

Corrections and completions that are imposed to constitutional dispositions and normative documents in the matter of local public administrations in Romania

Lecturer PhD **Mihai Cristian APOSTOLACHE**¹
Lecturer PhD **Mihaela Adina APOSTOLACHE**²

Abstract

The present study proposes to identify part of the problems that appeared in administrative practice and to offer possible solutions or interpretations. The identified problems, generated by numerous changes in society, oblige the lawmaker to adapt the legislations so that the social values find the needed defense through law, but also in other normative documents. State practice in general and administrative practice especially have highlighted that an ambiguous stipulations can lead in many situations, to divers interpretations or institutional blockages. Also, administrative lacunas create serious difficulties, especially in the domain of local public administration, in the activity of authorities and institutions of local level. It is thus imposed to find viable solutions in concordance with society development, in permanent state of change.

Keywords: *legislation, local public administration, controversy, administrative practice, solutions.*

JEL Classification: K23

I. Preliminaries

The law, said an author³, can survive only if it is actual, and it cannot be actual if the sense given is a past due one, that is gone, and that might have become meanwhile, antisocial.

Starting from this finding, we shall try in the present study to bring forward to the attention of the doctrine a series of constitutional or legal dispositions, that, in time, have lost meaning, or their sense does not correspond to the social reality they regulate, or generate diverse interpretations. We have focused our attention on some constitutional and legal dispositions that regulate the domain of local public administration and which's existence in the Romanian juridical order is no longer justified because of the dynamics of social relations but also of the administrative practice an of the judicial instances.

¹ Mihai Cristian Apostolache - Oil-Gas University of Ploiesti, Economics, Marketing and Business Administration Department, mihaiapostolache5@yahoo.com

² Mihaela Adina Apostolache - Oil-Gas University of Ploiesti, Economics, Marketing and Business Administration Department, mihapostolache@yahoo.com

³ Mihai Constantinescu in Ioan Muraru, Mihai Constantinescu, Simina Tănăsescu, Marian Enache, Gheorghe Iancu, *Interpretarea Constituției. Doctrină și practică*, Lumina Lex Publishing House, Bucharest, 2002, p. 123.

II. General appreciations regarding the necessity of improving the legislative framework

Before effectively going the subject approach, we wish to make some general appreciations regarding the necessity of improving the legal framework. The rapidity of the changes and transformations from the social environment generally, and from the state life especially, obliges the empowered authorities to create norm that defend certain social values, to keep pace with the permanent changes in society and with the challenges determined by the European integration process. As now, rightfully, some authors⁴ claim, the adherence of Romania to the European Union at January first 2007 is not resumed to transposing some community legislative dispositions in internal law, but presumes correctly applying on a national plan of the respective norms and acquiring an “European culture” by embracing the promoted values at an European level by national authorities and public institutions in Romania, including those found close to the citizen. Only that, at a European level, the changes linked to the political strategy to priorities, to ensuring stability and that the said values are continuous, fact that lead to changes of optics and, most of the time, of legislation at the level of each member state of the European Union. As example, the political priorities of the year 2013 at an European level are: “Citizenship of the European Union”, “Creating a space of liberty, security and justice”, “Economic growth” and “Europe in the world”. The difficult economic situation at an European level has imposed adopting new emergency measures to surpass the crisis and to have a economical re-launch, measures that have made their presence felt inside each member state, including under a normative aspect. Also, the new multi-annual European budget for the 2014-2020 period answers to today’s preoccupations and tomorrow necessities, being built in such a way that it has an important impact on the European citizens. Furthermore attracting and spending European funds, but also judicial usage of the national and local funds is done through developing our country’s administrative capacity, it is natural to concentrate our attention on means to improve or administrative capacity, and one of the methods is adapting the legislation, process doubled by the repositioning of the human, his rights in the center of public policies. Besides this, the complex European construction, from a basic local level to a super state union level, is centered on the idea of affirming and guaranteeing the human rights⁵, idea that has represented a permanent objective of the community institutions⁶.

