THE IMPLICATIONS OF CCR DEC. NO. 643/2024 ON THE NOTION OF PUBLIC GUARDIANSHIP

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Abstract

This study targets the interpretation of CCR dec. no. 643/2024 given to the notion of public guardianship, more precisely by redefining the area of the authorities that fall under the control of the Prefect in terms of the legality of the acts issued by such authorities. Therefore, starting from the exemplification referred to in art. 123 para. (5) of the Constitution, the issue that arises is whether the acts issued by the President of the County Council can be appealed before the Court of Contentious Administrative by the Prefect. Starting from these premises, the study analyses the notion of public guardianship, that of local and county authorities and concludes on the construction of the Constitutional Court in a critical way.

Keywords: *public guardianship, local government, the Constitution of Romania, CCR, local authorities, county authorities, Prefect.*

1. Introduction

Public guardianship, a fundamental concept of public law, designates all the legal means by which the state authorities exercise control over the activity of decentralised or autonomous entities. This form of supervision is distinct from hierarchical control and judicial review and has its own nature, rooted in the principle of legality and the public interest guarantee. Public guardianship is a concept closely linked to public law, in particular administrative law, and this study analyses the evolution of the concept, going all the way to problems of legislative finesse resulting from legislative inconsistency. From public guardianship seen as a general concept, to the detailed analysis of the Prefect's guardianship over local public authorities (which authorities?), the aim was to carry out a complete analysis, with a focus on the controversial aspects, raised by the doctrine. And last but not least, in this string of controversial issues raised by this concept, we come to CCR dec. no. 643/2024[1], not much commented so far but which comes and settles in an interesting and somewhat controversial manner the issue of the local authorities that fall under the legality control of the Prefect.

2. Theoretical basis of public guardianship. Aspects of comparative law

Public guardianship is an essential mechanism in public law, whereby the state makes sure that decentralised or autonomous entities act lawfully. Public guardianship is an essential mechanism in public law, whereby the state ensures respect for legality in the activity of decentralised or autonomous entities in the light of the consolidation of democracy and the emphasis on the principle of local autonomy, the issue of public guardianship has undergone a substantial reconfiguration. This study aims to analyse the theoretical foundations of public guardianship, to explore its historical evolution and to investigate the actual forms in which it is exercised in contemporary Romania, by highlighting the current challenges. The structure of the paper follows a step-by-step approach, from conceptualisation to practical and critical application, with a focus on Decision no. 643/2024 of the Constitutional Court, which reconfigured some classical interpretations of this concept.

In the specialised literature, public guardianship is defined in various ways, reflecting differences in approach between schools of legal thought. According to the doctrine, public guardianship means „a control of legality over the acts of the local government authorities, exercised by the Prefect on a constitutional basis."[2] The fundamental principles governing public guardianship, such as the principle of legality and the principle of the protection of public interest, are the theoretical pillars which are indispensable in understanding this mechanism.

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[1] CCR dec. no. 643/2024, published in the Official Gazette of Romania no. 41/17.01.2025.

[2] E.E. Ștefan, *Drept administrativ (Administrative Law)*, Part 1, 3rd ed., revised, supplemented and updated, Universul Juridic Publishing House, Bucharest, 2019, p. 217.

Public guardianship is therefore an important concept in administrative law, both in international and national legal doctrine. In international legal literature, public guardianship is generally defined as a form of control exercised by a superior administrative authority over a subordinate or autonomous authority, in order to ensure the legality and appropriateness of administrative acts.

„From the etymological point of view, guardianship control is borrowed by public law from civil law and is given a different content. While in common law, guardianship is a legal institution which expresses the protection and safeguarding of the interests of mentally incompetent persons, in administrative law, the concept of guardianship is intended to protect the general interest, which can sometimes be harmed in the context of administrative decentralisation. This type of control is expanding as different parts of the administration system organise themselves and operate autonomously."[3]

Some of the main features of public guardianship are the following:

- It does not eliminate the autonomy of the protected entity, but limits it in certain respects;
- It can include the approval, cancellation, suspension or replacement of decisions of the supervised entity;
- It is different from hierarchical control, which implies direct subordination;
- It can be legal (legality) or of expediency (political and administrative).

