MANIFESTATIONS OF THE ABUSE OF POWER IN THE ROMANIAN LEGISLATION REGARDING THE PREFECT' S OFFICE –CONSTITUTIONAL CENSORING OF THIS ABUSE OF POWER
Case study

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ABSTRACT

The current study case intends to render a phenomenon not at all to be neglected in the Romanian society: the encroachment of some authorities in the exercise of operation of some other authorities. The phenomenon is not the only one, it has been censored by the media, courts of law for many times, but it was elected especially because it appeared as a result of some legislative transformations, at their turn questionable by the critics. The prefect's institution plays at present a very important part in the life of the local community, although the power center of this authority parts from the central level. In this context, it is not to be neglected the prefect' s part in the life of the local community and how far its attributions can extend, besides, how far it can interfere in the appointment of the heads of some decentralized public services without breaking the Constitution and the laws that govern its activity.

I. GENERAL PRESENTATION OF THE PREFECT'S INSTITUTION

According to art. 123 of the Constitution, the prefect is the representative of the Government at the county level, but from the overall interpretation of the constitutional norms, it results the following capacities of the prefect:

a. Representative of the Government;
b. Chief of the state services at the county level (Bucharest municipality);
c. Authority of administrative guardianship for the surveillance of the law to be observed by the local public administration authorities.

Art. 123 of the Constitution of Romania, revised and republished, stipulates that the Government will appoint a prefect in each county and in Bucharest Municipality and that this one is the representative of the Government at the local level. Paragraph 3 of the same article stipulates that the prefect's attributions will be set by the organic law. At first, Law no. 215/2001[1] regarding the local public administration had a chapter designated to the prefect, but the provisions of this law were abrogated through the coming into force of Law no. 340/2004[2] regarding the prefect' s institution.The new regulation creates a modern system of the public sector management through the increase, sometimes too much, of the part of the prefect's institution.

The prefect, just as the sub-prefect, belongs at present to the category of the high public officials. The appointment of the prefect is made by the Government as its representative at the local level and the appointment is made at the proposal of the Ministry of Administration and Internal Affairs. In art. 4 of the law, it is

[1] Law no. 215/2001 was published in the Official Gazette of Romania, Part I no. 204 on 23.04.2001
[2] Law no. 340/2004 was published in the Official Gazette of Romania, Part I no. 658 on 21.07.2004

stipulated that the prefect's activity is based on the principles of lawfulness, impartiality, objectivity, transparency, efficiency, responsibility, citizen orientation, and the management of the decentralized public services of the ministries and of the other bodies in the central public administration in the administrative- territorial unit is the prefect' s attribute and competence.

Out of the prefect's attributions, maybe the most interesting one from the legal point of view is the one stipulated by art. 123 paragraph 4 of the Constitution and art. 26 of the law, which is, the possibility to bring before the administrative court the administrative documents issued by the authorities of the local public or county administration, except for the management documents, if it considers that they are illegal. The contested document is legally suspended. This prerogative of the prefect bears the name of administrative guardianship (it should be mentioned in this context also that this article of the law was brought before the Constitutional Court[3])

The prefect also appoints through order the secretary of the administrative – territorial unit and of the subdivisions of the municipalities as a result of the contest organized according to the law, or it orders this one' s disciplinary sanctioning except for the county general secretary and respectively, of Bucharest municipality.

The development of the individual professional performances of the prefects is made by a commission set based on the conditions of Law no 188/1999 regarding the status of the public officers, republished.[4] In order to carry out the attributions that are granted to it by law, the prefect issues orders with individual or normative character, which have to be communicated and brought to knowledge by publication.

II. DEVELOPMENT OF A LEGAL NORM – PROBLEM OF THE PREFECT'S EXCESS OF POWER

In fact, the current study pursuits the development of a legal norm starting with Law no. 215/2001, then, the way how the same idea is resumed under a different shape in Law no. 340/2004 and finally, the present form of this legal norm after the modification of Law no. 340/2004 through Emergency Ordinance no. 179/2005[5], approved in its turn by Law no. 181/2006[6].

As I pointed out in the content of the paper, we found first the provisions that regulated the prefect's institution in Law no. 215/2001 – law of the local public administration.

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[3] Resolution no. 314/2005 of the Constitutional Court published in the Official Gazette Part U no. 694 on 02.08.2005

[4] Law no. 188/1999 was published in the Official Gazette of Romania, Part I no. 251 on 22.03.2004. it should be noticed how many changes this statius of the public officers suffered in its 6 years from the adoption, changes that basically modified the law.

