VALENCES AND INADVERTENCES IN THE CONSTITUTIONAL AND LEGAL REGULATION OF ACTS SUBJECT TO THE ADMINISTRATIVE TUTELAGE CONTROL OF THE PREFECT

DOI:10.47743/rdc-2022-2-0006

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Abstract

This paper aims to discuss the variables of exerting the administrative tutelage control by the Prefect, a prerogative related to the sphere of administrative litigation, as regulated by Law no. 554/2004.

It showcases the current constitutional and legal status of the Prefect in Romania, analysing the provisions of article 123 of said law, from the section concerning local public administration. It makes note of the provisions of Emergency Ordinance no. 57/2019 on the Administrative Code referring to local public authorities and it underlines some inadvertences of the regulation.

It invokes the decisions of the High Court of Cassation and Justice – the Panel for solving certain legal questions, which brought to an end the case law controversies concerning the types of acts which are subject to the administrative tutelage control.

The author argues that the dispute – yet unsolved, concerning the measure in which such regulations can add to the constitutional text, by means of organic law, another legal subject – i.e., the president of the county council, whose acts are thus subject to the legality control of the Prefect – requires legislative intervention.

It concludes by expressing the opinion according to which, until the Constitutional shall be amended, and the infra-constitutional provisions as well, the acts of the county council president cannot be left out of the objective litigation set into motion by the prefect.

Keywords: *Constitution, Administrative Code, Prefect, administrative tutelage, president of the county council*

1. Brief introductory remarks

Having become a constant of political discourse, the reform of public administration has not avoided the issue of administrative tutelage, which was – and still is – widely

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examined within literature, but also capturing the interest of the public administration and legal practitioners alike.

The tutelage control was inspired by an institution of private law – specifically family law, but with a decisively different scope. In private law, the institution of tutelage control signifies the protection of the personal interests, while the administrative tutelage known to public law – having originated in French administrative law – aims to protect the general interest of society, in respect of the local interests invoked in and legislated by local autonomy and administrative decentralization.

The centralization-decentralization duality would not exist in the absence of administrative tutelage. In Romanian literature, it has been rightly said that "despite the fact that tutelage seems to be a depreciative term, owing to its civil law meaning, its legal significance allows a necessary distance between central and local authorities. It also allows the decentralized authorities to escape the hierarchy of central bodies, but also be absorbed in the hierarchy of legal norms"[1].

Specific to the annulment objective litigation, the administrative tutelage control is a form of control exercised by the central authorities or their representatives on the bodies of decentralized, deconcentrated and autonomous public administration.

According to administrative law experts, the administrative tutelage control "is undergoing expansion, as the various components of the administrative system organize themselves and shall operate autonomously"[2].

2. The legislative establishment of the prefect's administrative tutelage

The 1991 Constitution of Romania, revised in 2003, repositions the institution of the Prefect through new organizational and functional principles, inspired by the Romanian traditions in this field[3], but does not expressly enshrine the institution of administrative tutelage.

Professor Antonie Iorgovan, who led the constitution-making process, stated that "proposing this notion (administrative tutelage) in the theses of the constitution or the draft constitution would have been a mistake of political tact; this notion would have shocked, whilst searching for the appropriate words to express the idea of 'autonomy', not 'tutelage'; after decades of authoritarian regimes, a formula for real local autonomy was needed"[4]. Regarding this statement, one dares to say that the

[1] V. Stratan, Tutela în dreptul administrativ francez, Analele Universităţii de Vest din Timişoara, seria Drept, p. 42, available at https://drept.uvt.ro/administrare/files/1481045738-asist.-univ.-dr.-violeta-stratan.pdf (22 January 2023).

[2] E. Bălan, Instituţii administrative, C.H. Beck, Bucharest, 2008, p. 183.

[3] The office of prefect was enshrined within Romanian public administration through the Law of 2 April 1864 on the establishment of county councils, as well as the Communal Law of 1 April 1864, both inspired by the French model.

[4] A. Iorgovan, Tratat de drept administrativ, vol. I, All Beck, Bucharest, 2001, pp. 454-455.

reason why the constituent assembly did not explicitly enshrine tutelage control relies exclusively on the extant political circumstances.

Article 123 of the amended Constitution, which, with its marginal name "Prefect", is the basis for the institutional structure of this key institution of Romanian public administration, provides that:

"(1) The Government appoints a prefect in each county and in the Municipality of Bucharest.

(2) The Prefect is the representative of the Government at local level and leads the decentralized public services of the ministries and other central public administration bodies in the administrative-territorial units.

(3) The duties of the prefect are established by organic law.

(4) Between prefects, on the one hand, local councils and mayors, as well as county councils and their presidents, on the other hand, there are no subordination relationships.

