RESEARCH ARTICLE:

Some aspects regarding the role and powers of the prefect

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ABSTRACT

The research article entitled "*Some aspects regarding the role and powers of the prefect*" is analysing a traditional institution in Romania, naming here the prefect.

The prefect is the representative of the Government, at local level, and leads the decentralized public services, of the ministries and the other central public administration bodies of the administrative-territorial units.

The important role that the prefect plays in public administration architecture in Romania and present concerns are debated in the article.

KEYWORDS: *public administration, the Prefect, status and developments Advocate, role and powers, status and features, guarantees.*

1.Introduction

The prefect institution is old and traditional in the public administration in Romania, found in Muntenia and Moldavia even before the Union of the Principalities (1859). It is true that those who represented it wore a different name, namely "stewards of the counties" or "administrative stewards". They were appointed by the Lord, for 3 years, between two candidates proposed by the administrative counsel and had administrative and police powers.

After achieving the Union the Principalities, essential changes have occurred in the administration of the Romanian countries, imposed by the consolidation of the state and the modernization of the administrative structures.

The prefect institution itself appears both common law as well as in the law for the establishment of county councils in 1864. The prefect was appointed by the Government[1], as its representative in addition to the county council and was the executor of his decisions. If either the county council or its Standing Committee, adopted decisions beyond their duties or were against the interests of the county, the prefect was obliged, within 10 days to appeal to the Government, notifying the board or committee. The appeal was suspensive of execution for 30 days from the date of notification, and if the government did not decide within this range, the judgment became enforceable.

2.Current status and developments

Currently, according to art. 123 of the Romanian Constitution[2], the Government shall appoint a Prefect in each county and in Bucharest.

The prefect is the representative of the Government, at local level, and leads the decentralized public services, of the ministries and the other central public administration bodies of the administrative-territorial units.

The powers of the Prefect shall be established by organic law, currently Law. 340/2004 regarding the prefect and the prefect institution[3].

Among the Prefects, on the one hand, the local councils and mayors as well as county councils and their presidents, on the other hand, there is no subordination relationships, but relationships of administrative tutelage.

Within the administrative tutelage control, the prefect may challenge, in the administrative court, an act of the County Council, of the Local Council, or the mayor, if he deems it unlawful. The contested law is suspended.

The administrative tutelage problem arises only between those administrative authorities between which do not exist hierarchical subordination relations, between a subject within the scope of the executive power and one beyond it. As such, there can be no administrative guardianship between central bodies of the executive power - government, ministries, on the one hand - and those who exercise this power at county or local level, as the prefect and the decentralized public services of the ministries, on the other hand. The ratios between these are hierarchical subordination relations, and the control of the central bodies, on those operating at the local level is a hierarchical control, with all the features and effects that characterize it.

The guardianship control is governed by the national law. Thus, according to art. 3 of Law no. 554/2004 on administrative contentious[4], administrative

[1]Preda, M. 2002. *Public administration authorities*, Bucharest, Romania: Ed. Lumina Lex.
[2]Republished in the Official journal of Romania, Part I, no. 767 dated 31 October 2003.
[3]Republished in the Official Journal no. 225 of 24 March 2008.
[4]Published in the Official Journal of Romania, Part I, no. 1154 of December 7, 2004.

tutelage is exercised either by the prefect or by the National Agency of Civil Servants on illegal acts of local authorities, provided that the Agency shall exercise this form of administrative control only on those acts which violate the law on civil service.

The fact that art. 3 paragraph. 2 of Law no. 554/2004 limits the control exercised by the National Agency of Civil Servants at the central and local acts adopted or issued in breach of civil service legislation has led to the opinion[5] of qualifying this form of administrative control rather as a specialized control than a the guardianship control as defined by law.

The control guardianship is exercised, as mentioned, by the State trough the Government or its representative - the prefect - over authorities[6] or the local public administration authorities' acts.

Thus, according to art. 19 para. 1 letter e of Law. 340/2004, it, as a representative of the Government, exercises control on the legality of the administrative acts of the local and county public administration authorities.

The prefect only controls the legality of administrative acts, not their opportunity.

In conducting the review, the prefect may cancel the document, which deems illegal, but must notify the administrative court, the only one that has jurisdiction to rule on the illegality of the act.

In a state of law it is inconceivable that an unlawful act of a local authority cannot be challenged before the court by the prefect, as representative of the Government, given the fundamental mission of the Government to ensure the enforcement of laws[7].

An example is the action brought by a prefect to court for the annulment of two decisions of a local council, one based on the change from office of the deputy mayor and the second to elect a new deputy mayor, both taken in the same session. The reasons given by were prefect meant that choosing the new deputy mayor cannot be done in the same meeting in which was replaced the former deputy mayor and in the content of the decisions, it has not been mentioned the appeal, the court that it can be appealed at and the term of the appeal.