[5] Emergency Ordinance no. 179/2005 was published in the Official Gazette of Romania, Part I no. 1142 on 16.12.2005

[6] Law no. 181/2006 was published in the Official Gazette of Romania, Part I no. 450 on 25.05.2006.

The text approved by the current analysis was art. 133 of Law no. 215/2001 that ordered in paragraph 2 that: "*The appointment and dismissal from a position of the heads of the decentralized public services of the ministries are made with the prefect's consultative approval within the law*."

In its three years of applicability, this text has created its own jurisprudence. For this reason, we point out that Resolution no. 8462 on November 24 2004 of the Court of Cassation[7] basically considers that "the management positions in the public administration should be occupied as a result of an examination. The occupancy of such a position by another person without having the examination is illegal. The prefect's approval, requested for the registration in the exam based on Law no. 215/2001, has a consultative character." Considering this cause, the case has in view the action introduced by a person that passed an examination organized for the occupancy of a position of director with Suceava Fiscal Control Department, but who had not received the approval from Suceava County Prefect' s Office. Suceava Court of Appeal recorded that, according to art. 133 of Law no. 215/2001, the prefect leads the activity of the local public administration authority. The appointment and dismissal from position of the heads of these authorities are made with the prefect's approval and without this approval being granted, the appointment of the plaintiff was correctly finalized, although he had passed the examination. Against this sentence, it was declared recourse admitted by the Court of Cassation that pointed out the consultative character of the prefect's approval.

The above- analyzed text was abrogated together with an entire chapter that dealt with the prefect, by Law no. 340/2001.

Going forward on the same idea, art. 25 of Law 340/2004 regarding the prefect's institution, stipulated: "*The appointment and dismissal from a position of the heads of the decentralized public services of the ministries and of the other bodies of the central public administration in the administrative- territorial units are made only at the prefect's suggestion within the law*".

The current text is deeply unconstitutional and illegal through its reference to the following provisions:

-art. 51 paragraph 1 of Law no.188/1999 regarding the Status of the public officers published in the Official Gazette, Part I, no. 251 on 22.03.2004 "*The occupancy of the vacant public positions can be made by means of promotion, transfer, redistribution and examination***".**

-art. 51 paragraph 3 of Law no.188/1999 regarding the Status of the public officers published, with further modifications and completions.

"*The examination is based on the principle of the open, transparent, competition, of the professional merits and competence, as well as to that of the equality of the access to the public positions for each citizen that fulfills the legal conditions*";

It can also be noticed the violation of the following constitutional provisions:

-art.16 of the Constitution of Romania, revised "Equality before the law"

Paragraph1 *The citizens are equal before the law and the public authorities, without privileges or discriminations*.

[7] Resolution no. 8462/2004 of the Court of Cassation was published in the Cassation Gazette no. 2/2005

Paragraph 2 *No one is above the law*.
Paragraph 3 *The public positions and public, civil or military honors can be occupied within the law by Romanian persons that have Romanian citizenship and domicile in the country. The Romanian state guarantees the equality of chances between women and men for the occupancy of these positions and honors*".
-art. 41 of the Constitution of Romania, revised "Work and work safety".
"Paragraph.1 The right to a work place can not be broken. The choice of the profession, *job or occupation, as well as of the work place is free*".

So, it was noticed that the provisions of art. 25 of Law 340/2004 regarding the prefect's institutions are against the provisions of art. 16 of the Constitution, that points out that the public positions can be occupied by the persons that have Romanian citizenship and residence in the country within the law, that is, in the case of the public officers, within Law no. 188/1999.

The provisions of art 25 of the Law of the prefect's institution according to which "The appointment and dismissal from a position of the heads of the decentralized public services of the ministries and of the other bodies of the central public administration in the administrative- territorial units are made only at the prefect's suggestion within the law, affect also the Status of the public officers by restricting the right of a person to have access to a public position. This provision breaks also the provisions of art. 41 of the Constitution, by restricting the right to work and also the right to choose both the occupation and the work place, because, in the acceptance of the law and in practice, the word "ONLY" in the mentioned article was interpreted as being a proposal or an obligatory approval.