(5) The prefect can challenge, before the administrative litigation court, an act of the county council, of the local council or of the mayor, if he considers the act illegal. The challenged act is suspended by law".

This constitutional norm can be found under Title III – "Public Authorities", Chapter V – "Public Administration", Section 2 – "Local Public Administration".

In the specialized doctrine, it was emphasized that "the insertion of art. 123 within the section devoted to local public administration should not determine the conclusion that the prefect represents an authority of the local public administration, this positioning being justified by the role of administrative guardianship exercised by the prefect"[5].

Without denying the justice of the above-mentioned argumentation, we believe – as we have argued before[6] – that a more inspired option was the positioning of the prefect within a distinct section "Central public administration in the territory", a solution advanced by the legislative proposal regarding the revision of the Romanian Constitution[7].

The public authorities through which local autonomy is achieved – in communes and cities, are local councils – deliberative authorities and mayors – executive authorities, which function as autonomous administrative authorities and solve public affairs in communes and cities. In this sense, art. 121 of the Constitution, taken over and developed in arts. 105-106 of the Administrative Code, are available.

[5] V. Vedinaş, in I. Muraru, E.S. Tănăsescu (eds), Constituţia României. Comentariu pe articole, C.H. Beck, 2008, p. 1206.

[6] A.J. Niță, Prefectul demnitar public versus prefectul înalt funcționar public – o dispută cu evoluție sinuoasă, Revista Universul Juridic no. 3/2021, p. 47.

[7] Decision (CCR) no. 80 of 2014 on the legislative proposal to amend the Constitution of Romania, published in the Official Gazette of Romania, Part I, no. 246 of 7 April 2014.

At county level, this mission falls to the county councils, deliberative bodies, which - as stipulated by art. 122 of the Constitution, have the role of coordinating the activity of the local communal and city councils, in order to provide public services of county interest. We note that the constituent legislator – in the content of art. 122, does not refer to the executive authority at the county level, about which in the Constitution we find a reference in the content of art. 123 paragraph 4. According to the latter constitutional text, between the prefect – representative of the Government in the territory, on the one hand, and local councils and mayors, county councils and their presidents, on the other hand, there are no subordination relationships.

The delegated legislator, adopting Emergency Ordinance no. 57/2019 on the Administrative Code[8], inspired by the provisions of arts. 121-122 of the Constitution, establishes that: "The local public administration authorities are: local councils, mayors and county councils" (art. 3). The text of art. 3 appears s to be somewhat in contradiction with two other norms of the Code, especially with the one establishing that the executive authorities at local level are "mayors of communes, cities, municipalities and territorial administrative subdivisions of municipalities, the general mayor of the municipality of Bucharest and the president of the county council" (art. 5 letter n) and the one that enshrines the public administration authorities in the counties, which expressly establishes that the president of the county council leads the county council (art. 107 para. 2).

Returning to the constitutional texts, it should be specified that paragraph 5 of art. 123 must be related to the provisions of art. 126 para. (6) of the Constitution, which provides that the courts, through administrative litigation, exercise judicial control of the administrative acts of the public authorities, with the exception of those concerning the relations with the Parliament, as well as the acts of it is a command with a military character.

In accordance with art. 123 para. (5) of the Constitution, the Administrative Litigation Law no. 554/2004, with the subsequent amendments and additions[9], establishes – in art. 3 para. (1), that the prefect can attack directly before the administrative litigation court "the documents issued by local public administration authorities", if they consider them illegal; the action is formulated within the term provided by art. 11 para. (1), which begins to run from the moment the act is communicated to the prefect and under the conditions provided by Law no. 554/2004. Since the adoption of the normative act, art. 3 para. (1) has not undergone any changes, so that it still refers, generically, to "acts issued by local public administration authorities".

Referring to the resolution of the exception of unconstitutionality of the provisions of art. 3 para. (1) of Law no. 554/2004, the Constitutional Court – by Decision no. 482/ 2011 – found that the criticized provisions were a reiteration of the constitutional provisions (art. 123 para. 5) and consequently, the criticism of their unconstitutionality

[8] Published in the Official Gazette of Romania, Part I, no. 555 of 5 July 2019.
[9] Published in the Official Gazette of Romania, Part I, no. 1154 of 7 December 2004.

is clearly unfounded[10]. At the same time, the Court held that the support of the author of the exception of unconstitutionality according to which the criticized legal text is unconstitutional to the extent that it is interpreted that the prefect's administrative tutelage could be exercised over acts other than the administrative acts issued by the local public administration authorities, such as be, for example, documents issued within the framework of civil, contractual or employment legal relations, cannot be received, because it represents a matter of interpretation and application of the law, which falls within the jurisdiction of ordinary courts, and not of the court of constitution litigation[11].

