

ISSUES RELATED TO THE EXERCISE OF THE LEGALITY CONTROL BY THE PREFECT IN THE DECISIONS OF THE CONSTITUTIONAL COURT

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ABSTRACT: *This article examines some aspects of the decisions made by the Constitutional Court in the matter of the legality control exercised by the prefect on the local government acts. The article analyzes the acts which form the subject of the legality control exercised by the prefect, and the question which arises is whether the Prefect may challenge the administrative contracts at the administrative court. The article also tackles the theme of the law suspension of the administrative acts as contested at the administrative court of prefect in the exercise of the legality control. Finally it highlights the necessity to correlate the regulations that determine the competence of the prefect in the field of legality control.*

KEYWORDS: *prefect, legality control, the Constitutional Court of Romania, administrative contentious, administrative act, administrative contract.*

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1. PRELIMINARY CONSIDERATIONS

Through the Constitution of 1991 the Constitutional Court was established in Romania for the first time in its history, with the role of guarantor of the Constitution supremacy. Subsequently, the Law no. 47/1992 was adopted, on the organization and functioning of the Constitutional Court.

Since its establishment, the Constitutional Court has contributed by its decisions at the reforming of the legal mentality for building a democratic society. Thus, the influence of the Constitutional Court decisions has led to the manifestations of "a process of constitutionalization of the law branches, which not only increase the prestige of the Constitution but also the respect for the ideas and sustainability of its provisions" (Vasilescu, 1999, p. 142).

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During its work, the Constitutional Court has received a few exceptions of unconstitutionality on the exercise of the legality control by the prefect over the local government acts. In what follows we consider some aspects of Constitutional Court decisions pronounced in order to solve these exceptions.

2. THE ACTS THAT ARE SUBJECT TO LEGALITY CONTROL EXERCISED BY THE PREFECT

In motivating the unconstitutionality exception its author has argued that the provisions of Article 3(1) of the Law no. 554/2004 as amended by art. I, section 4 of the Law no. 262/2007 amending and supplementing Law no. 554/2004 are contrary to Article 123 para. (5) of the revised Constitution "insofar as it interprets that the administrative tutelage exercised by the prefect might exert on acts other than administrative acts issued by local authorities, such as for example the acts issued in the civil, contractual or employment legal relations". The Article 3(1) of Law no. 554/2004 contains the following: "The prefect may challenge directly to the Administrative Court the acts issued by local authorities if deemed unlawful; action is filed within stipulated in art. 11 para. (1) which commences from the time at which the act was communicated to the prefect and under the conditions provided by this law. Action brought by the prefect is exempt from stamp duty". The Article 123 para. (5) of the revised Constitution stipulates that "the Prefect may challenge, in the administrative court, an act of the county council, the local council or the mayor, if he deems it unlawful. The contested act is suspended of law".

Through the Decision No. 482/2011 the Constitutional Court rejected this unconstitutionality exception holding that:

"With regard to the provisions of Article 3 (1) of Law no. 554/2004, the Court notes that, according to them, the Prefect may challenge directly to the administrative court the administrative acts issued by local authorities if they consider them illegal and in accordance with art. 123 para. (5) of the Constitution, "the Prefect may challenge, in the administrative court, an act of the county council, the local council or the mayor, if he deems it unlawful. The contested act is suspended of law". Therefore, the Court finds that the challenged provisions of Article 3(1) of Law no. 554/2004 are a reiteration of constitutional provisions and, therefore, criticism of their unconstitutionality is obviously unfounded.

The argument of the unconstitutionality exception, according to which the criticized text of the law is unconstitutional insofar as it interprets that the administrative tutelage exercised by the prefect might exert on other acts than administrative acts issued by local authorities, such as for example the acts issued in the civil, contractual or employment legal relations, cannot be accepted as it is a matter of interpretation and application of the law falling within the jurisdiction of the law court, and not of the constitutional court".

Similarly, the Constitutional Court ruled in Decision no. 1369/2011.

We emphasize that we do not share the view of the Constitutional Court, considering the text of article 3(1) of Law no. 554/2004 is not really a reiteration of art. 123 para. (5) of the Constitution.

