REPRESENTATION OF THE STATE IN TERRITORY BY THE PREFECT IN THE ROMANIAN LEGAL SYSTEM

Verginia VEDINAŞ, Prof.Phd.
University of Bucharest

Daniela CIOCHINA, Lecturer Phd.
Dimitrie Cantemir Christian University,
Superior Council of Magistracy
danielaciochina@yahoo.com

Summary:
This paper aims to examine the status of the prefect, in his capacity as representative of the Government in the Romanian legal system. The analysis is based on constitutional and legal provisions equally. Both regulations will be analyzed both in terms of positive law, in a critical view, and in terms of suggestions of ferenda law which should be considered in the future. These proposals cover both the current constitutional and legal framework represented by Law no. 330/2004.

Keywords: *prefect, Government, State, representative, subordination relations, administrative trusteeship, administrative, constitutional status, legal status.*

I. Terminological substantiation

The notion of representation in plain language is the quality of a person, individual or legal, to act on behalf of another public or private law, or exercise, on its behalf but on its own responsibility, rights and obligations conferred by law.
Representation is found equally in private law and public law.
For private law, the substantiation of the representation is found mainly in the Civil Code[1], which is, as we like to say, "the bible of private law" and the Civil Procedure Code[1] or the Criminal Procedure Code[2].

[1] The Civil Code was approved by Law No. nr.287/2009 published in Official Gazette no. 511 of 24 July 2009 and put into force by Law no.71/2011 published in the Official Gazette of Romania, Part I, no. 409 of 10 June 2011.

It's mainly about the following types of representation:
a). representation of persons lack capacity to use and exercise capacity[3];
b). representation by the governing bodies of legal entities[4];
c). representation, before courts or the commercial arbitration, of the parties in a litigation[5];
d). representation before the investigators or criminal prosecution of persons that are accused or defendant[6].
In public law, the representation can be analyzed from several aspects.
The first variant is the **representation function** exercised by certain public authorities or institutions at central and local level.
The art. 80 of the Romanian Constitution revised and republished[7] provide that **the President represents the Romanian State** and, although the Constitution does not expressly provide, **the representation is exercised both internally and externally**.
Law no. 215/2001 on local government[8], provides in Article 62. paragraph 1 and Article 102 para. 1 that the mayor and the president of the county council represent the common, city, municipality, or where applicable, the county, in relation to all other natural or legal persons, from country or from abroad, and also in justice.
A second situation is the one that aims to **represent the people** by **certain bodies**, elected by universal, equal, direct, secret and freely expressed vote.
The art. 2 of the Constitution provides that the *Romanian national sovereignty belongs to the Romanian people, who exercise it through its representative bodies chosen through free, regular and fair elections and by referendum.* Have quality of central representative body:

- **Parliament**, which is described in the Constitution as **the supreme representative body of the Romanian people;**

[1] The Code of Civil Procedure was approved by Law nr.134/2010 published in the Official Gazette of Romania, Part I, on July 15, 2010 nr.485, implemented by Government Emergency Ordinance no. 4 of January 30, 2013 published in the Official Gazette of Romania, Part I, no. 68 of 31 January 2013.
[2] The Criminal Procedure Code was approved by Law nr.135/2010 published in the Official Gazette of Romania, Part I, no. 486 of 15 July 2010, implemented by Law no.255/2013 published in the Official Gazette of Romania, Part I, nr.515 of 14 August 2013.
[3] It is about art. 143 and the following ones from the Civil Code
[4] Regulated by art. 1919 from the Civil Code
[5] According to the art. 80 and the following ones from the Code of Civil Procedure
[6] According to the art. 96 from the Code of Criminal Procedure
[7] The Romanian Constitution was published in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003 , was revised by Law nr.429/2003 published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003 and republished by the Legislative Council under Art. 152 of the Constitution.
[8] Republished in the Official Gazette of Romania, Part I, no. 21 from 18 july 2006

- **President of Romania**, which has a **double function of representation internally,** being one of the representative bodies referred by art. 2 of the Constitution, but also **externally.**

Locally, have status of representative bodies the local councils and county councils, that are *deliberative bodies of local autonomy* and **mayors** and **chairmen of county council**, that are their executive bodies.

We need to distinguish between the concept of a **representative body**, on the one hand, and **quality** (function) **of representative** exercised by some public body or public function holder or dignity, on the other side.

The notion of *"public function"* and its title should be understood in a lato-sensu sense, which includes various professions.

The quality of "representative body" is conferred by the formation of that organ, respectively **the choice**, and also its proclamation, which is made by the **legislator**. As mentioned above, the Constitution itself, fundamental law in State qualifies Parliament as "the supreme representative body" by Article 61 para. (1).

