Public Law

The Control of the Administrative Tutelage Exercised by the Prefect

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Abstract: This study aims at highlighting the important aspects of administrative tutelage control achieved by the prefect: notion; evolution; comparative law; administrative acts submitted to control; the limit for introducing the action in administrative contentious. In order to achieve the objectives of the paper we have performed an analysis of the specific legislation, of the specialized literature and jurisprudence. The traditional institution for administrative law, along with the administrative contentious, it can be said that since 1990, the administrative tutelage is constantly expanding. The tutelage control conducted by the prefect regards exclusively the legality of the administrative acts issued by the local government authorities. After the empirical analysis and research, the paper summarizes and specifies the general conclusions on the legality control exercised by the prefect on administrative acts of the local authorities, as defined by the Law of administrative contentious no. 554/2004.

Keywords: administrative tutelage; regulation; administrative act; control of legality

1. Introduction

The traditional institution for administrative law, along with the administrative court, the administrative tutelage[2] of experienced, over time, various interpretations.

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[2] Professor Paul Negulescu shows that the name of administrative tutelage is open to criticism, as there is no similarity between this institution and the tutelage of civil law. For details see (Negulescu, 1934).

Etymologically speaking, the concept of tutelage is borrowed in the public law from civil law, giving content in the sense of protecting the general interest (Rîciu, 2009, p. 130).

The Professor Anibal Teodorescu believes that administrative tutelage as being "the right of central authority to control the local administration, municipality and the public establishments, as exerted to some of their acts most important and towards their deliberative bodies" (Teodorescu, 1929 p. 248). It should be noted that the definition is circumscribed to the provisions of Law for organizing the local administration of 1929 (Title VI Entitled "Tutelage and control of local government") and *Administrative Law of 1938* (Chapter IX entitled "Control and tutelage of local administration").

In recent doctrine, the concept of administrative tutelage is defined as "the supervision exerted by the Government, by virtue of its attributions of general leading of public administration on respecting the law by the local public authorities and other authorities or institutions of public administration, organized locally or centrally, either through its local representative, the prefect, or through bodies of the central government organized under its authority, or ministries, such as the National Agency of Civil Servants, according to their material and territorial competencies" (apud Vedinaş, 2015, p. 507).

The control of administrative utelage is found in all democratic European states. In France, for example, although after 1946 the term "tutelage" was suppressed from the important laws (Constitution, Law of 2 March 1982 on the rights and freedoms of municipalities, departments and regions, the General Code of territorial communities) in the specialized literature it is used either the term "administrative control" or the administrative tutelage (Petrescu, 2009, p. 57; Rouault, 2005, p. 414). In this country, the prefect exercises *a posteriori* control of legality, having only the opportunity to challenge, in the administrative court the acts that it considers illegal (Vedinaş, 2015, p. 506).

At EU level, the *European Charter of Local autonomy* establishes in art. 8, the administrative control of local public administration authorities, a control that it cannot be exercised only in the forms and in the cases stipulated by the Constitution or by law, its objective being of ensuring the compliance of the legality and the constitutional principles.

In Romania, given that parts of the public administration system is organized and it operates autonomously, the control of administrative tutelage is nowadays booming

(Balan, 2008, p. 183), whereas, as described by Professor Anthony Iorgovan, the local autonomy can operate only within certain limits set by the law (Iorgovan, 2005, p. 466).

Due to the imprecision and inconsistency, the legislation framework on the control conducted by the prefect on the legality of authorities' acts of local public administration authorities has undergone significant amendments, both in terms of technique formulation and in terms of unsolved substantive issues (Apostol Tofan, 2014, p. 366). However, the Constitutional Court has reconsidered its jurisprudence based on the legislative changes in our country.

2. The Administrative Tutelage Control Achieved by the Prefect

For the first time since 1990, the term of administrative tutelage is established by the Law of administrative contentious no. 554/2004, in art. 3 with reference to the prefect and the National Agency of Civil Servants.

As noted in the doctrine, the text of the Law distances from the classic tutelage creating a "milder administrative tutelage" (Petrescu, 2009, p. 57), in the sense that the authors of the control for administrative tutelage are not entitled to cancel the illegal act of the controlled authority, but only to appeal the court of administrative contentious, the act being unable to produce the legal effect from that moment, being suspended by the law.

