

THE RECENT LEGAL EVOLUTION OF THE ROMANIAN PREFECT IN EUROPEAN CONTEXT: FROM SENIOR CIVIL SERVANT TO PUBLIC OFFICIAL

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Abstract

The prefect has the essential role of creating a link between the central and the local public administration, being most frequently described with the phrase “the representative of the Government in the territory”. In the last two decades, the role, responsibilities and, especially, the juridical statute of the prefect have stirred debates. Recently, the Government has adopted an emergency ordinance that changes the statute of the prefect from senior civil servant, to public official with political affiliation. Arguments have been brought by specialists both in favour and against this change. Even though the institution of the prefect has been the subject of numerous analyses in the literature, this recent transformation demands a new one, focusing on both its impact, and its European context. However, thoroughly analysing the whole institution of prefecture, especially taking into account its whole historical evolution, is a rather vast undertaking. Therefore, in this paper, we limit ourselves to two objectives. Firstly, we aim to analyse the impact of this recent change on the main attributions of the prefect, such as on the administrative supervision of acts signed by local public authorities. Secondly, we set out to analyse comparatively the present legislative provisions of the prefect in Romania with the ones in other EU member states. In order to reach our objectives, we employ the logical and comparative methods, studying both the relevant legislation, as well as the national and international doctrine on the subject.

Keywords: administrative law, prefect, civil servant, public official, European Union.

1. Introduction

This paper concerns the regulatory framework of a public position essential in the Romanian public administration, the prefect, with emphasis on its evolution. Our perspective is focused on its comparative aspects – more exactly, comparing the present legislation, which has undergone recent changes, with the previous one, as well as comparing the Romanian legislation with European ones.

Analysing the prefect, both as a public position and as an institution, is important for several reasons. First and foremost, the prefect is invested with important powers and responsibilities, having the role of creating a connection between the central and the local administration. The prefect’s powers also include creating and leading strategies and interventions in case of natural disasters, by having the role of president of county commission for disaster defence. Moreover, the prefect has the right to challenge the legality of acts emitted by public authorities, and having them suspended until the court makes a decision on the matter. Therefore, any changes concerning the prefect can upset a delicate balance in the public administration. Secondly, the prefect and the institution of the prefect have a long tradition in Romania, predating the Great Union of the country. Thirdly, the position of the prefect is not only established through the Administrative Code, but through the Constitution – which means that certain changes cannot be adopted only by organising a popular referendum, which underlines the importance of this position. Fourthly, the analysis of the Romanian prefect is important since it

concerns a public position that is rather rare, when looking at other public administrations in the region as well as in the world.

In order to analyse the evolution of the regulatory framework concerning the prefect, we will analyse comparatively the previous legislation and the current one, underlining the relevant changes and their implications. We will also include the views of specialists on the matter, as far as these are relevant in relation to the changes in the legislation. Moreover, we will consult the legislation and doctrine of several countries that have the public office of the prefect: France, Spain, Italy, or of those that organise differently the responsibilities attributed to the Romanian prefect, such as the United Kingdom. This will underline how the recent changes relate to other public administration systems in Europe, whether they make the Romanian prefect more or less European.

Given the novelty of these legislative changes, the existing specialised literature on the role, importance and responsibilities of the prefect can be outdated, and the papers that have already discussed the implications of these transformations are quite few.

2. Recent changes concerning the Romanian prefect

Despite relative frequent changes to the duties and power of the prefect, the Romanian prefect remains an important position in the administrative system. As stated by the Constitution, the prefect acts as the Government representative at local level, also having to role of directing the decentralised services of the ministries at local level. Another role established by the

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Constitution for the prefect is to challenge the local administrative acts considered illegal before the administrative court¹. Further responsibilities are established in the Administrative Code, which adds duties regarding emergency situations². The Administrative Code also adds details regarding the role of the prefect as the representative of the Government at local level, such as public order duties, supporting the electoral process, collaborating with certain institutions for certain goals, and ensuring the quality of some public services, such as the issue of passports and driving licenses³.

Recently, important changes have been brought to the statute and the role of the prefect through Government Emergency Ordinance no. 4/2021. In this section, we present these changes in a comparative manner, highlighting both the previous and current judicial provisions.

First and most important of all, it has changed art. 250 from the Administrative Code, which previously categorized the prefect, as well as the subprefect, as senior civil servants; after this Ordinance, the prefect and the subprefect are public officials (dignitaries)⁴. In the same article, this new law clarifies the prefect's and subprefect's rights concerning payment, which are now subject to Law no. 153/2017.