Examples of public guardianship include the control exercised by a ministry over an autonomous administrative authority (*e.g.*, city halls, decentralised institutions,).

In France, public guardianship is known as *tutelle administrative* and has been intensively discussed in relation with local and territorial authorities.

In Italian law, the term *tutela amministrativa* is used, especially in the context of control over autonomous regions and public institutions.

In international and comparative law, public guardianship is frequently referred to in the context of decentralised administration and local self-government and is seen as a balancing tool between autonomy and public accountability. In France, the Prefect (le préfet) is the representative of the state in departments and regions and plays a key role in the administrative supervision of territorial units (communes, departments, regions). This guardianship is mainly exercised by means of the control of legality of the acts adopted by local authorities.

Therefore, the Prefect exercises the control of legality of local authorities' acts. According to the General Code of Territorial Units (GCTU), the Prefect verifies the legality of resolutions, decisions and contracts concluded by local authorities. The acts adopted by the local authorities shall be delivered to the Prefect for verification. If an illegality is found, the Prefect can refer the matter to the administrative court for cancellation of the act (*i.e.*, a commune makes a decision to award a public contract without following the legal procedures. The Prefect can notify the commune on the respective illegality and refers the matter to the administrative court for annulment if the commune fails to withdraw the decision).

Furthermore, the Prefect can request the suspension of administrative acts in case of emergency. The Prefect can request the suspension of the execution of a local administrative act if it considers that there is a serious risk to prejudice public order or legality (*i.e.*, a city hall adopts a local regulation that excessively restricts freedom of movement (*i.e.*, prohibits movement in a wide area without valid reason). The Prefect can request prompt suspension of this act on grounds of illegality and infringement of fundamental rights.

Another dimension of public guardianship exercised by the Prefect in France enables control over decisions on the organisation of local elections. The role of the Prefect is to validate or dispute the organization of local elections (*i.e.*, convocation of the local council, validation of councillors' terms of office). If a local councillor is considered to be incompatible (*i.e.*, an employee of the city hall), the Prefect can challenge the validation of the term of office before the administrative court.

Last but not least, the Prefect shall be responsible for supervising the legality of the local budget. The Prefect can refer a matter to the Regional Chamber of Accounts if a local budget is not balanced or is adopted with delay. In serious cases, the budget can be rectified by the central authorities.

It can therefore be emphasised that public guardianship exercised by the Prefect in France is a mechanism for ensuring that the law is observed in the activities of territorial units. Although these entities have autonomy, it is not absolute - the state, through the Prefect, maintains a rigorous but strict legal control framework.

[3] E. Bălan, *Instituții administrative (Administrative Institutions)*, C.H. Beck Publishing House, Bucharest, 2008, p. 183.

With regard to the legal nature of public guardianship, it is an institution of public law and is exercised within the legal relations between public authorities. It is a mechanism through which the state exercises its role as guarantor of legality and public interest in the activity of other public entities. Furthermore, public guardianship is a form of administrative control that is part of the category of administrative control of legality and expediency, but in general the emphasis is on legality. It is not a hierarchical control (involving a direct subordination relationship), but an external one, exercised by an authority distinct from the one being controlled. As regards the legal source, public guardianship is not general but specifically regulated by law. The authority exercising guardianship may not extend it beyond the cases and forms laid down by law (principle of legality).

This is how we reach the classic example of public guardianship, which is exercised by the Prefect over local government (city halls, local councils), initially under the Local Government Act (Law no. 215/2001, later replaced by the Administrative Code).

Following this example, we can say that the functions of public guardianship are aimed at ensuring compliance with the law by autonomous entities, correcting possible excesses of power or illegalities and protecting the public interest in the exercise of local or institutional autonomy.