An incoherent legislation, unpredictable, anchored in the past does nothing else but to affect, through applying it, the human rights, the well functioning of the public administration and the institutional reports between different public

⁴ Ioan Muraru in Ioan Muraru, Elena Simina Tănăsescu, *Constituția României. Comentariu pe articole*, C.H.Beck Publishing House, Bucharest, 2008, p. 673.

⁵ Corneliu-Liviu Popescu, *Autonomia locală și integrarea europeană*, All Beck Publishing House, Bucharest, 1999, p. 331.

⁶ *Idem*, p. 334.

authorities. It is normal to have a stable legislative frame, but as long as the social values are in a permanent change, so does the legislation that protects the special values to keep up with the change. In a correct context it has been sustained in the doctrine⁷ that the report between stability and innovation in law constitutes a complex and difficult problem that must be handled with all attention necessary, taking in consideration a wide spectrum of factors that can determine a favorable or unfavorable position towards legislative changes.

Legislation regarding public administration generally, local public administration, especially has known an evolution process in the period 2001-2010, but in the last period, despite the many problems that appeared in the activity of the administration, generated by certain issues and legislative imperfections and of the diverse point of view expressed in the doctrine, the political rulers have not been preoccupied to adapt the legislation to current requirements. More serious is the fact that it limits local autonomy through diverse acts of the central authorities, referring including the watchful light tower and the whole legislative edifice, meaning the Romanian Constitution, that urgently need modifications and updates of the nature of stating in a clear way the reports between the state authorities, to complete the necklace of fundamental rights and liberties and to fortify the system that guarantees for their protection, but also to ensure the legislative frame to a process of administrative territorial reorganization. Territorial administrative reorganization is an important premise in the economical and social development of the country. According to the doctrine⁸, in Western Europe there have been three models of territorial administrative organization of the states. This regards the Napoleon model, the Germanic model and the Anglo-Saxon model.

III. Considerations regarding the actual normative frame regarding local public administration and proposal with character of improvements

This assembly of new realities requires a profound change in the conception of the law maker, regarding the legislation of public administrations generally, but especially administration in the proximity of the citizen.

A clearer definition of the president of the county council as a one person authority, executive at the level of the county, introducing the region as a second administrative level, intermediary between the state and the base administrative level, but also of its administrative authorities (regional council and president of the regional council), rethinking the administrative tutelage exerted by the prefect, in the sense of eliminating the thesis according to which the administrative act charged by the prefect in instance of administrative contentious is suspended by right, these being just some of the elements that the new constitutional edifice must contain in the matter of dispositions regarding the local public administration.

⁷ Victor Duculescu, Georgeta Duculescu, *Revizuirea Constituției*, Lumina Lex Publishing House, Bucharest, 2002, p. 12.

⁸ Gurutz Jauregui, *Națiunea și statul național în perspectiva Uniunii Europene*, in „Altera” Magazine, no. 9/1998, Târgu-Mureș, p. 73.

From the perspective of the legal dispositions it is imposed a rethinking of them in such a way that they can offer juridical solutions to some situations that appear in practice as: mayor not summoning the monthly ordinary meeting of the local council, the refusal of the validation commission of the local council to validate the mandate of a local councillor, the protraction of the requirement to lawfully end the mandate of a councillor. Also, the practice of applying different legal norm in concrete situations as shown the fact that many of these stipulations are deficient. Example given, we can talk about the deficient stipulation of the procedure to delegate the attributions of the mayor to the vice mayor, of the wrongful stipulation of the clerk statute of the discrepancies in defining the consulting process of the local authorities to the central public administration authorities. A subject of law that requires attention and that needs a new conception in regard with its statute is the vice mayor. Is it normal that the vice mayor is defined as a lawful replacement of the mayor and at the same time his subordinate? Can the vice mayor, that is the replacement of the mayor and that keeps his quality as a local counsellor, vote in the local council? Is the calculation quorum of the meeting of the local council when the vice mayor is the replacement of the mayor? What happens in a town is not the choice of the vice mayor after declaring as a legal constitute of the local council?