In other words, according to art. 15 para. 1 of Law no. 393/2004 on the Statute of local elected officials[8], the quality of mayor and respectively chairman of the county council, shall cease on the date of taking the oath by the new mayor, respectively, of the County Council president.

According to Art. 15 para. 2 of the Law, the quality of mayor and respectively of chairman of the county council ceases, by law before the normal expiry term of the mandate in the following cases:

- Resignation;
- Incompatibility;
- Relocation to another administrative unit;
- Conviction by final court decision to a custodial sentence;
- Placing under judicial interdiction;
- Loss of voting rights;
- Loss by resignation of membership of political parties or national minority organization on whose list he was chosen;
- Death.

According to art. 16 of Law no. 393/2004, in all cases of early termination

[5] Trailescu, A. 2002. *Administrative Law*, Bucharest, Romania: All Beck, p. 333.

[6] Regarding the control of local public administration authorities we can exemplify the establishment of the termination of the mandate of the mayor by the prefect (see art. 69 of Law no. 215/2001 on local public administration, republished in the Official Journal of Romania, Part I, no. 123 of 20 February 2007).

[7] Constitutional Court Decision no. 137 of 7 December 1994, published in the Official Journal of Romania, Part I, no. 23 of 2 February 1995.

[8] Published in the Official Journal of Romania, Part I, no. 912 of October 7, 2004.

of the mandate of the mayor, the prefect issues an order stating the termination of the mandate of the mayor.

The order will be based on a report signed by the secretary of the municipality or city, and as well as the acts from which resulting the legal grounds for termination of the mandate.

An example in this regard, is to issue an order on legal termination, before the normal expiry term of the usual term of office of a mayor in Arges county based on an evaluation report of the National Integrity Agency on the incompatibility in which was that locally elected. The incompatibility was the fact that the locally elected held simultaneously, the mayor office as well as a natural person trader capacity thus identifying elements, in terms of an incompatibility in violation of Art. 87 para. 1 letter g of Law. 161/2003 on certain measures to ensure transparency in exercising public dignities, public functions and in the business environment, preventing and sanctioning corruption[9].

It was therefore noted that the mayor and vice-mayor and deputy mayor of Bucharest, president and vice president of the county council is incompatible with the individual trader.

Another situation is related to the mayors definitively convicted for criminal offenses, and to whom was applied also the additional punishment of prohibition of certain rights.

In such a case reports drawn up by the Secretaries of localities were accompanied by the communications of the delegate judges with the enforcement of judgments rendered in criminal cases concerning the respective mayors.

The communications of judges the delegates noted that in addition to the main prison sentence, suspended under supervision, it has been applied to the mayors also the additional punishment of prohibition of certain rights.

In this context, at the base of the decision to issue orders terminating the mandates of mayors it was taken into account the additional punishment of prohibition of rights provided by art. 66 point b and k from the new Criminal Code[10].

According to these provisions, the additional punishment imposed, consist of a prohibition of exercising for a period of 5 years, of the right to occupy a position involving the exercise of state authority, respectively, of the right to occupy a leading position within a legal public person.

In applying the above legal provisions, art. 68 paragraph 1 letter b) the new Criminal Code provides that enforcement of the sentence prohibiting the exercise of rights starts from a final decision of conviction ordering suspension of sentence under supervision.

Another example relates to a mayor who was sentenced to imprisonment, but was suspended under supervision the execution of the punishment.

As for the prison, according to the doctrine on the matter, by its essence it is a custodial sentence, conditional suspension of it as a means of enforcement serves as a judicial measure, the observance of which depends on the extinction of the execution.

It was also shown that the suspension of enforcement or suspension of sentence under supervision are measures of individualization of punishment and do not alter or remove the legal status of the person sentenced to a custodial sentence.

However, regarding the application of art. 16 of Law no. 393/2004 under art. 15 paragraph 2 e, some courts have held as being legal the order of the prefect for termination of the mandate as mayor because of his conviction to a custodial sentence with suspension of it, while other

[9]Published in the Official Journal of Romania, Part I, no. 279 of 21 April 2003.

[10]Law no. 286 of 17 July 2009 on the Criminal Code published in the Official Journal, Part I, no. 510 24 July 2009.

courts have held as unlawful such an order .

Thus, by the civil sentence no. 215 / 12.02.2008, issued by Arad Court rejected the administrative action exerted by a mayor to cancel the Order no. 335 / 29.05.2006 issued by the prefect of C county, holding that the order was legally issued.

The first instance court, held that by the criminal sentence no. 2054 / 23.12.2005 pronounced by the Court Gherla in criminal case no. 970/2005, the applicant was sentenced to 6 months imprisonment for the crime of embezzlement with suspension, during the probation period of 2 years and 6 months.

The sentence became final by decision no. 284 / 16.05.2006, issued by the Court of Appeal Cluj.

Considering the provisions of art. 15 (2) e of Law. 393/2004, the secretary of the village, under art. 16 (2) thereof, notified the Prefect of C county, which under art. 16 (1) of the Law issued Order no. 335 / 29.05.2006 of finding the termination of the mandate as mayor of the applicant, before the normal expiry term of the mandate.