3. Forms and mechanisms of public guardianship. Guardianship exercised by the Prefect

Public guardianship over local authorities in contemporary Romania is mainly exercised by the Prefect, whose main duty is to ensure that administrative acts are lawful. Local Government Law no. 215/2001 regulated this duty in detail, giving the Prefect the prerogative to challenge unlawful acts of local or county councils before the court. Beyond the Prefect, guardianship also manifests itself in relation to autonomous public institutions, through more subtle mechanisms, such as the authorisation or suspension of administrative acts.

According to art. 123 (*of the Constitution, s.n.)*, the Prefect is the representative of the Government at local level, but, looking at the regulation as a whole, the Prefect has the following powers: 1. Representative of the Government; 2. Head of state in the county (Bucharest municipality); 3. Public guardianship authority for the supervision of compliance with the law by local government authorities. In the capacity of authority supervising compliance with the law by the local government authorities, the Prefect shall be entitled to bring before the contentious administrative court any act of an elected council (local or county), of a Mayor or any executive body created, according to the law, at county level, when the Prefect considers that it is illegal."[4]

The public guardianship exercised by the Prefect is a specific form of legality control over the acts of local government. This paper analyses the legal bases, mechanisms of application, legal limits and practical implications of the Prefect's guardianship, as well as possible directions of reform to make this essential instrument more efficient in a decentralised state.

In the architecture of public administration in Romania, the Prefect plays an essential role in maintaining the balance between local autonomy and central authority. The Prefect is not a mere civil servant, but the government representative in the territory, responsible for ensuring the legality of administrative acts of local authorities. The guardianship that the Prefect exercises is not one of expediency, but exclusively one of legality, being regulated both constitutionally and by specific public administration legislation.

„In exercising public guardianship control, the Prefect acts as the representative of the Government at county level and as guarantor of law and public order. By bringing an action before the contentious administrative court, the Prefect does not seek the enforcement of a right or interest of his own, but the annulment of unlawful administrative acts issued or adopted by the public administration authorities established at county level."[5]

The relevant provisions in terms of public guardianship are represented by art. 123 para. (5) of the Constitution of Romania, „The Prefect may challenge, in the administrative court, an act of the County Council, of a Local Council, or of a Mayor, in case he deems it unlawful." This constitutional provision enshrines a specific form of public guardianship which combines the principles of decentralization with the requirements of legality.

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[4] A. Iorgovan, *Tratat de drept administrativ (Administrative Law Treaty)*, vol. 1, 4th ed., All Beck Publishing House, Bucharest, 2005, p. 466-467.

[5] L. Giurgiu, *Evoluții recente în progresul legislativ de modernizare a administrației publice românești cu privire la controlul de tutelă administrativă exercitat de prefect (Recent developments in the legislative progress of modernization of the Romanian public administration with regard to the control of public guardianship exercised by the Prefect)*, in Curierul judiciar no. 7-8/2006, p. 74-79.

From the legal point of view, the constitutional provisions are developed as follows: „Art. 3 para. (1) of Law no. 544/2004 of the contentious administrative applies the provisions of art. 123 para. (5) of the Constitution according to which the Prefect exercises a role of public guardianship, meaning that he may challenge, in the administrative court, an act of the County Council, of a Local Council, or of a Mayor, in case he deems it unlawful. The subject matter of the guardianship control has been defined by two preliminary rulings on points of law (HCCJ, Panel for the determination of points of law, dec. no. 11/2015[6] and dec. no. 26/2016[7]), where the High Court of Cassation and Justice has established with mandatory force, pursuant to art. 521 CPC, that the Prefect can challenge before the contentious administrative courts only typical administrative acts issued under public authority, within the meaning of art. 2 para. (1) letter c) of Law no. 554/2004, not the refusal to settle a request [assimilated to an administrative act according to the provisions of art. 2 para. (2) of Law no. 554/2004] or acts of a different legal nature of local government."[8]

The detailed regulation can be found in the Administrative Code (Law no. 57/2019), which sets out the Prefect's powers, the procedure for bringing cases to court and the legal effects of his actions. Art. 252 of the Code clearly states that the Prefect may exercise the control of legality over acts issued by local councils, county councils and Mayors.