In what concerns the President, through art. 80 of the Constitution it is given the role of *"representative of the Romanian state"* and from the content of art. 82 on *the election of the President*, results that it has the quality of **representative organ**. We can say that, what concerns the President, the Constitution confers a double quality: the authority exercising a function, a role, that of representing the Romanian State and **status** of representative body, being elected by universal equal, direct, secret and freely expressed vote.

The same double quality results also for other public authorities, such as mayor or chairman of the county council, which, according to the provisions of Law 215/2001 on local public administration, as amended and supplemented, republished, have the status of *"representative bodies"*[1] but is also exercising the function of representing the administrative unit in which they are elected and operate. In terms of representing exercised by certain holders of function or dignity under the law, we have to make some clarifications. First, from principle, every manager of a public authority or institution fulfills the role of *representing that authority or public institution* in relation to other individual or legal persons, Romanian or foreign, from country or abroad.

Such a quality results otherwise from the content of the law governing the organization and functioning of the public authority or institution concerned. Exempli gratia, **H. G. No. 156 of 10 April 2013** [2] amending and supplementing of Government Decision no. 416/2007 on the organization of

[1] It is about art. 62 from Law no. 215/2001

[2] Published in the Official Gazette of Romania, Part I, no. 213 from 15 april 2013

the Ministry of Internal Affairs and to amend certain acts, which states in Article 1 that the Minister of Internal Affairs is leading the ministry and represents is in relations with other subjects of private law.
Secondly, certain holders of high public functions or dignity receive, in their duties, in exercising their tasks, empowerment or delegation to represent the public authority or institution.
For example, the regulation of organization of specific activities[1] provides in paragraph 50 and the following, that the specific activities of the Court of Accounts, respectively performing control actions/audit by specialized staff is made based on documents called "*delegations"*, whose content is provided on Annex no.2.2 contained in to the Regulation.
Regarding the procedure of solving civil or criminal litigations, where appropriate, the new Civil Procedure Code and the new Code of Criminal Procedure contain an independent section which governs **the representation of parties before the court**[2].

In conclusion, to those mentioned in the introductory part of this number, we consider that may be essentialized the following ideas:

a. the notion of *"representative body"* evokes the status that certain public institutions have, which is determined by the way of constitution, respectively by universal, equal, secret, freely expressed vote;
b. the representative quality of a public law matter is conferred by law, to subjects of public or private law (state *representative* by the president, representative of the village by mayors or presidents of the local council, representative of the public authority or institution that leads the person performing the function of head of the public authority, respectively President, director, CEO) or the prefect quality of government representative;
c. specific representation task of a matter of public or private law which exercises specifically a certain person who performs a public function or dignity under an *act of empowerment* or of *delegation*, in order to perform a specific activity.
Regarding this study, we will consider the quality of representative exercised by the holder of a public function or dignity under the law, situation including the prefect.

[1] RODAS published by Plenum Decision no. 130/2010 published in the Official Gazette of Romania, part I, no. 832 from 13 december 2010
[2] We consider the art. 80 from the Code of Civil Procedure and art. 96 from Code of Criminal Procedure

II. The prefect - government representative in each county and in Bucharest . A vision of lege lata and of lege ferenda.

II.1. The current constitutional status.

Art.123 para. (1) of the Constitution provides that **the prefect is the representative** of the government in each county and in Bucharest. According to the legislation in force[1], the prefect has the status of a **civil servant** from **the high-rank public officials**. Since the first draft of the Constitution, by the old art. 122 paragraph (1) that become art. 123 para. (l) by republishing, it was stipulated that the prefect is **the representative of the local government**.

Such a quality is reflected by the Law no. 340/2004 regarding the prefect and the prefect institution, as amended and supplemented, republished[2], which in Article 1 paragraph. (1) reproduces the provisions of Article 123 para. (2) providing that *"the prefect is the representative of local government."*

This is a constitutional and legal norm, which explicitly proclaims the quality of prefect to be the representative of local government.

To this rule set out in Article 123 para. (2) the first thesis is added the one from the same paragraph, second thesis, according to that the prefect *"leads decentralized public services of the ministries and other bodies of specialized central administration.* "

The function to *"lead the decentralized public services"* is derived from prefect representative function of Government locally. The Government, under Article 102 par. (1) of the Constitution, **exercises the general management of public administration[3]**.

This is **the administrative role** that government exercises, along with **its political role**, through which ensures the **country's internal and foreign policy[4]**.