Article 123 para. (5) of the Constitution refers to the prefect's opportunity to challenge before the administrative court "an act of the county council, the local council or the mayor, if he deems it unlawful" given therefore any type of administrative act (both

unilateral administrative acts and bilateral - administrative contracts). The acts of private management (civil law, commercial law, labor law, etc.) are not covered by art. 123 para. (5) of the Constitution because the constitutional provision refers to the opportunity of the prefect to challenge those acts at "the administrative court"; however, in disputes concerning acts of private management, ordinary courts are competent.

Unlike the text of the Constitution, article 3(1) of Law no. 554/2004 refers to the fact that the prefect may challenge before the administrative court "acts *issued* [o.u. C.-S. Săraru] by local government authorities if they are deemed unlawful", thus considering only unilateral administrative acts, given that the bilateral acts shall be *concluded*, not be *issued*. Also note that art. 123 para. (5) of the Constitution does not cover acts of the county council president, unlike Article 3(1) of Law no. 554/2004, which uses a general expression - "acts issued by local government authorities" – which include, of course, the acts issued by the county council president. Therefore, article 3(1) of Law no. 554/2004 violates the provisions of the art. 123 para. (5) of the Constitution, by reduction of the scope of the constitutional provisions.

It is interesting that the regulations of Article 3(1) of Law no. 554/2004 are not an isolated case; that positive law includes many provisions restricting the administrative tutelage control exercised by prefect only at the sphere of the unilateral administrative acts issued by local government authorities, despite constitutional provisions of art. 123 para. (5). Thus, the initial form of law no. 69/1991 on Local Government (published in the Official Gazette of Romania, Part I, no. 238 of 28 November 1991) in art. 101 shows that in the exercise of control on the legality of acts adopted and issued by local government authorities and county, *except the usual management*, the Prefect may challenge, in the administrative court, these acts if considered illegal. This provision has given rise to controversies in the doctrine of that time (Apostol-Tofan, 2006, p. 324-327). It was argued that the administrative contracts are covered by the concept of *routine management acts* and they cannot be attacked by the prefect in any form or, on the contrary, that the Prefect may challenge those acts only the common law court; it was also considered that the notion of *routine management acts* covered *acts of private management* (civil and commercial contracts) that could be challenged at a court of common law, as opposed to *acts of public management* (the administrative contracts) that were challenged at the administrative court (Dragoș, 2005, pp. 180-184; Săraru, 2009, pp. 7-50).

Law no. 215/2001 on local government and Law. 340/2004 on the institution of the prefect, in the initial version, have maintained the exemption of routine management acts from legality control by the prefect. Thus, art. 134 para. (1). b) of Law no. 215/2001 shows that the prefect, as representative of the Government, "exercises the control on the legality of the administrative acts adopted or issued by local authorities and county councils and the county council president, except those of the routine management acts". It should be noted that, since the adoption of Law no. 215/2001, the administrative doctrine suggested the amendment of art. 134 para. (1) b) for the purposes of abandoning the qualification of the acts which may be challenged as administrative, in order to allow control of contractual acts as well (Petrescu, 2002, p. 114).

During this time there has been a perceived need for legal clarifications of the doctrine. The notion of routine management acts was described in the doctrine as a vague concept which enables a totally subjective interpretation of the legal nature of those acts, hence the conclusion that it is necessary to adopt provisions which are clear, precise, in

order to eliminate any possibility of inconsistent interpretation of the meaning of that term (Brezoianu, 2004, p. 437).

Following this doctrinal criticism, one will note a change in the vision of the law. The phrase "acts of management" is rejected through the Law no. 554/2004 on administrative contentious and subsequent amendments to the Law no. 340/2004.

Currently, the Law no. 340/2004 regarding the prefect and institution of the prefect, republished in 2008, stipulates in art. 19 para. (1) letter e) that as representative of the Government, the prefect verifies the legality of the administrative acts of the county council, the local council or the mayor. Government Decision no. 460/2006 for the application of certain provisions of Law no. 340/2004 regarding the prefect and institution of the prefect "develops" the legal regulation showing that the specialized structures of the prefect institution, in the exercise the powers of verification of the administrative acts legality adopted or issued by local government authorities, can verify the legality of the contracts concluded into by such authority, assimilated by the law of the administrative acts, as a result of intimation by people who consider their rights or legitimate interest to have been prejudiced. (art. 6 pt. 2 letter c).

