law No. 24/2000 regulates that notions must be expressed in the same terms. The use of different terms by the legislator leads to the conclusion that he had considered different legal realities.

From this perspective, a third conclusion is that **the notion of public institution and the notion of institution governed by public law are not identical.** We acknowledge the fact that between these two concepts **the element that binds them** is that **they both perform an activity of general public interest**. From this perspective, **research institutes are institutions governed by public law, as qualified by the legislator and not public institutions**. Therefore, as already shown, when the legislator wished to give such an institute the qualification of public institution he specified it in the contents of the founding act. This tendency to mix concepts arises not only from ignorance and non-compliance with the principles of law, but also from the intention to create a state of confusion, that would benefit the State, which we believe must be abandoned. Unfortunately, an imbalance is still being maintained between the prerogatives of the State and those of some legal subjects to which only a public mission is conferred, without financial and logistical support in general. There is a concern for fulfilling some **obligations,** real or alleged, but the aspects regarding **rights** are being ignored.

We believe that in the future a new regulation will be enforced, that will put research in its rightful place, in general and research institutes, in particular. The research domain is too important, but we can observe that it is "a national priority" only at declarative level. It must also become so at legislative and institutional level. Maintaining a regulation adopted in 2002 by the delegated legislator – a simple ordinance of the Government – we consider it to be unsatisfactory.

R E F E R E N C E S

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