---

[1] We consider art.12 of the Law no.188/1999 on Civil Servants Statute, republished in the Official Gazette of Romania, Part I no. 251 of 22 March 2004 and article 1 paragraph 1 of Law no.340/2004 on the prefect and the prefect institution, published in the Official Gazette of Romania, Part I, no. 658 of 21 July 2004

[2] The republishing was made in the Official Gazette of Romania, Part I, no. 225 from 24 march 2008

[3] The article 102 para. (1) has the following content: "The government, according to the government program accepted by Parliament, ensures the country's internal and external policy and oversees on public administration"

[4] Regarding details on this issue, see **Dana Apostol Tofan** in **I. Moraru E.S. Tanasescu** (coord.) *Romanian Constitution, comment on articles*, ed. Ch Beck, Bucharest, 2008, pp.941-942.

As the government **manages the entire administration**, appears naturally that its representative in the local state administration to lead the state administration in territory represented by the **decentralized public services of ministries and other central administration bodies of specialty.**

Moreover, Article 1 para. (4) of Law no. 340/2004 states that *"the ministers and the heads of other central government bodies under the public central administration under Government may delegate some of their duties of management and control with respect to the activity of decentralized public services subordinated".* The duties that may be established by the delegation are established by Government decision, now being about GO no. 460/2006[1].

From the quality of representative of the Government in the territory derives the special right that the law recognizes to the prefect[2] **to be given military honors**, under the conditions established by specific regulations[3], during military ceremonies held in the county.

By the content of Article 123 of the Constitution are determined the categories of relationships that the prefect has with other government bodies operating in the county where he was appointed by the Government:

a). as far as that goes the **central government decentralized public services** of specialized central public administration in the county, the **prefect leads them**, hence results the existence of **relations of subordination thereof to the prefect**, being, as allowed by the doctrine and practice, a **horizontal subordination** that coexist with **vertical subordination** which they have to central authorities of central specialized administraion in structure which they belong;
b). with respect to the **local autonomous authorities**, the Constitution provides that **the prefect is not in relations of subordination to them**. We consider par. (3) of Article 123[4], which states, expressis-verbis, **the absence of subordination between prefect**, on the one hand, **the local council** and **the mayor** and **county council** and **its chairman**, on the other hand.

[1] Published in the Official Gazette of Romania, Part I, no. 363 from 26 april 2006
[2] By art. 16 of Law 340/2004
[3] Is about the Regulation on military honors and ceremonies approved by the Minister of National Defence, published in the Official Gazette of Romania, Part I, April 2009 nr.208/1st of april 2009
[4] The text was introduced by Law Review no. 429/2003

Lack of subordination is natural and legitimate, the local autonomy governing the activity of administrative authorities from administrative units excluding any other authorities.

This is the main reason why the Constitution, in the first version, did not consider it necessary to clarify that there is no subordination between the prefect and authorities of local autonomy in communes, towns and counties.

As practice has shown that not always have been understood and were correctly interpreted the laws governing the organization and functioning of public administration in territorial-administrative units, has found it necessary in 2003 to complement the current contents of Article 123 para. (3), that brings two new elements:

a). on the one hand, **is completed the scope of the authorities in the county with the county council president;**

b). on the other hand, is stated that between **the prefect** and **autonomous authorities in communes** and **cities** (local council and mayor) and **from the counties** (county council and county council president) **there are no relationship of subordination**.

To all these changes occurred in present to the fundamental law, the current constitutional status includes the following key dimensions:

a). **the prefect** is **the representative of the Government in each county** and **in Bucharest**, function exercised by virtue of an appointing act passed by the authority that he represents, respectively the Government;

b). **the prefect leads the deconcentrated services of the central specialized administration** from counties and Bucharest, being to them in horizontal relations of subordination;
c). **the relations between the prefect**, on the one hand, and **autonomous deliberative and executive authorities of the communes**, cities (municipalities) and **counties there are not subordination relationships;**

d). **the prefect exercises the supervising of legality of local and county authorities activity**, whose **acts may appeal to the administrative contentious courts**, which attracts **the suspension** of the contested acts. This right of the prefect is qualified in doctrine as **administrative**

guardianship[1] institution that enjoys legal recognition by Article 3 of Law no. 554/2004, of the administrative contentious[2].

II. 2. The prefect, from the perspective of constitutional revision

In the following, we will briefly analyze, from a critical perspective, the draft law amending the Constitution[3], which was subject to review by the Constitutional Court, which declared it, in the most part, contrary to the fundamental law[4].

As far as we are concerned, we have commented on the draft law amending the Constitution[5] before it was subject to analysis of the Constitutional Court and we remain constant to the vision expressed, with the additions that we make in this material.