Secondly, the new law indicates six conditions that a person has to respect in order to become prefect: Romanian nationality and residence on Romanian territory; possessing electoral rights; lack of criminal convictions or the presence of rehabilitation; having an undergraduate degree, at least; having graduated a specialised training program organised by the National Institute of Administration. This was a necessary measure, taking into consideration that the appointment of a public official has fewer conditions compared to the appointment of a senior civil servant. Therefore, if additional conditions were not clearly specified, there would have been a decrease in the standards, as well as the prestige of the position and institution of the prefect.

Thirdly, within the prefect's institution, the new law introduces a new function, that of general secretary of the prefect's institution, who is a senior civil servant directly subordinated to the prefect. In order to be appointed as general secretary to the prefect, one needs a university degree in one of these fields: law, public administration, or political sciences⁵.

The role of the general secretary is to ensure a higher stability to the institution of the prefect, once the

prefect becomes a public official, as well as a continuous management, taking into consideration that the prefects and subprefects will be changed each time a new government is formed and approved. Another important role of the general secretary to the prefect is to act as a link between different departments of the prefect's institution⁶.

The actual responsibilities of the secretary general are to be established through a Government Ordinance, at the proposal of the minister that has as a responsibility the coordination of the prefect's institution⁷ (at the moment, this is accomplished through the Ministry of Internal Affairs, through a specialised General Direction⁸). Therefore, Government Ordinance no. 906/2020 was modified in 2021 in order to indicate the specific attributes of the secretary general to the prefect, of which we underline the role in "supporting the activity of the prefect in exercising the attributions regarding the verification of legality"⁹, as provided in the Administrative Code.

3. The impact of the recent changes concerning the Romanian prefect

Besides the novelty of this law and its implications, one other reason why we chose it for our analysis is the strong, opposite opinions that it generated. Regarding the shift of the prefect from senior civil servant to public official, which have quite different judicial regimes, especially in their relation to the political element, the majority of views we encountered were either in favour, or strongly opposed; the provisions of GEO no. 4/2021 were either considered long awaited and beneficial, or detrimental, anti-European and regressive.

The main criticism received by this Ordinance was the so-called 'politicisation' of the prefect: under the old provisions, it was forbidden for a prefect to be member of a political party, which is now allowed. According to the Constitution, art. 123, the prefect is named by the Government, one for each county and one for Bucharest; then, each prefect acts as a representative of the Government.

In the substantiation note to GEO no. 4/2021, the legislator argues that the fact that prefects and subprefects can have political affiliation "is in line with the role of the prefect as a representative of the Government at the local level, the Government being a

¹ Art. 123, Romanian Constitution.

² Art. 252, Government Emergency Ordinance no. 57/2019 regarding the Administrative Code, published in the Official Journal of Romania, no. 555 of July 5th 2019.

³ Art. 258, Government Emergency Ordinance no. 57/2019.

⁴ Art. 1, Government Emergency Ordinance no. 4/2021 for modifying and completing Government Emergency Ordinance no. 57/2019 regarding the Administrative Code, published in the Official Journal of Romania, Part I, no. 117 of February 3rd 2021.

⁵ Government Emergency Ordinance no. 4/2021.

⁶ *Ibidem*.

⁷ *Ibidem*.

⁸ "Directia Generala pentru Relatiile cu Institutiile Prefectului", Ministerul Afacerilor Interne, accessed March 14, 2021, <https://www.mai.gov.ro/despre-noi/organizare/aparat-central/directia-general-a-pentru-relatiile-cu-institutiile-prefectului/>.

⁹ Art. 3, Government Ordinance no. 906/2020 for the implementation of some provisions of Government Emergency Ordinance no. 57/2019 regarding the Administrative Code, published in the Official Journal of Romania, no. 994 of October 28th, 2020.

public authority that has a political structure”¹⁰. One of the observations of the supporters of this change is that, until now, each Government has named its own prefects¹¹. As it is stated in the doctrine, “in reality, the prefect has become a political and politicised public servant”¹². Therefore, there was rather a contradiction between practice and the constitutional role of the prefect, on one hand, and his statute of senior civil servant, on the other hand, a statute which should ensure a high degree of continuity, predictability and independence from political shifts.

Before the Administrative Code, which repealed Law no. 340/2004, there were explicit provisions regarding the principles of the prefects’ activity; more exactly, the activity of the prefect was subject to the principles of impartiality and objectivity¹³. The Administrative Code included most of the provisions of Law no. 340/2004, however, the ones regarding those principles, including the requirements of impartiality and objectivity, were left out. At the time, in 2019, the prefect was a senior civil servant, and, therefore, was subject to the general principles applying to civil servants, which, according to art. 373 of the Administrative Code, include both impartiality and objectivity¹⁴. Once the prefect became a public official, these principles automatically changed, and the prefect and subprefect only remain subject to the general principles of public administration, stated in art. 6-13 of the Administrative Code. Therefore, the prefect no longer has to act in accordance to the principle of objectivity, but the principle of impartiality remains.