Besides these questions many others like the following may appear: can the competence of the validation committee be changed in the mandate of the local council and with whom? Can condemning with suspension of the mayor with the penalty of depriving of liberty attract on its own the lawful ending of the mandate or not? Who can summon the meeting of the local council or the extraordinary meeting?

All these questions must receive answers and the problems that show up in administrative practice solutions must be found.

In the following sentences we have proposed to concentrate on certain text from the Constitution or other normative documents that regulate local public administration, texts that are not clearly enough formulated, being susceptible to different interpretations to which's existence in the internal juridical order is not harmonized with the social economic reality in permanent change, as a consequence of the social relations, and creates difficulties in administrative practice. Also, we will also point out the legislative lacunae and we will formulate concrete proposals to have them covered.

IV. Problems and controversy that appeared in administrative practice and possible solutions of interpretation

1. Referring to *the right of the prefect to attack in instance of administrative contentious an act of the local public administration authority*, the Romanian Constitution stipulates in article 123, paragraph 5 that "the prefect can attack, at the instance of administrative contentious, an act of the county council, of the local council or of the mayor, if he considers the document to be illegal", text

that is completed by the disposition according to which “the attacked document is suspended by law”.

This constitutional stipulation is incomplete, as it does not include amongst the local authorities that can be attacked in instance by the prefect the president of the county council, as a one person authority, executive at the level of the county, elected in the conditions of the law. If until year 2003, the president of the county council was not named in the constitution, with the revisal of the constitution, the president of the county council became an institution of constitutional rank⁹, being included in paragraph 4 of article 123, referring to the nature of the reports that are settled between the prefect, as representative of the government in the territory and the local public administration authorities. That is why we propose at the future revisal of the Constitution article 123, paragraph 5 to be completed with the president of the county council, completion that must also target article 122, named “the County Council”.

In what regards the principle of lawfully of the act attacked in the instance of administrative contentious, we consider it must not have a constitutional stipulation, because, even if it dedicates a norm of protection of the person in front of the abuse of the local public administration authorities, but also of national interests, in report to the local ones, how it was judiciary sustained in the doctrine¹⁰, it open the path to excess of power for the prefect. Administrative practice has proven that the prefect, even if he is formally nonpolitical¹¹, in fact he sustain the political directions given by the party that sustained him to obtain this function. We say this because from the moment of stipulating the function of prefect as high clerk until today, all persons that held or hold this function have been sustained by one party or another that succeeded to power, the experience and professional experience of the respective persons not being taken into consideration.

We can easily observe two completely opuses realities: the normative reality, idyllic, in which the prefect is defined as a high clerk, nonpolitical and the administrative reality that shows, despite the normative reality, that the prefect was and remains a political clerk. That is why we agree to the point of view in the doctrine¹² according to which maintaining this norm that states that the attacked act is suspended by law and gives the possibility to vitiate the control, the prefect having the possibility to deprive the effects, abusively, the acts of those local authorities that belong to other parties than the one that helped him obtain his

⁹ Antonie Iorgovan in Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituția României revizuită-comentarii și explicații*, All Beck Publishing House, Bucharest, 2004, p. 262.

¹⁰ *Idem*, p. 263.

¹¹ According to Article 10 from Law no. 340/2004, republished in the Romanian Official Monitor, Part I, no. 225, from the 24th of March 2008, modified and completed, *the prefect and sub prefect are part of the high clerks*.

¹² Liviu Coman-Kund, *Reflecții privind controlul administrativ al actelor autorităților administrației publice locale*, in „Revista de Drept Public” no.4/2009, C.H.Beck Publishing House, Bucharest, pp. 35-36.

function and can let effects happen, through the omission to notify the instance of administrative contentious regarding the illegal acts of local authorities that are from the same party as the one that helped him reach the function.

Starting from this reality that demonstrates the lack of guarantees of impartiality and professionalism regarding the tutelage authority that can transform it in a redoubtable political weapon, in detriment of the interests of the local communities¹³, we propose that *the act attacked by the prefect to be suspended only as a decision of a competent instance of law*. In this way we eliminate the abuse and ensure an equal treatment to all subjects of law.