The guardianship exercised by the Prefect is therefore a form of control of legality and does not imply a relationship of subordination between the Prefect and the local authorities. The Prefect is not competent to annul or modify local administrative acts, but only to challenge them before the contentious administrative court. The court is thus the only authority competent to decide on the legality of the challenged act.

It is essential to emphasize that the guardianship of the Prefect does not affect the principle of local autonomy, enshrined by art. 120 of the Constitution and reaffirmed in the European Charter of Local Self-Government, ratified by Romania by Law no. 199/1997.

The process of exercising the legality guardianship involves the following steps:

- Submission of acts: Acts adopted or issued by local authorities must be submitted to the Prefect, in accordance with the law, for verification of their legality;
- Legal analysis: the Prefect, through the specialized structures, analyses the acts from the point of view of their compliance with the legislation in force;
- Referral to the court: If the act is found to be unlawful, the Prefect brings an action before the competent administrative court. Pursuant to article 254 of the Administrative Code, the exercise of this action suspends the execution of the challenged act;
- Court judgment: Only the administrative court can decide to annul the act in question, based on an objective judgment.

The Prefect's guardianship is governed by a number of legal limits and safeguards that ensure a balance between government control and local autonomy:

- Limitation as to legality: the Prefect is not allowed to intervene on the considerations of expediency of an administrative act, even if he considers them inappropriate;
- Strict procedural deadlines: the Prefect's action shall be brought within 6 months as of the date on which he became aware of the act in question. Failure to bring an action within the time limit renders the act fully valid, even if it is unlawful;
- Institutional neutrality: although the law provides that the Prefect is a high official, in practice his appointment is often politically influenced, which raises questions of impartiality (see the appointment/removal of prefects by the government on the occasion of each new government).

Although the legal framework is clearly shaped, in practice, the guardianship function exercised by the Prefect faces several difficulties, starting with the politicization of the function, with prefects often being changed with the change of government, as we have shown above, which affects the stability and neutrality of the guardianship, followed by the reduced administrative capacity, in relation to an often undersized Prefect's institution, not having sufficient human resources or expertise to analyse thousands of local acts within a

[6] HCCJ dec. no. 11/2015, published in the Official Gazette of Romania no. 501/08.07.2015.

[7] HCCJ dec. no. 26/2016, published in the Official Gazette of Romania no. 996/12.12.2016.

[8] G. Bogasiu, *Legea contenciosului administrativ comentată și adnotată (Law of the contentious administrative, commented and annotated)*, 5th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2022, p. 105.

reasonable timeframe and last but not least, there are institutional conflicts, with local authorities often perceiving the prefect's control as a form of political interference rather than as a mechanism to protect legality.

In order to make the Prefect's guardianship more effective and to strengthen his role as guarantor of legality, the following proposals could be considered: effective depoliticization of the position of Prefect, through transparent competitions and clear professional criteria; increasing the institutional capacity of prefectures through digitalisation, recruitment of specialized lawyers and partnerships with academic institutions; legislative clarification of the powers of local authorities and the limits of the Prefect's intervention; the creation of a national digital system of local administrative records to allow more efficient and faster control; continuous training of local civil servants to prevent the issuing of illegal acts.

4. Current issues and controversies

Although the main scope of public guardianship is to guarantee legality, the excessive application thereof may lead to unjustified interference in local self-government in violation of the Constitution and the European Charter of Local Self-Government. A notable example is CCR dec. no. 361/2014, which established that the Prefect cannot intervene in the decision-making process of local authorities, his powers being limited to the control of legality. Therefore, the balance between supervision and autonomy remains a constant challenge.

In the following paragraphs, we will analyse several controversies arising from the interpretation of the legal and constitutional texts governing the guardianship of the Prefect, concluding with a unique interpretation that the Constitutional Court has given in the field of acts subject to guardianship control.