The importance of the impartiality of the prefect, in the context of his political affiliation, concerns one of his most important responsibilities: his role in checking the legality of administrative acts issued by the public local authorities, established by art. 252 of the Administrative Code, which states that the prefect has the right to challenge any local administrative act considered illegal. Moreover, art. 255 of the Administrative Code brings further explanations to this power, stating that the prefect can check the legality of any acts issued by the mayor, the local council and the county council, and challenge the ones considered illegal. All these provisions are in accordance with the constitutional ones – actually, in this case, the Constitution has additional details on the matter: that the challenged act is suspended de jure, and that the competent court is the administrative court.

Moreover, on the matter of the impartiality of the prefect, the founding of the function of general secretary of the prefect’s institution, a senior civil servant, represents an additional guarantee.

4. The Romanian prefect in European context: a comparative view

In Council of Europe’s European Charter of Local Self-Government, it is stated that the right to participate in public affairs is best exercised at the local level, therefore the importance of local self-government, and of limiting the powers exercised at a central level¹⁵. Since the Romanian institution of the prefect represents the power of the Government in the territory, the attributions of the prefect have to be limited in order to protect the principles of local self-government and those of decentralisation. In art. 8 of the European Charter of Local Self-Government, the administrative supervision of local authorities is limited to those stated either in the Constitution, or in a statute; more exactly, its exercise should only be “according to such procedures and in such cases as are provided for by the constitution or by statute”¹⁶. As we have already pointed out, the institution of the prefect is enshrined in the Romanian Constitution, and its duties established in the Administrative Code are in line with those indicated in the Constitution.

When one consults comparative law literature, it appears that the institution of the prefect is rather rare in this form, even though in some cases there are some rough equivalents.

As it is widely pointed out in the literature, the Romanian institution of the prefect has been inspired after the French one, both initially, and as it evolved in time. In France, the prefect is a senior civil servant, which, given its influence on the Romanian prefect, can partly explain the controversy regarding the change into a public official.

As the literature points out, the French prefecture is a pre-democratic institution, which has been subject to a wide adaptation process in order to fit into the new context¹⁷. In its infancy, the French prefecture had a military component. Through several reforms, the French prefect nowadays “have justified their existence through notions related to the horizontal coordination of the State, partnership with local and regional

¹⁰ Ibidem.

¹¹ “Guvernul a aprobat ordonanța de urgență care le permite prefectilor și subprefecților să fie membri de partid. Constituția prevede că atribuțiile prefectului se stabilesc doar prin lege organică / Cseke Attila: Terminăm cu ipocrizia”, G4Media, accessed May 14, 2021, <https://www.g4media.ro/guvernul-a-aprobat-ordonanta-de-urgenta-care-le-permite-prefecților-si-subprefecților-sa-fie-membri-de-partid.html>.

¹² Irina Alexe, “Prefectul și subprefectul în viziunea propunerii legislative privind revizuirea Constituției României”, Drept public, no. 10 (2014): 586-588.

¹³ Art. 5, Law no. 340/2004 regarding the prefect and the institution of the prefect, republished in the Official Journal of Romania, no. 225 of March 24th 2004.

¹⁴ Art. 373, Government Emergency Ordinance no. 57/2019.

¹⁵ Council of Europe, European Charter of Self-Government, Strasbourg, 15th October 1985.

¹⁶ Ibidem.

¹⁷ Alistair Cole, “Prefects in Search of a Role in a Europeanised France”, *Jnl. Publ. Pol.*, Cambridge University Press, 31, no. 3 (2011): 385-407.

authorities and orchestration of France's interaction with the European Union in the field of regional policy"¹⁸. We underline the fact that all these three elements are also present in the role of the Romanian prefect. However, we also underline an important difference between the French and the Romanian prefect: the first can be seen as a professional corps, even though this characteristic is not as strong as it was some decades ago, researchers observing a decrease and fracture in the collective identity, influence and professionalism of this corps¹⁹.

Another European institution similar to the Romanian prefect is the Italian one. As it is the case in France, in Italy the prefect currently is a public official. This position has historically been one of high importance for Italy; for example, a historian calls the liberal period of Italy the "prefectocracy" (it., *prefetocrazia*)²⁰. Similar to the French prefect, the Italian one was subject to a deep process of adaptation and evolution. For example, before 1982, the prefect did not need special qualifications for appointment, exercised supervision over local authorities, and was involved in solving both administrative and political issues²¹. The most important force for modernizing the institution of the prefect in Italy was the decentralization. The acts that most changed the institution of the prefect in Italy were, on one hand, Act no. 300/1999, which transformed the institution of prefecture in „territorial government offices”, and the prefect into the holder of these offices and, on the other hand, Regulation no. 287/2001.