Also, at infraconstitutional level the provisions of art. 123 para. (5) find their concretization also in the Administrative Code. Art. 255, bearing the marginal name "Attributions regarding the verification of legality", provides that "(1) The prefect verifies the legality of the administrative acts of the county council, the local council or the mayor. (2) The prefect can challenge the acts of the authorities provided for in para. (1) that he considers illegal, before the competent court, under the conditions of the administrative litigation law".

3. Doctrinal orientations and case law controversies on the acts which are subject to the prefect's administrative tutelage control

In the context of the current constitutional regulation, in doctrine, but especially in judicial practice, the complex issue of the administrative guardianship exercised by the prefect has raised numerous controversies related to: a) the type of documents issued by local public administration authorities; b) the extent to which a new subject of law can be added by organic law - respectively the president of the county council, whose acts are subject to the control of legality exercised by the prefect.

Regarding the typology of acts issued by local public administration authorities, during the period of incidence of normative acts prior to the adoption of the Administrative Code, respectively Law no. 215/2001 on local public administration and Law no. 340/2004 on the prefect and the institution of the prefect , the High Court of Cassation and Justice[12] referred to – pursuant to art. 519 of the Civil Code, in order to issue a preliminary ruling, ruled that:

"In the interpretation of the provisions of art. 3 of the Administrative Litigation Law no. 554/2004, with subsequent amendments and additions, combined with the provisions of art. 63 para. (5) lit. e) and art. 115 para. (2) from the Local Public

[10] Decision (CCR) no. 482 of 2011, published in the Official Gazette of Romania, Part I, no. 473 of 6 July 2011.

[11] The same reasoning was subsequently used in Decision (CCR) no. 1369 of 18 October 2011, published in the Official Gazette of Romania, Part I, no. 14 of 9 January 2012.

[12] It referred to a procedural mechanism of assuring unitary judicial practice.

Administration Law no. 215/2001, republished, with subsequent amendments and additions, and of art. 19 para. (1) lit. a) and letter e) from Law no. 340/2004 regarding the prefect and the institution of the prefect, republished, with subsequent amendments and additions, and of art. 123 para. (5) of the Constitution, the prefect is granted the right to challenge before the administrative litigation court the administrative documents issued by the local public administration authorities, within the meaning of the provisions of art. 2 para. (1) letter c) from the Administrative Litigation Law no. 554/2004, with subsequent amendments and additions" (Decision no. 11/2015)[13].

"The provisions of art. 3 (...) of the Administrative Litigation Law no. 554/2004, with subsequent amendments and additions, is interpreted in the sense that the prefect cannot challenge before the administrative litigation courts the refusal [assimilated to an administrative act, according to the provisions of art. 2 para. (2) from Law no. 554/2004] to the local council to put on the agenda of the meeting and to take note of the legal termination of the mandate of the local councillor before the deadline, refusal expressed at the prefect's request addressed according to the attributions regulated by the provisions of art. 19 para. (1) letters a) and e) from Law no. 340/2004 regarding the prefect and the institution of the prefect, republished, with subsequent amendments and additions..." (Decision no. 26 of October 10, 2016)[14].

The solutions pronounced by the ÎCCJ (the Panel for resolving some legal issues[15]) are in agreement with the doctrinal approach, they capitalize on the decisions of the constitutional court and come to put an end to the non-unitary judicial practice in the matter.

With reference to the extent to which a new subject of law can be added to the constitutional text, by organic law – specifically the president of the county council, whose acts should be subject to the control of legality exercised by the prefect, the dispute is not new, but neither resolved.

Under the rule of the legislation prior to the entry into force of Emergency Ordinance no. 57/2019 regarding the Administrative Code, the specialized doctrine opined in the sense of admitting the control of legality exercised by the prefect on the acts of the chairman of the county council[16]. An argument in support of this guideline[17] was derived from the wording of art. 30 para. 3 of Law no. 90/2001 on the organization and functioning of the Government of Romania and the ministries: "The prefect leads the decentralized public services of the ministries and those other central bodies from

[13] Published in the Official Gazette of Romania, Part I, no. 501 of 8 July 2015.

[14] Published in the Official Gazette of Romania, Part I, no. 996 of 12 December 2016.

[15] Decisions (CCR) no. 137 of 1994 (published in the Official Gazette of Romania, Part I, no. 23 of 2 February 1995), no. 314 of 2005 (published in the Official Gazette of Romania, Part I, no. 694 of 2 August 2005), and no. 1353 of 2008 (published in the Official Gazette of Romania, Part I, no. 884 of 29 December 2008).

[16] D. Apostol-Tofan, Drept administrativ, vol. I, 4th edition, C.H. Beck, Bucharest, 2018, p. 399.

[17] Published in the Official Gazette of Romania, Part I, no. 164 of 2 April 2001.

the territorial administrative units and exercises control over the legality of the administrative acts of the local council, the mayor , of the county council and of the president of the county council".