Considering that such an appointment proposal would be made from the prefect's part – although the law does not stipulates a certain moment – it would be necessary that all the participants should obtain such a proposal, which would lead to the violation of the provisions of the Regulation of organizing and carrying out examinations (Annex 2 of Government Resolution no. 1209/2003), in which such a proposal is not stipulated for the registration at the examination file.

If we analyze the documents that the file of that who takes part to the examination has to contain, we notice that these are:
a) copy of the identity card;
b) type registration form;
c) copies of the study certificates and of other documents that certify the carrying out of the specialization;
d) copy of the work pass or, if it is the case, a certificate certifying the seniority in work and, if it is the case, in specialization;
e) records of punishment;
f) certificate that certifies the corresponding health condition;
g) copy of the evaluation chart of the individual professional skills, or, if it is the case, the recommendation from the last work place;
h) statement on one's responsibility or certificate certifying that it did not carry out activities of political police.

As it can be easily seen, among the documents that the law orders that the examination file should obligatory contain, there is also a proposal from the prefect out of which it should result this one's approval in order to take part to the examination, as well as the fact that the person will have the support of the prefect's institution in order to be appointed in the public leading position.

Considering that the Regulation regarding the organization and carrying out of the examinations does not stipulate that the file should contain such a proposal, it leads to the conclusion that such a proposal has no place among the documents that the law demands to the candidates. Moreover, art.17 alin.2 of the same Government Resolution stipulates that the accepted person is the one that got the highest score of the candidates that competed for the same public position.

If the favorable approval were given just to one person, in the context in which the occupancy of the vacant positions is made by means of […] an examination according to the Status of the public officers, which is based on the principle of the open, transparent, competition, of the professional merits and competence, as well as to that of the equality of the access to the public positions for each citizen that fulfills the legal conditions, we would deal with a gross violation of the constitutional rights mentioned above.

The provisions of art. 25 of Law no. 340/2004, as they could be interpreted, created a situation obviously discriminatory, because they promoted a person that, in order to take part to a competition for the occupancy of a vacant public position, would mostly get such an approval from the prefect based on political criteria, to the detriment of some other person that would fulfill all the conditions stipulated by law, creating in this way privileges and discriminations to a certain category of persons, and that is, those that take part to the competition for the occupancy of the public management position within the decentralized public services.

In this way, it was violated also the provisions of paragraph 1 of art. 16 of the Constitution "the citizens are equal before the law and the public authorities", as well as the provisions of art. 25 paragraph 2 of Law no.188/1999 according to which "it is forbidden any discrimination among the public officers on political criteria[….] It is hard to believe that the legislator could have instituted an exception from the principle of equality regarding the access to the public positions for each citizen. Such an exception from a principle that governs the material of the development of the career of the public officers could not have been justified. This law text was brought also before the Constitutional Court as a result of the abuses created in the life of the local community by the prefect's encroachment, still the politicians at the beginning of the present governing.

So, the National Authority for the Consumers' Protection raised the unconstitutionality exception of the provisions of art. 25 of Law no. 340/2004 in File no. 4.983/2005 of Bacau Court of Appeal. The history of this file of the administrative court is less important for the present scientific reason, and it has

a much stressed politic character of local fight in order to put at the top of a decentralized public service a certain person depending on the alliance algorithm.

The Constitutional Court expressed itself through Resolution no. 208/2006[8]. The result of the judges' from this court analysis was relatively easy to foresee at the moment when the debates took place, because, meanwhile, the text brought before the court had been modified at the executive level through an emergency ordinance.

The unconstitutionality reasons invoked by the National Authority for the Consumers' Protection had in view the violation of art. 16 and art. 41 paragraph (1) of the Constitution. In this sense, ANPC pointed out that "to grant the favorable approval just to one person [by the prefect], in the context in which the occupancy of the vacant positions is made through a […] competition according to the Status of the public officers" represents "a gross violation of the above-mentioned constitutional provisions". At the same time, "the provisions of art. 25 of Law no. 340/2004, as they can be interpreted, create a situation obviously discriminatory, because they promote a person that, in order to take part to a competition for the occupancy of a vacant public position, would mostly get such an approval from the prefect based on political criteria, to the detriment of some other person that would fulfill all the conditions stipulated by law in order to take part to the competition for the occupancy of the vacant public position".