In Spain, there is an equivalent of the prefect called a civil governor (sp., *gobernador civil*), which is a public servant, but that, in comparison with the French and Italian ones, has a more important role in public order. The Spanish civil governor generally holds less powers than the Italian one²².

In the United Kingdom, there is no institution of the prefect in the Romanian and French model, and no prefect equivalent. A somewhat similar position is held by the lord-lieutenant, which, however, is the monarch's representative in the lieutenancy areas of the country. Lord-lieutenants are unpaid, and their main duty is to uphold the dignity of the monarchy, as well as promoting local administrative cooperation. Even so, the literature underlines how foreign is the concept of 'prefect' to the British administration: "for English observers, the most curious creature in the whole French administrative menagerie must surely be the prefect [...] the prefect combines the functions and powers of many officers in British local government"²³, the author enumerating no less than eight different ones.

The foreign comparisons could continue; however, not all countries had the same evolution regarding the prefect. In the 19th century, many European countries, such as Greece, Belgium, Portugal or the Netherlands, had French-inspired prefects, but not all passed the test of time. For example, in 2013 Portugal decided to suppress its prefects, called civil governors.

5. Conclusions

Regarding the impact of GEO no. 4/2021 on the attributions of verifying the legality of local administrative acts and of contesting acts considered illegal before administrative contentious courts, the Ordinance added in this process the secretary general, in order to avoid concerns regarding the politicisation of this process, which must be exclusively legal, characterized by objectivity and impartiality. Therefore, we notice that this responsibility is shared between a public official, the prefect, and a senior civil servant, the general secretary of the prefect, who brings additional guarantees regarding the objectivity and impartiality of challenging the legality of public administrative acts.

Following the comparative analysis with the role of the prefect and the institution of the prefect in other states, we draw some conclusions. This institution is not a common one in administrative systems, and, in some states that it does not exist, its responsibilities are divided into several different positions. Where it is encountered, France and Italy being particularly relevant, the prefect is a (senior) civil servant, and many of his duties coincide with those of the prefect as regulated in Romanian law. However, we emphasize that in both in France, and in Italy, the role of the prefect has been in a constant change and evolution in order to adapt and remain relevant in relation to the current administrative, social, political and cultural realities.

In our opinion, the change of the prefect's status from senior public officer to public official falls into this category of transformations, even though these turned in a different direction than its European counterparts.

However, taking into consideration the importance of the principle of objectivity in the activity of the prefect, further guarantees to ensure this, beyond the new function of general secretary of the prefect, would be beneficial.

We emphasize the importance of limiting the prefect's powers and consider that these changes do not have a negative impact. For example, a problematic change in relation to the European Charter of Local

¹⁸ *Ibidem*, p. 385.

¹⁹ *Ibidem*, pp. 403-404.

²⁰ Gaetano Salvemini *apud* Gaetano Armao, "The Role of the Prefect in the Italian Legal System", *ILAS Student Review*, no. 1 (2018): 1-26.

²¹ Gaetano Armao, *op. cit.*

²² Council of Europe, *Report on European practice and legal framework on prefect institution, local government in emergency situations*, Council of Europe, Strasbourg, 2015.

²³ Howard Machin, "The French Prefects and Local Administration", *Parliamentary Affairs*, no. 27 (1974): 237-250.

Self-Government and the Romanian Constitution would have been the increase of its powers and of the domains of competence.

However, a potential problem we notice is the adoption of amendments to the prefect's status by Government Emergency Ordinance. Even if there are exceptions to the constitutional provisions regarding the obligation to regulate the prefect's institution by organic law, it is not impossible for the Romanian Constitutional Court to consider the adoption of amendments by this legislative form as unconstitutional. Only the presence of this possibility, even if it does not materialise, has the unfortunate effect of adding a negative element of uncertainty, in relation to a position and an institution that is currently of great

importance for the Government, as well as for the local administration.

Taking into consideration these findings, we expect further legislative changes, firstly, in order to consolidate the objectivity of the prefect, and, secondly, in order to protect these changes from being challenged on unconstitutionality grounds.

Further research could focus on other aspects related to the prefect as a public official, or as an institution. Since this study was concerned with the evolution of legislation, others could analyse the changes by employing public administration theories. Moreover, we consider that the prefect's European role, concerning his powers related to the European Union, could be further analysed and critically discussed, as well as those concerning disaster defence.

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