A first observation is that we share the option to devote a separate section in Chapter V of Title III of the Constitution to regulate "*the state administration of the territory*." In this way, it eliminates the discussions that the current constitutional regulation created, who puts the prefect in Section II of Chapter V of Title III of the Constitution, in which is regulated the *"public local administration"*.

On the other hand, these discussions focused on the use of the concept *"local" both* for administration from the administrative units (villages, towns, cities) but also for those at the **intermediate level** (counties). In other words, the local level, in terms of terminology, encompasses also the county one, which is **partially true**. Secondly, but in relation to the first, hence the issue of whether **the prefect is local body or a central one**? In our opinion, as the representative of the Government in the territory, the prefect is a **central body**, a **public descentralized authority of the Government in the county.**

The prefect is not a part of public authorities which together constitute "local public administration" as it might result from where it is placed. In this respect, the solution that proposes the draft law amending the Constitution **is legitimate**. But what is lacked of legitimacy is the article

[1] For more about development of the institution, see **Bezerita Luciana (Tomescu)** - *Administrative trusteeship* PhD Thesis, Bucharest, 2014, University of Bucharest.

[2] Published in the Official Gazette of Romania, Part I, nr.1154 of 7 December 2004. Article 3 of this law is called "administrative trusteeship".

[3] We consider the draft law was released by Parliament in June 2013

[4] By Decision. 80/16.02.2014 published in the Official Gazette of Romania, Part I, no. 246/07.04.2014.

[5] See **Verginia Vedinas** - *Some considerations on the draft law amending the Constitution*, the Public Law Magazine no. 3/2013, pp. 17-35.

content that is proposed to constitute the section governing *"state administration in territory."* A first aspect, that we consider a drafting one, aimes **even that the proposed section would consist of a single article.** In our view, a section is part of a law, which should have a structure that includes several items, at least two, which confer identity of distinct part of a chapter.

A second aspect concerns **the proposal to establish at the level of fundamental law** also the **sub-prefect**, alongside prefect, but especially how it proposes to achieve this, which, from the text analysis, we find that **it puts on an equal footing legal prefect and sub-prefect**. If in respect to the first issue we can accept, we can also admit that the subprefect to be enshrined in the Constitution, with the second we can not agree. Such a view is unacceptable, legally, and would cause problems in practice. Therefore, we consider necessary for a rethink, otherwise the text. A section of the text proposed to be introduced as the first section of Chapter V of Title III of the Constitution, **could have two items**: a first article in which to regulate **the prefect**, with its constitutional status, as Government representative at the county level, and **a second article** in which to regulate **the sub-prefect,** as deputy of prefect and as its substitute, when he is unable to perform the function.

The Constitutional consecreation of the sub-prefect could be beneficial for the protection of its status in relation to political decisions. We consider the formal declaration, by law, of the prefect and the sub-prefect as high-rank civil servants, to whom political affiliation is prohibited, under penalty of dismissal from office, otherwise. But the government practice flagrantly contradicts the letter and spirit of these regulations, until cancelling them. Secondly, we consider the abolition of one of the two sub-prefects consecrated by Law. 340/2004 that existing in each county[1], which was made by a political decision, not enshrined in terms of legislative, motivated by the so-called need to reduce costs, the economic crisis through which Romania also passes. Beyond that we do not share such a view, that, in our view, **the genuine democracy has its costs and we can not sacrifice citing *"economic"* excuses**, we can point out **the lack of legitimacy of the procedures: political decision can not substitute the law.** So it is that **the law continues to talk about the two sub-prefects**, because in reality, **to have a single sub-prefect in the county.**

[1] Under Article 9, which has the following content *"(1) For carrying out the duties and powers conferred upon it by law, the prefect is assisted by two deputy prefects. Bucharest prefect is assisted by three sub-prefects. (2) Powers subprefect shall be established by the Government *). "*

Therefore, if in the Constitution would be a separate article devoted to the sub-prefect, in which to specify how many sub-prefects are in the county and how many in the capital (in our opinion should be about two to the county and three to the capital), things would be stabilized.

Another serious issue that also requires to be resolved by the Constitution and aimes equally *the prefects* and *sub-prefects* is **their status**, **politicians** or **high-rank civil servants**. As is known, to the prefect and sub-prefect there were conferred the status of high-rank civil servants by law in 2003[1] and, effectively, since 2005, when it was adopted GEO no. 179/2004[2] and was coverred the certification process on their position of the prefects and sub-prefects that, at that time were on their positions, were political appointed and were tenured as high-rank civil servants. This thing has caused some criticism and feedback in doctrine[3] but, although passed 9 years from that moment and more than 10 years after the adoption of the law, the things have not changed, the prefects and sub-prefects continue to be appointed with violation of the recruitment procedure of high-rank civil servants, by national competition, governed by Law no. 188/1999 and Government Decree which implements it[4].