„With regard to the field of administrative acts that are subject to the control of public guardianship and to the action filed by the Prefect before the contentious administrative, an analysis is still required after the adoption of the Administrative Code, by referring the constitutional provisions to the infra-constitutional legal provisions that must be adopted within the limits set by the Constitution and based on the principle of the pre-eminence of the Constitution that must be at the basis of the entire normative edifice. Unfortunately …, the Administrative Code has not clarified some controversial issues from the period of the old special normative act (Law no. 340/2004, repealed by the Administrative Code), by taking over tale quale the provisions of the old normative act regulating the field of administrative acts that are subject to public guardianship control and to the action brought by the Prefect before the contentious administrative court.

The content of these legal provisions shows that, in the same manner as in the old normative act, the provisions of the President of the County Council are not included among the administrative acts subject to public guardianship control exercised by the Prefect."[9]

Following the same line of ideas and emphasizing the same inconsistencies between the Constitution and the subsequent normative acts, Prof. Cătălin-Silviu Săraru wonders: „The provisions of the President of the County Council may be subject to legality control exercised by the Prefect? In our opinion, the regulation by law of the Prefect's authority to verify the legality of acts issued by the Presidents of the county councils violates art. 123 para. (5) of the Constitution, since the constitutional text relied on does not include the acts of the President of the county council in the limitative list of acts which may be challenged by the Prefect before the contentious administrative courts. However, it is not possible to add by law a new subject of law the acts of which are subject to the control of legality exercised by the Prefect, the extension of the scope of application of the provisions of art. 123 para. (5) of the Constitution can only be achieved by a law revising the Constitution."[10]

In another opinion, Prof. Dana Apostol Tofan points out in a subtle way: „We note that both art. 123 para. (5) of the Fundamental Law and art. 255 of the Administrative Code refer only to the control of administrative acts of the county council, the local council and the Mayor, omitting the category of administrative acts of the President of the county council, although he is identified by art. 5 letter n) of the Administrative Code as an executive authority, and in the administrative practice, the control exercised by the Prefect has traditionally concerned his acts. As far as we are concerned, we consider that the admission of the legality control exercised by the Prefect over the acts of the President of the county council must be directly associated with the admission of the qualification of the President of the county council as a genuine authority of the local government

[9] O. Puie, *Contencios administrativ și fiscal (Contentious administrative and fiscal)*, Universul Juridic Publishing House, Bucharest, 2019, p. 170-172.

[10] C.S. Săraru, *Contenciosul administrativ român (Romanian contentious administrative)*, C.H. Beck Publishing House, Bucharest, 2019, p. 186-187.

alongside the three categories of local public authorities expressly identified by the constitutional provisions, namely the county council, the local council and the Mayor. As long as the Administrative Code confers him a special legal status, establishing his term of office, role, powers, acts issued in the exercise of his duties and liability, identifying him as an executive authority at county level, it is self-evident that the Prefect should also exercise the control of legality over his acts."[11]

In 2024, the Constitutional Court pronounced dec. no. 643 which includes in the scope of the acts that can be controlled by the Prefect, the building permits or demolition permits issued by the county councils.

This decision was made in a broader context, the provisions of art. 2 of Law no. 50/1991 on the authorization of construction works being challenged in court.

The relevant paragraphs of the decision are the following:

- „The scope of the exception of unconstitutionality is represented by the provisions of art. 12 para. (2) of Law no. 50/1991 on the authorization of construction works, republished in the Official Gazette of Romania, Part I, no. 933/13.10.2004, as amended by item 9 of sole article of Law no. 119/2005 on the approval of GO no. 122/2004 for the amendment of art. 4 of Law no. 50/1991 on the authorization of construction works, published in the Official Gazette of Romania, Part I, no. 412/16.05.2005. The challenged legal text has the following normative content: „(2) Once the action has been filed, the court may be asked to suspend the construction or demolition permit and to cease the execution of the works until the merits of the case have been resolved."
- The constitutional provisions claimed in support of the exception of unconstitutionality are those of art. 123 para. (5), according to which „The Prefect may challenge, in the administrative court, an act of the County Council, of a Local Council, or of a Mayor, in case he deems it unlawful. The act thus challenged shall be suspended de jure."
- The provisions of art. 12 para. (2) of Law no. 50/1991 establish the possibility for the Prefect to request the court, at the same time as filing an action for annulment, to suspend the building or demolition permit and to cease the execution of the works, pending the resolution of the case on the merits.

With regard to the legal regime applicable to the building or demolition permit, the Court notes that, according to art. 2 para. (1) of Law no. 50/1991, the building permit is „the final act of authority of the local government on the basis of which the construction works are permitted, in accordance with the measures provided by law regarding the location, design, construction, operation and post-use of buildings".

With regard to the public authority issuing this administrative act, art. 4 of Law no. 50/1991 establishes that building permits are issued by the Presidents of the county councils and Mayors of administrative and territorial units, as the case may be, depending on the categories of works to be carried out, as set out in art. 3 of the law.

As regards the scope of the acts over which the Prefect has the right of public guardianship by virtue of art. 123 para. (5) of the Constitution, the Court considers that it is necessary to make a certain distinction, starting from the issuer of the administrative act under challenge, namely whether it is the Mayor or the President of the county council, as provided for by art. 4 of Law no. 50/1991 in relation to the building permit or to the demolition permit.

Therefore, in what concerns the Mayor, he is expressly mentioned in the content of art. 123 para. (5) of the Constitution, in the capacity of issuer of an administrative act that can be challenged by the Prefect. The constitutional text, however, does not expressly mention the President of the county council in the same capacity, although, as the Court pointed out above, the President of the county council, in the exercise of his powers, issues a number of administrative acts, and a building/demolition permit can be issued by both the Mayor and the President of the County Council, as the case may be. The acts issued, in general, by the President of the County Council are not among those expressly listed in the fundamental rule relied on, which uses lato sensu the expression an act of the county council, the local council or the Mayor. Therefore, the Court holds that, as a matter of principle, the administrative acts issued by the President of the county council fall within the category of acts of the county council and cannot be exempted from the legality control exercised by the action brought by the Prefect by virtue of his constitutional right of public guardianship."[12]

[11] D. Apostol Tofan, *Drept administrativ (Administrative Law)*, vol. I, 5th ed., C.H. Beck Publishing House, Bucharest, 2020, p. 287.
[12] CCR dec. no. 643/2024, para. 15, 16,18, 19, 20, 22, 23.

Although in a subtle way, the Constitutional Court grants the Prefect the power to challenge the acts of the Presidents of county councils in contentious administrative proceedings, thus broadening the scope of acts that can be challenged by the Prefect on grounds of legality.

5. Conclusions

Public guardianship continues to be a fundamental tool for ensuring respect for legality and protecting the public interest in administrative relations. Notwithstanding, its exercise must be carefully calibrated so as not to affect the constitutionally guaranteed autonomy of decentralized authorities. In the future, adapting public guardianship to the new European realities will require a reconsideration of the applicable limits and procedures, in a spirit of balance and respect for the principles of the rule of law.

In what concerns the guardianship exercised by the Prefect in Romania, it is an essential legal instrument for maintaining legality in local government. Although it does not affect local self-government, this form of control has direct implications for the quality of administrative acts. Legality must take precedence in a state governed by the rule of law, and the Prefect must be its guardian. In order for this function to be effective, a balanced, professionalized and depoliticized approach is required.

Furthermore, in the light of all the concepts presented, in the light of what has been ruled by the Constitutional Court, it is necessary that the future amendment of the Constitution should also consider an amendment to art. 123 para. (5), broadening expressis verbis the scope of acts that can be controlled by the Prefect and of the acts issued by the Presidents of the county councils.

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