On this control form of the legality of administrative acts, the following features can be highlighted: being special control it shall be exercised only in cases specified by the law, by this feature it distinguishes from the hierarchical control; it is achieved only by the public authorities expressly provided by the law; it is a control that regards only the legality of the administrative act, and not its oportunity (Petrescu, 2009, p. 57).[1]

The specific of the administrative tutelage control has been emphasized in the doctrine and by analyzing the differences between this form of control and

[1] The classical administrative tutelage law is also characterized by the right of the public authority who achieves the control of approving the administrative acts before being published, to cancel the illegal administrative acts of the decentralized authorities or to suspend them if there are doubts regarding their legality. Within the classical tutelage, the body that achieves control cannot substitute in the place of the decentralized public authorities and it cannot modify the documents issued by them (Petrescu, 2009, p. 58).

hierarchical control.[1] Thus, if the hierarchical control is exercised on the basis of its subordination relations between the controlling and the controlled authority, the control of administrative tutelage is achieved within the limits prescribed by the law. If within the hierarchical control, the control authority can verify both legality and appropriateness of the acts of the controlled authority, within the administrative tutelage control the prefect can only verify the legality of the acts of local authorities. While within the hierarchical control the superior body may cancel, revoke or suspend the acts of the controlled body, the prefect can only refer inform the matter to the court of administrative contentious, in order to annul the act of the public local administration authority which he considers as being unlawful (Trăilescu, 2010, p. 325).

As supervising authority for respecting the law by the local public administration authorities[2], the prefect shall, in accordance with art. 3, paragraph (1) of Law no. 554/2004 attack directly to the court of administrative contentious the acts issued by the local public administrative authorities, if he considers being unlawful.

In the administrative practice but also in the doctrine it was raised the question of whether the legal action of prefect as administrative tutelage authority is circumstantial and conditioned by meeting deadlines (Iorgovan, 2005, p. 467). The first legal depositions to this effect were found in Law no. 69/1991 on local public administration, which set a deadline of 15 days for bringing the action into contentious by the prefect against the acts local public administration, excepting from this control the routine management acts.

Coming into force in December 1991, the Constitution did not provide a deadline for bringing into action by the prefect and it did not establish exceptions to this control (Apostol Tofan, 2014, p. 366).[3]

[1] The hierarchical administrative control is carried out by "the superior administrative bodies on the work of the lower bodies, based on relations of subordination between them without having to be expressly provided by the law" (Trăilescu, 2010, p. 324). On the differences between the two forms of control see (Puie, 2009, p. 58 and the next).

[2] According to art. 19, paragraph (1), letter a) of Law no. 340/2004 regarding the prefect and the prefect's institution, it provides, at the level of the county or, where appropriate, of Bucharest, the application and enforcement of the Constitution, of laws, ordinances and decisions of the Government, other legislative laws and public order. Also, the prefect verifies the legality of administrative acts of the county council, local council or mayor (art. 19, paragraph (1), letter e) of Law no. 340/2004).

[3] Art. 123, paragraph (5) of the Constitution provides that: "The Prefect may challenge, in the administrative contentious court, an act of the County Council, of a Local Council or the mayor, if he deems it unlawful. The attacked act is suspended by law."

The term of 15 days for bringing into action was established by the mentioned law and it was considered by the Constitutional Court Decision no. 137/1994 as being unconstitutional, appreciating that "the prefect cannot be held by the 15 days term and no other period for bringing proceedings before the administrative court", "any provision of a law that establishes deadlines for bringing into action by the prefect is a provision contrary to the Constitution."[1]

Subsequently, ignoring this decision, Law no. 24/1996, which amended substantially Law no. 69/1991, has established a time limit of 30 days of the appeal by the prefect, expressly being qualified as limitation period and it kept exception in the text of the Law no. 69/1991, respectively the routine management acts.