Changing from their function, is drawn, as a rule, by the changes in political alliances governing, an dis realized by **mobility procedure**, which led to wonder whether **mobility is longer a way** to change the service relation of the high-rank civil servant or become a form of its termination[5]. Clarifying the legal status of the prefect and sub-prefect is a problem that is becoming more stronger required in the legal doctrine , to give up what is called demagogy, in sense that it declares something by the law, but in reality things occures the opposite[6].

---

[1] It is about Law. 161/2003 on transparency in public functions and public integrity, public dignities and business environment, the prevention and punishment of corruption, published in the Official Gazette of Romania, Part I, no. 279/21.04.2003 which amended several laws, including the Law. 188/1999 on the status of civil servants.

[2] Published in the Official Gazette of Romania, Part I, no. 1.142/16.12.2005.

[3] **Verginia Vedinas** – *Status of the civil servants*, Ed.Law Universe, Bucharest, 2009, pp.84-86.

[4] See Article 18 of the Law no.188/1999 on the Statute of civil servants and G.D. 611/2008 for the approval of the organization and career of civil servants

[5] **Irina Alexe** - *Mobility of high-rank civil servants - way to change or terminate the service* in nr.4/2009 Public Law Review, published in Scientific Notebook of the Institute of Administrative Sciences "Paul Negulescu" no. 7/2005, pp.275-284.

[6] **Radu Nicolae Stoian** - Prefect in Romanian law and comparative, Ph. thesis, University of Bucharest, 2014.

Therefore, we allow ourselves to reiterate this problem, as the need to slice in a manner of harmonizing the text of the law with the practice of governance and administration. The solution that we support and we have presented it in our other articles[1] is the one of returning to the status of **the prefect and sub-prefect as politicians**. In our view, within a genuine rule of law, as Romania is stated by the Constitution, and how it aspires to be, perfecting the legal and institutional realities, it is not accepted the existence and perpetuation of some ambiguous situations, which creates a sort of pharisaism, of duplicity that are not good for anyone. It may serve some interest at a time, cyclical, but erodes the foundations of democracy. What stands out a rule of law and democratic from a totalitarian one is the correspondence between the promoted ones at the legislative and declarative level and what actually happens, in practice of governance and administration. The solution is, moreover, supported by the Constitution, which gives **the quality** of **representative of the government** for **the prefects**. Or, since the government is eminently a political body, is naturally that also its territorial representative to have the same character, and hence **the sub-prefect**, the prefect replacement right.

Conclusions

We have analyzed in this article the role and the place of the prefect, as representative of the state in territory.

It is a traditional institution for Romania, whose status varied between **the quality of a politician** and the one of **administrative officer,** of the "career prefect" dominant, in terms of extent in time, being the first quality.

In the 150 years since its appearance, the prefect continues to reveal as an institution that has not yet found a natural track of its manifestation. After 1990, the prefect was, until 2005, **a politician** as otherwise the sub-prefect, so as from 2005 to go back to **the prefect - official career,** by a forced procedure that has revealed the inefficiency in terms of practical settlement and legal institution[2]. Its role, however, is extremely important and deserves to be understood in its full and complex valences equally.

[1] See **Verginia Vedinas**, **Daniela Ciochina**-Priorities of constitutional revision in terms of public administration regulation, the Public Law Magazine no. 1/2013, pp. 64-68.

[2] See **Irina Alexe**, *High-rank public officials*, Law Universe Publishing House, Bucharest, 2014, Annex II "The employment situation of public functions in the category of high-rank public officials by the prefect and sub-prefect in the period 01.01.2009 - 01.04.2013", pp.283-314

For this, **we must start from the role of Government**, whose representative is, to **determine the role of prefect in the territory**. Since the Government exercises its dual **political** role, through which ensures the country's external and internal policy and administrative, which oversees the general management of the public administration, results that also to the prefect incumbent powers that reflected this dual role. They are otherwise enshrined by the organic law under which incumbent to the prefect responsibilities in achieving territorial government program, as well as general management responsibilities in public administration, having to oversee the legality of the activity of local autonomous authorities.

For these reasons, we argued also through this article the need to clarify the legal status of the prefect, in order to strengthen its role as representative in counties and in Bucharest as Government guarantor of constitutional and legal status in public administration from territorial-administrative units.