Bacau Court of appeal – Trading and Administrative Court, before which the exception had been raised, considered that this was ungrounded. According to the provisions of art 30 paragraph (1) of Law no. 47/1992, the informing closure was communicated to the Presidents of the two Parliament's Chambers, Government and People's Advocate, in order to express their points of view on the unconstitutionality exception.
The Government considered that the unconstitutionality exception was inadmissible because of the new modifications that it had just brought to Law no. 340/2004. Similar to this, the People's Attorney considered that the unconstitutionality exception became inadmissible. The two Presidents of the Parliament's Chambers did not communicate their points of view on the raised unconstitutionality exception. Examining the informing closure, the points of view of the Government and of the People's Attorney, the report drawn up by the reporting judge, the dissertations of the representative of the exception author, the conclusions of the persecutor, the criticized legal provisions reported to the provisions of the Constitution, as well as Law no. 47/1992, the Court kept the following aspects:

1. The Constitutional Court was legally informed about the provisions of art. 146 letter d) of the Constitution, of art. 1 paragraph (2) and art. 2, 3, 10 and 29 of Law no. 47/1992, in order to solve the unconstitutionality exception.

[8] Resolution no. 208/2006 of the Constitutional Court was published in the Official Gazette of Romanian, Part I no. 336 on 14.04.2006.

2. The object of the unconstitutionality exception is the provisions of art. 25 of Law no. 340/2004 regarding the prefect' s institution, published in the Official Gazette of Romania, Part 1, no. 658 on July 21 2004.
3. After the informing closure on 14.11.2005, both the title of Law no. 340/2004, as well as art. 25 of this normative act were modified through art. 1 point 1 and point 21 of Emergency Government Ordinance no. 179 on 14.12.2005 for the modification and completion of Law no. 340/2004 regarding the prefect's institution, published in the Official Gazette of Romania, Part 1, no. 1.142 on December 16 2005.

At present, the criticized text has the following content:

- Art. 25. "(1) *It is obligatory that a representative of the prefect's institution where the public service has the office, designated through the prefect's order within the law should be a part of the examination commission for the occupancy of the head position of a decentralized public service.*
- *(2) The prefect can propose ministers and heads of the other bodies of the central public administration organized at the level of the administrative-territorial units, the sanctioning of the heads of the decentralized public services in their subordination*".

4. The constitutional texts invoked in order to support the exception are those of art. 16 regarding the equality of rights and those of art. 41 paragraph (1), regarding the right to a work place and the freedom to choose one's profession, job or occupation, as well as the work place.

Examining the raised unconstitutionality exception, the Court kept in mind that the provisions of art. 25 of Law no. 340/2004 were modified after the informing date and that the legislative solution adopted as a result of the modifications of the text was substantial different. The Court finds that, before the occurred modification, the criticized law text stipulated: "The appointment and dismissal from a position of the heads of the decentralized public services of the ministries and of the other bodies of the central public administration in the administrative-territorial units are made only at the prefect's suggestion within the law".

In its jurisprudence, the Constitutional Court constantly stated that, if the legal provision submitted for control was modified after the invocation of an unconstitutionality exception before the courts, the Court would deliberate on the legal provisions in its new drawing up, only if the legislative solution in the law or modified ordinance was basically the same with the one before the modification. Considering that in the cause the request is not met and that, according to the provisions of art. 29 paragraph (1) of Law no. 47/1992, the Constitutional Court can deliberate on the provisions "of a law or ordinance in force", the unconstitutionality exception of the provisions of art. 25 of Law no. 340/2004 is to be rejected as having become inadmissible according to the provisions of art. 29 paragraph (6) of Law no. 47/1992.

III. INSTEAD OF CONCLUSION

Although all the aspects brought into discussion through the current study clearly shape the possibility that the prefect had in interfering in the appointment of the heads of the decentralized public services of the ministries and of the other bodies of the central public administration in the administrative-territorial units, the legal reality hurried and did not allow the Constitutional Court to censor a law text that not only was not correlated to the other legal provisions in the domain, but it violates also certain constitutional principles.

We do not know to what extend the Constitutional Court would have adopted the admittance solution of the invoked unconstitutionality exception, but it can not be neglected that the solution of the legislator was a wrong one, and even more, an immoral one. The path of the society should be an ascendant one, and the legislator should be aware of the progress of the society. In this context, it is inexplicable how it was possible that from a solution relatively legal (that of Law no. 215/2001), it got to a solution where the word "ONLY" should dictate unilaterally, at the prefect's disposal, the modality of appointment and dismissal of some persons that held public positions.

The current formulation of the text restricts the prefect's part, but it is not enough to remove the abuses already committed.

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