In this context, after republishing Law no. 69/1991, in 1996, by Decision No. 66/1999, the Constitutional Court, reconsidering its jurisprudence, said that "the establishment of a limitation period for bringing an action by the prefect at the administrative contentious court in order to abolish the act which is considered illegal, is not a limitation of its prerogatives of administrative tutelage, but rather an incentive and a guarantee of the examination, expeditiously, of the administrative acts issued by the local public authorities in order to take legal measures for abolishing those data breaching the law. However, there is no doubt that only by establishing some limitation periods for appealing the action in administrative contentious by the prefect, it ensures the stability of the legal relations arising from these acts and therefore the legal security of citizens who are parties to these legal relations".[2]

The time limit of 30 days was maintained also in the Local Public Administration Law no. 215/2001, which repealed Law no. 69/1991. Thus, in its initial form, art. 27 of Law no. 215/2001 established the right of the prefect to attack "in whole or in part, before the administrative contentious court, the decisions adopted by the local council or county council and the provisions issued by the mayor or county council chairman, in the case where he considers these measures or provisions as being illegal", and according to article 135, paragraph (1) " The Prefect may appeal to the administrative contentious court these documents within 30 days from the

[1] Decision no. 137 of 7 December 1994 on the exception of unconstitutionality of the depositions of art. 101, paragraph (2) of the Local Public Administration Law no. 69/1991, published in the Official Monitor no. 23 of 2 February 1995.

[2] Decision no. 66 of 27 April 1999 on the exception of unconstitutionality of art. 111, paragraph (2) and (3) of the Local Public Administration Law no. 69/1991, republished, published in the Official Monitor no. 308 of June 3rd, 1999.

communication, if he considers to be illegal, after the completion of the procedure provided for in art. 50, paragraph (2) except those of routine management"[1].

In its republished form, as a result of numerous amendments, Law no. 215/2001 no longer refers to the time limit of 30 days for administrative contentious proceedings and it no longer establishes exceptions to the legal control conducted by the prefect.

The legal basis for administrative tutelage control can be found in Law no. 554/2004, so that, according to art. 3, paragraph (1) of this legislative act, *the action shall be made within the period specified in art. 11, paragraph (1), which begins to run when communicating the document by the prefect and in the conditions set out therein*, that is the term of 6 months.

As in art. 3 it refers exclusively to art. 11, par. (1), it is inferred that regardless of the type of administrative act (individual or legal), the prefect may institute proceedings within six months from the notification (Apostol Tofan, 2015, p. 203).

The 6 months term defined by law as a limitation period, subject to suspension, interruption or restoring the timeframe as provided in the Civil Code, a fact criticized in the specialized literature, considering that the action a to protect the public interest cannot be subject to any limitation (Săraru, 2015, p. 66).

The analysis of article 3 of Law no. 554/2004 must be carried out also in relation to the acts submitted to administrative tutelage. This analysis is necessary especially after the publication in the Official Monitor no. 501 of 8 July 2015, the Decision of the High Court of Cassation and Justice no. 11 of May 11, 2015 (The panel of judges for the absolution of issues of law) on the interpretation of the provisions of art. 3 of the Law on administrative contentious no. 554/2004, as amended and supplemented, in conjunction with article 63, paragraph (5), letter e) and art. 115, paragraph (2) of the Local Public Administration Law no. 215/2001, republished, as amended and supplemented, and art. 19, paragraph (1), letters a) and e) of Law no. 340/2004 regarding the prefect and the prefect institution, republished, with subsequent amendments and art. 123, paragraph (5) of the Constitution.

By Decision no. 11/2015, the Supreme Court stated that "... it is recognized to the prefect the right to appeal before the administrative contentious court only

[1] The notion of *routine management acts* was described in the doctrine as being a vague notion, something that lead to entirely subjective interpretations of the legal nature of those acts (Săraru, 2015, p. 65).

administrative acts issued by the local public administrative authorities within the meaning of art. 2, paragraph (1), letter c) of Law no. 554/2004 as amended and supplemented."

Therefore, in accordance with decision no. 11/2015, the prefect cannot attack in administrative contentious all documents in the administrative local administration, whatever their nature[1], which he considers as being unlawful, but only the administrative acts as defined by art. 2, par. (1), letter c) of Law no. 554/2004.

A contrary interpretation of the depositions of art. 3 of Law no. 215/2001 would lead to "a furthering from the rules and general principles governing, on the one hand, the institution of administrative contentious and, on the other hand, the institution of administrative tutelage".

Besides also the Constitutional Court ruled to that effect by Decision No. 1353 of 10 December 2008, arguing that the right to administrative tutelage of the prefect refers to the control over the administrative acts of local public authorities, as they are issued under the regime of public power, and the prefect is, as required by art. 1, par. (3) of Law no. 340/2004, the "guarantor of respecting the law and public policy at the local level." The recognition possibility of the prefect to appeal acts other than the administrative ones would lead to a violation of the constitutional principle of local autonomy.