We note, however, that Art. 6 point 2. c) of Government Decision no. 460/2006 added to the law (thus violating art. 108 (1) of the Constitution which provides that "decisions are issued for the application of laws"), the assimilation of the administrative contracts with the administrative acts is not mentioned by the Law no. 340/2004, being mentioned only by the Law no. 554/2004. The assimilation is of exceptional nature, being interpreted strictly (*exceptio est strictissimae interpretationis*), the applicability domain being reduced to the regulations contained in Law no. 554/2004. Then verification of the legality of the administrative contract is purposeless because Law no. 554/2004, as we shall see, does not permit attacking the administrative contracts at the administrative court by the Prefect, if he considers that they contain unlawful provisions.

Law no. 554/2004, as amended, stipulates in art. Article 3(1) that "The prefect may challenge directly to the Administrative Court the acts issued by local authorities if deemed unlawful; action is filed within the term stipulated in art. 11 para. (1), which commences from the time when the act was communicated by the prefect and under the conditions provided by this law. Action brought by the prefect is exempt from stamp duty". Until settlement of the case, the contested act is suspended of law (*de jure*).

These provisions still leave room for interpretation as to whether or not the Prefect may challenge the administrative contracts concluded by the local authorities at the administrative court. Together with the initiator of Law no. 554/2004 we believe that from the wording of the text of art. Article 3. (1), which refers to "acts issued" it goes without saying that the legislator had in mind only the unilateral administrative acts (Iorgovan, 2006, p. 295). Here is how the legislator has missed another opportunity that could create the necessary control over the legality of administrative contracts concluded by local authorities.

Unlike the Romanian legislation in France, following the dictum "*pas de tutelle sans texte*" (Pacteau, 2010, p. 112) - no tutelage without text [of law] - the State representative in the territorial collectivities controls, under art. L3132-1 related to art. L3131-2 section 4 of the General Code of Local Authorities, the legality of administrative contracts concluded by local authorities in communes, departments and regions on loans, public procurement (except for contracts with a value below a threshold defined by Code) and

concession contracts for local public services and partnership contracts. The state representative may notify the Administrative Court if it considers that an administrative contract is contrary to law.

We believe that in Romania, *de lege ferenda* is also appropriate that the prefect could challenge the administrative contracts in the contentious administrative, if it is considered that they are infringing the legal provisions regarding the stages prior to the conclusion of the contract or the conclusion, modification, interpretation, execution and termination of the contract. Article 3(1) of Law no. 554/2004 should be completed by specifying that "the prefect may challenge directly to the administrative court, the acts issued *or concluded* by local authorities if they are deemed illegal". This change is necessary because, as we pointed out above, the current regulation Art. 3(1) of Law no. 554/2004 is unconstitutional, being contrary to Art. 123 (5) of the Constitution.

Further, the conditions for the exercise of legality control should be adapted *de lege ferenda* to the specific of the administrative contracts.

The Law no. 554/2004 states that the Prefect may formulate the action within the period of six months required by art. 11 para. (1). This is a limitation period, which may be subject to suspension, interruption, or restoring the timeframe as provided in the Civil Code in Book VI, Title I - The statute of limitation. It is hard to understand how an action to protect the public interest may be subject to a limitation period. This provision is unconstitutional. The revised Constitution provides in the Art. 136 para. (4) that the public property goods are unalienable. A consequence of unalienability is the imprescriptibility (provided by art. 861 para. (1) of the Civil Code). Thus under the conditions in which these provisions would be applicable to administrative contracts, if a local authority concludes a contract with a particular having as object the alienation of a public property asset, the prefect will challenge this contract within 6 months from the communication of that act to the prefect. However, this contract is affected by absolute nullity, and the action for annulment brought by prefect should be indefeasible, otherwise art. 136 para. (4) of the Constitution would be purposeless. If the prefect action designed to protect the public interest in administrative contracts is subject to a limitation period, the question is how the prefect can be a guarantor of law and maintain public order at the local level as required by art. 1 para. (3) of Law no. 340/2004. We believe, therefore, that the exercise of legality control of the administrative acts, unilateral or bilateral, should not be subject to a limitation period.