The first instance court, dismissing the action noted that on the one hand, termination of the mandate by law for failure to perform the duties established by art. 15 (2) e, on the other hand that art. 15 (2) e does not distinguish on the execution of the sentence or not.

The only condition to be fulfilled that requires in order to operate termination of the mayor quality before term provided by art. 15 (2) e is, as the court noted, the existence of a final sentence to a custodial sentence.

Therefore, the trial court, held that the Order of the Prefect of C county was issued under the conditions required by art. 15 and 16 of Law no. 393/2004, that the applicant is in the situation provided by art. 15 (2) e of the law and therefore its action is not unfounded.

Civil Sentence no. 215 / 12.02.2008 issued by Arad Court became final by Civil Decision no. 621 / 28.05.2008 issued by the Court of Appeal Timisoara, the Department of Administrative and Fiscal by rejecting the applicant's appeal against the civil sentence mentioned.

The Court held regarding the applicability of art. 15 paragraph 2 letter e) of Law no. 393/2004, that the text of the law requires the consequence of termination of the mandate as mayor in case of conviction by final court decision to a custodial sentence.

Thus, the Court held that the legal text quoted does not distinguish between custodial sentences for which it was ordered conditional suspension of sentence execution and sentences whose execution has not been suspended.

From this point of view, the Court held that such a distinction does not have a legal basis in relation to art. 15 paragraph 2 letter e) of Law no. 393/2004 and that the disposition of conditional suspension of a sentence execution of 6 months imprisonment, established by final criminal judgment, does not affect the applicability in the case of the applicant of art. 15 para. 2 letter e) of Law no. 393/2004.

It is worth mentioning, on the other hand, that in a similar legal situation, Olt Court considered that it cannot find termination of the mandate as mayor because there has been no objective impediment in exercising.

At the same time, the Constitutional Court found that the challenged statutory provisions, namely art. 15 paragraph 2 letter e) of Law no. 393/2004 does not introduce any discrimination between persons to whom they are addressed, namely mayor categories who have been convicted by a final court decision to a custodial sentence. Therefore the measure of the termination of the mandate as mayor,

as provided in the text of the law is applied equally without privileges and without discrimination, to all who are assuming the legal norm[11].

4.Conclusions

Since the prefect has an important role in the public administration of a county we consider that some improvements could be made regarding the prefect institution legislation.

One solution would be returning to the role played by the prefect of administrative police in the period before communism, by moving in the prefect's competences, policies of public order in the county and therefore under its subordination passing, the gendarmerie and the police of the county and rural areas. It should also be strengthened its role in the emergency management to shift emergency inspectorates in his direct leadership, not coordination.

This model of organization is current, being met in France and Italy. In the 80s, France has concluded that it must decentralize the massive power of decision, to the detriment of excessive centralism which the French state had reached, so that local authorities can decide for themselves about the issues that concern them in particular.

In this new context, it was needed to rethink the role of the prefect institution in the gearing of the public administration. Thus the prefect took the lead in local activities related to ensuring public order and safety, as well as coordinate measures in emergency situations. But here, at this time the prefect may not be effective as long as it does not actually lead the mentioned public service.

Another aspect, concerns, the management prerogative by the prefect of the decentralized public services. We consider that although in theory the prefect leads these services, in reality they are not subordinated to him. He can only give advisory opinions on the appointment or dismissal of their leaders or their draft budget.

A change, which we consider uninspired, in the law regarding the prefect

[11]Constitutional Court Decision no. 1192 of 13 December 2007 on the objection of unconstitutionality of art. 15 para. 2 letter e of Law. 393/2004 on the Statute of local elected officials, published in Official Journal no. 39 of 17 January 2008.

institution was the one relating to the abolition of the position of secretary general of the prefecture. It was replaced with the deputy prefect. Regulation has not kept the terms of office of the deputy prefect of studies respectively a juridical or administrative profile which the secretary general of the prefecture had. Basically through this, the Secretary General was a guarantor of legality, especially since the prefect made a review of the legality of the administrative acts of the local public administration authorities.

Or, at this moment deputy prefects can have any kind of higher education, although they meet the powers that require legal or administrative training. Moreover, norms of legislative technique, make it compulsory for countersignature for legality purposes of the orders of the prefect. In these circumstances, we consider inappropriate, that an engineer, or an economist, for example, to countersign these orders.

We appreciate to be necessary to revert to the previous provision on the literature, so that the deputy prefect who performs tasks of control of legality and approval of orders issued by the prefect to have administrative or legal studies.

Therefore, an important role of the Prefect as a representative of government in the territory, is also to ensure that the local public administration authorities' work to be carried out in accordance with the law. As between the prefect and local government authorities there is no subordination relationships, it carries legal action, only for reasons of illegality of the contested administrative act.

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