2. According to article 39, paragraph 1 from Law no. 215/2001¹⁴, republished, modified and completed, the local council gather in ordinary meeting, monthly, at the summoning of the mayor. Through this article the monthly character of the ordinary meeting of the local council is settled and the mayor, in this case, has the exclusive attribute, but also the obligation to summon the local council into an ordinary meeting. We are thus talking about an imperative norm, which states, in the attributions of the mayor, the right but also the obligation to summon monthly the meeting of the local council. With all these, in administrative practice situations are found in which the mayors of some administrative territorial units do not summon the ordinary meeting of the local council every month, but when they see fit, removing the fact that, in that month, the local council was summoned in an extraordinary meeting or on an urgent meeting. Sometimes financial arguments are invoked. These sorts of arguments are not valid in front of the law text which states as mandatory the fact that the ordinary meeting is summoned by the mayor monthly, no other subject of law having the possibility to summon the local council. This monthly meeting is the normal and natural way the local council functions¹⁵. Thus, by the mayor not respecting these legal dispositions represents an abuse and must be sanctioned in the contents of this law. Only that, from the analysis of chapter XI from the law, that regulates he sanctions in which the dispositions of the law are broken, results that for such a situation, no sanction is stipulated. If such a juridical situation is not sanctioned, than this practice will perpetuate and will continue to develop, affecting the well functioning of the local public administration activity but also the intention of the lawmaker. That is why, in the respective law, we propose *to include a sanction for the mayor in the situation in which he does not summon the monthly local council meeting in the content of chapter XI name "Contraventions and sanctions"*.

¹³ *Idem*, p.36.

¹⁴ Republished based on art.III from Law no. 286/2006 for modifying and completing the Law no. 215/2001 of local public administration (Romanian Official Monitor no. 621 from the 18th of July 2006), the text having afterwards a new index numbers and rectified in the Official Monitor no. 776 form the 13th of September 2006.

¹⁵ Rodica Narcisa Petrescu, *Probleme actuale ale administrației publice locale*, in „Revista de Drept Public” no. 2/2002, p. 58.

3. Article 39 from Law no. 215/2001 established the means of functioning of the local council that reunites, as a rule, monthly in ordinary meeting summoned by the mayor, but also in extraordinary meeting in cases of force majeure or extreme emergency to resolve the interest of the inhabitants of the commune, town or city. If in the case of the ordinary meeting, the law institutes the right but also the obligation of the mayor to summon the meeting, in the case of the extraordinary meeting, the possibility to solicit the summoning of the meeting belongs to the mayor, at least a third of the councilors but also to the prefect¹⁶. What happens in case of the straight off meeting? Who can summon this meeting as the law is ambiguous? In practice it is interpreted that, as long as the extraordinary meeting can be summoned by the mayor, at least a third of the councilors, that also this meeting can be summoned by these two subject of law. From our point of view this is a wrong interpretation of the law, because in the matter of competence, the legal dispositions are of pure interpretation. Thus, as long as the law maker did not state explicitly and expressly who can summon the local council in these on straight off meetings, it cannot be interpreted as the initiators of these request to be the same as the in the case as the extraordinary meeting. In our opinion, summoning the local council in an on straight off meeting can be done only by the mayor, as he has the exclusive right to summon an ordinary meeting of the local council. But, to eliminate any sort of speculation regarding the summoning of the local council in an straight off meeting we propose that *the text of the law to stipulate the fact that the mayor is the one that summons the local council in straight off meetings.*

4. In regard to *the summoning of the local council into meeting*, the question has been raised if the request to summon the meeting comes from at least on third of the councilors, the secretary of the administrative territorial unit must invite the councilors to a meeting at the term stated by law or must previously have a disposition of the mayor that summons the meeting of the council at the request of one third of the councilors.