Although in the Administrative Code we do not find a similar provision, in our opinion, from the economy of its provisions, the doctrinal orientation stated above must be preserved.

A dispute with a winding evolution, the election of the president of the county council was settled by the Administrative Code. The direct election of the president of the county council, on the basis of one-person voting, gives him the same legitimacy as the authorities of the local public administration, enunciated by art. 3 of the Administrative Code.

Moreover, Professor Verginia Vedinaș, whose "sovereign territory" is the codification of administrative law and its science[18], appreciates that the law approving the Administrative Code will require an amendment of art. 3, so as to include the presidents of the county councils[19].

Contrary to the opinion according to which the position of the president of the county council is not enshrined in the Constitution, not being mentioned in art. 122 ("The County Council")[20], we unconditionally agree with professor Iorgovan, who stated that the president of the county council "has become a legal institution of constitutional rank", in 2003, through the amendments that Law no. 429/2003 on revision of the Constitution brought to Chapter V of Title III[21]. Indeed, the statement is supported by the provisions of art. 123 para. 4, which was introduced by the amending constituent power.

Moreover, the possibility of the prefect to exercise legality control over the acts of the county council president was among the criticisms of unconstitutionality – formulated on the basis of art. 146 letter a) of the Constitution, before the promulgation of the Law on the completion of some provisions of the Local Public Administration Law no. 215/2001, as well as some provisions of Law no. 340/2004 regarding the prefect and the institution of the prefect, as well as the Law on the Administrative Code. In both cases, the constitutional court – through the decisions issued[22], noting the defects of unconstitutionality of an extrinsic nature which – in the

[18] M. Voicu, Laudatio Prof. dr. Verginia Vedinaș – Doctor Honoris Causa of the Ovidius University of Constanța, 13 October 2022.

[19] For details, see V. Vedinaș, Codul administrativ adnotat, 3rd edition, Universul Juridic, Bucharest, 2021, p. 27.

[20] Notification of unconstitutionality on the Law on the Administrative Code of Romania, the President of Romania, available at: https://www.presidency.ro/ro/media/comunicate-de-presa/sesizare-de-neconstitutionalitate-asupra-legii-privind-codul-administrativ-al-romaniei (22 January 2023).

[21] A. Iorgovan, in M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, Constituția României. Comentarii și explicații, p. 260, apud V. Vedinaș, Codul administrativ adnotat, 3rd edition, Universul Juridic, Bucharest, 2021, p. 216.

[22] Decisions (CCR) no. 747 of 4 November 2015 (published in the Official Gazette of Romania, Part I, no. 922 of 11 December 2015) and no. 681 (published in the Official Gazette of Romania, Part I, no. 190 of 11 March 2019).

end, attract the unconstitutionality of the law as a whole - did not proceed to examine the measure in which, in the context of the current constitutional regulation, it is possible to add by law a new subject of law whose acts are subject to the control of legality exercised by the prefect.

Returning to the current way of electing the president of the county council, we recall that the constitutional court – by Decision no. 305/2008[23], ruled that "the election by unanimous vote of the president of the county council is the result of the popular vote and not of some political transactions of the competitors electoral", regulation to support the constitutional provisions on local autonomy.

In this context, we appreciate that the reasons justifying the possibility of the prefect to challenge the acts of the mayor in an administrative dispute now apply mutatis mutandis to the acts of the president of the county council, who – indeed, at the date of the adoption, respectively of the revision of the Constitution, was elected indirectly, by members of the county council.

An additional argument in support of the control of legality exercised by the prefect and over the acts of the president of the county council is derived from the administrative practice and the jurisprudence of the administrative litigation courts, which recognizes the president of the county council as a procedural authority in disputes based on the provisions of Law no. 554/2004.

In the mentioned aspect, the opinion expressed in the specialized literature is relevant: "If the president of the county council is not a public authority, this automatically means that he does not have passive procedural status in administrative litigation, the injured party having to go either against the county council (considering that the disposition of the president is, in reality, the act of the county council), either against the county"[24].

4. Instead of conclusion

Until a future legislative intervention in this regard, which is required not only at the level of the Administrative Code, but also at the constitutional level, we firmly support that the acts of the president of the county council cannot be left out of the contentious objective achieved by the prefect unless we accept the abandonment of the principle of legality, enshrined by art. 1 para. (5) of the Constitution.

[23] Decision (CCR) no. 305 of 2008, published in the Official Gazette of Romania, Part I, no. 213 of 20 March 2008.

[24] O. Podaru, M.M. Pop, Provocările limbajului în Codul administrativ, Studia UBB Iurisprudentia no. 1 (2020), available at https://law.ubbcluj.ro/ojs/index.php/iurisprudentia/article/download/58/85?inline=1 (22 January 2023).