3. THE SUSPENSION OF LAW (DE JURE) OF ADMINISTRATIVE ACTS CHALLENGED AT THE ADMINISTRATIVE COURT BY THE PREFECT IN THE EXERCISE OF ADMINISTRATIVE TUTELAGE CONTROL

Through an exception of unconstitutionality raised before the Constitutional Court it was argued that the provisions of Article 3(3) of the Law no. 554/2004 (which relates to the suspension of law of the contested act by the prefect to the administrative court until resolving the case) would be contrary to the provisions of the Constitution contained in art. 21 para. (1) - (3) which guarantee the free access to justice and the right to a fair trial, Art. 124 para. (2) under which the justice is unique, impartial and equal for all, and art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the right to a fair trial. The exception of unconstitutionality sustains, in

essence, that the application of legal provisions reached a situation where simple formulating and submission to the competent court by the prefect's institution of an action for annulment of an administrative act to cause the suspension of the effects of the contested act, the court not being able to order on the merits of the application for suspension or the need to adopt such a measure, "which can only have exceptional character". The author states that, due to legal provisions criticized, "the control is no longer performed by an impartial tribunal, but on the basis of the contested legal text, the action brought by prefect is given a presumption of rationality/solidity, which leads to the conclusion that the part no longer benefits from the situation of a fair trial". In addition, the author argues that the contested provisions violate the right of free access to justice, "since the parties are deprived of the ability to overcome the effects of the suspension, operating under the law, by simply submission of the action to the administrative court".

By Decision no. 1156/2009 the Court rejected, we think rightly, this exception of unconstitutionality. In the motivation the Court held that:

„Article 3(1) of the Law no. 554/2004 regulates the procedure for exercising the prerogatives of administrative tutelage by the prefect, through the introduction at the administrative court of the action provided for by art. 123 para. (5) of the Constitution, in the case of the acts issued by the county council, the local council or the mayor, if it is considered that they do not comply with the law. The paragraph (3) of Art. 3 of the same law states that, pending resolution of the case, the contested act, which is a unilateral administrative act issued by a public authority, is suspended by law/de jure. The Court considers that, in this case, the suspension will last until the final and irrevocable settlement of the case by the administrative court. Establishing that the enforcement of administrative acts of whose legality has been challenged before the administrative court by the prefect is suspended of law, the critical legal text does nothing more than summarize the principle encapsulated in Art. 123 para. (5) the second sentence of the Constitution, so that it cannot sustain its unconstitutionality".

Indeed, art. 123 (5) of the Constitution, amended in 2003, provides that "the Prefect may challenge, in the administrative court, an act of the county council, the local council or the mayor, if he deems it unlawful. *The contested act is suspended of law* [o.u. C.-S. Săraru]". In a future revision of the Constitution we consider that the second sentence of this article, which refers to the suspension of law, this regulation is an obstacle to real local administrative autonomy. The suspension de jure of the act can turn into a baffling instrument of the activity of local authorities, which is often made on political considerations. Thus, whenever the prefect has a suspicion on the legality of an administrative act adopted by local government authorities, merely contesting the administrative court will determine the suspension of the act, which will operate, in the absence of express legal clarifications, until the settlement of the case.

According to Law no. 188/1999 on the Statute of civil servants, the prefect is high civil servant (art. 12 letter C) and prohibited from being part of a political party (art. 44 (2)). The political factors cannot, however, be removed from the activity of the prefect, as he is the representative of the Government at a local level and acts in order to achieve the aims included in the government program in the county, respectively in the Municipality of Bucharest, according to art. 19 (1) letter b) of Law no. 340/2004 regarding the prefect and the prefect institution. Therefore, we consider that the maintenance of suspension de

jure of the administrative act contested by the prefect at administrative court does nothing more than act as an impediment to achieving genuine local autonomy.

In addition, in relation to art. 15 of Law no. 554/2004, the prefect has a privileged position, he is not obliged to justify an imminently hazardous situation which would motivate the suspension, unlike other applicants (Dragoș, 2009, p. 151).

We believe that all these negative aspects militate for the drop of the suspension of law and in order to give the administrative court the right to determine whether the suspension is appropriate or not based on concrete danger which affects the achievement of the public interest.

4. CONCLUSIONS

The exercise of legality control by the prefect on the administrative acts gave rise to doctrinal and jurisprudential debate, including the lifting of unconstitutionality exceptions before the Constitutional Court of Romania.

The prefect institution is a legal institution of tradition being established by *Law of the municipalities* from April 1, 1864. In time, the prefect institution was given great importance by princes, kings or governments that succeeded at the country leadership, giving different powers, from a role of limited powers to head of the county, depending on the changes in the law that established the position of the prefectures (Alexandru, 2005, pp. 223-224). Tradition and prestige of this institution currently require that the competence of the prefect in the control of legality should be well-defined by the law by unambiguous rules and correlated regulations.

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