The original provisions of Law no. 340/2004, respectively art. 24, letter f) excluded from the control exercised by the prefect the management acts. Currently, these provisions are repealed so that the prefect can exercise control of legality also on administrative contracts assimilated to administrative acts according to art. 2, par. (1), letter c) of the Administrative Contentious Law[2].

Starting from the strict interpretation of the law, also this aspect has been criticized in the specialized literature on the grounds that art. 3, paragraph (1) of Law no.

[1] *All the other acts of local authorities (such as, for example, those relating to civil legal relations or work) concluded within the framework of legal relations of other branches of law exceed the law and administrative contentious. Regarding these documents concluded or issued by local public administration authorities are specific to regulations applicable to substantive and procedural law and they do not have the common law in the administrative contentious matter, which falls within the legal institution of administrative tutelage*. Decision no. 11/2015.

[2] According to art. 2, par. (1), letter c) of Law no. 554/2004 they "are assimilated administrative acts which, under this law, and concluded contracts by public authorities that have as their object the enhancement of public property, execution of works of public interest, conduct public services, public procurement; there may be provided by special laws also other administrative contracts subject to the jurisdiction of administrative contentious courts".

554/2004 should be supplemented by specifying that "The Prefect may appeal directly to the court of administrative contentious the acts issued or *concluded* by local public administration authorities, if deemed to be unlawful" (Săraru, 2015, p. 66). The author of the critique argues that the wording of the text of art. 3, paragraph (1), which refers to "issued documents", it can be understood that the legislator had considered only the unilateral administrative acts as the administrative contracts are concluded and not issued.

As for us, starting from art. 2, par. (1), letter c) we consider that the text of art. 3, paragraph (1) of Law no. 554/2004 envisages also the conclude administrative acts.

3. Conclusion

After 1990, beyond the legal and jurisprudence inconsistencies the administrative tutelage control has continuously evolved.

The Law no. 554/2004 on administrative contentious, valuing the traditions and harmonizing the national legislation with EU legislation through article 3 has devoted a contentious goal, through the institution of administrative tutelage.

The Prefect, the supervision authority for complying the law by local public administrative authorities, has the right to appeal directly to the court of administrative contentious the acts issued by local public administrative authorities, if deemed to be unlawful.

The baseline of the control of the administrative tutelage regards exclusively the legality of administrative acts which the local public administrative authorities adopt or issue.

3. References

Apostol Tofan, Dana (2014). *Drept administrativ/Administrative Law*, Volume I, 3rd edition. Bucharest: C. H. Beck.

Apostol Tofan, Dana (2015). *Drept administrativ/Administrative Law*, Volume II, 3rd edition. Bucharest: C. H. Beck.

Bălan, Emil (2008). *Instituții administrative/Administrative institutions*. Bucharest: C. H. Beck.

Iorgovan, Antonie (2005). *Tratat de drept administrativ/Treaty of Administrative Law*. Vol. I, 4th Edition. Bucharest: All Beck.

Petrescu, Rodica, Narcisa (2009). *Drept administrativ*/*Administrative law*. Bucharest: Hamangiu.

Puie, Oliviu (2009). *Contenciosul administrative/Administrative contentious*. Vol. II. Bucharest: Universul Juridic

Rîciu, Iuliana (2009). *Procedura contenciosului administrativ*/*The procedure of Administrative contentious*. Bucharest: Hamangiu.

Rouault, Marie-Christine (2005). *Droit administratif*/ *Administrative law*. Paris: Gualino éditeur.

Săraru, Cătălin, Silviu (2015). *Legea contenciosului administrativ nr. 554/2004. Examen critic al Deciziilor Curții Constituționale. 2000-2014*/*The Law of Administrative contentious no. 554/2004. Critical examination of the decisions of the Constitutional Court. 2000-2014*. Bucharest: C. H. Beck.

Teodorescu, Anibal. (1929). *Tratat de drept administrativ*/*Treaty of Administrative Law*, Vol. I, Bucharest.

Trăilescu, Anton, (2010). *Drept administrativ/Administrative law*. 4th Edition. Issue Bucharest: C. H. Beck.

Vedinaș, Verginia. (2015). *Drept administrativ*/*Administrative law.* 9th edition revised and updated. Bucharest: Universul Juridic.