Regarding this problem, the doctrine¹⁷ has revealed that in the case of extraordinary meetings, summoned at the initiative of the local councilor in the numbers required by law, the decision to summon the meeting still belongs to the mayor, that emits a disposition in this way, indicating the date, hour and meeting calendar, and on the basis of this administrative document, the secretary send to each councilor the invitation to the meeting. It is understood, according to the same

¹⁶ According to Article 23 from the Law no. 340/2004, regarding the prefect and the institution of the prefect, republished in the Romanian Official Monitor, no. 225 from the 24th of March 2008, the prefect can request the mayor to have an extraordinary meeting of the local council in case that need adopting immediate measure for preventing, limiting or removing calamities, catastrophes, fires, epidemics but also for defending public law order. Also, according to paragraph 2 of the same article, in case of force majeure and maximum urgency for resolving the interest of the inhabitants of the administrative territorial units, the prefect *can request to the mayor* the summoning of the local council.

¹⁷ Antonie Iorgovan, *Tratat de drept administrativ*, vol. I, the 4th edition, All Beck Publishing House, Bucharest 2005, p. 503.

author that the action of a third of the councilors to give to the media the place, hour and meeting calendar of an extraordinary council meeting, in disregard to the mayor, represents and abusive behavior and the respective “public shouting” can have no juridical meaning. Thus, as long as the law establishes as that the mayor has the exclusive right to emit the juridical document of summoning, it must be admitted that any other juridical summoning solution is voided, this also resulting indirectly from the terminology used by the law maker. If in the case of the extraordinary meeting the lawmaker has precisely stipulated that it is summoned by the mayor, in the case of the extraordinary meeting the lawmaker did not use the term summoning, but has stated that the meeting of the local council in an extraordinary meeting can be requested by the mayor, but also by at least a third of the councilors or by the prefect. Hereby, one if the request and the other is the summoning, process that takes place only based on the disposition of the mayor, for, as we have seen, the request to summon an extraordinary meeting or straight off meeting can also be done by the prefect.

As the extraordinary meeting can only be summoned based on the disposition of the mayor, and in the lack of this administrative document the request to summon is illegal, at the same time the refusal of the mayor to summon a meeting at the request of a third of the councilor or at the request of the prefect is described as an abuse, with all its consequences. Based on the presented situations, we believe that it would be indicated to have stipulated in article 39 the fact that “*in all cases, the summoning is done by the mayor through a disposition*”, stipulation that would resolve the present problem.

5. One of the cases to end the mandate of local councilor before term is also the one regarding the loss of the quality of a party member on the lists of the party on where he was candidate for the elections. Article 9, paragraph 2, letter h, from Law no. 393/2004¹⁸, regarding the statute of the local elected persons establishes the fact that the mandate of the local councilor end by law, before the expiry of the normal duration of the local council, as a consequence of losing the quality of member in the political party or organization of national minorities on who’s list he was elected from, and this situation is ascertained by the local council, through decision, at the proposal of the mayor or any local councilor. This sort of decision of the council can be attacked by the councilor that loses his mandate in the instance on administrative contentious, in 10 days from its communication, the instance having to pronounce in the term of 30 days. This case of ending the mandate of councilor was not stipulated initially in the law body, but from the wish to stop political migration, the law maker introduced such a disposition through Law no. 249/2006¹⁹.

¹⁸ Published in the Romanian Official Monitor, Part I, no. 912 from 7 October 2004.

¹⁹ Law no. 249/2006 for modifying and completing Law no. 393/2004 regarding the statute of the local elected persons, published in the Romanian Official Monitor no. 554 form the 27th of June 2006.

If at first sight things seem clear in what regards such a case of ending the mandate of a local councilor, it is not as clear as applying in practice the procedure to end the mandate of a local councilor. Even if the current case we are talking about and ending according to law of the mandate of a local councilor, as a consequence of a state of facts that intervened while exerting the mandate and that does not imply any type of deliberation, but just an observation of filling up the requirement, the local councilor, do not include, in many cases, on the meeting calendar such a project for decision, or they can consider that they can vote against the project of decision, and thus, the local councilor to maintain the mandate, despite of the law.

Maintaining a councilor in function using diverse procedural shift does nothing else than break the order of law and public interest, but also modifies the political configuration resulted from the elections. In this sense the Constitutional Court has pronounced itself through Decision no. 273 from the 24th of February 2009²⁰. The Constitutional Court has stated with a value of principle that the stipulations regarding the ending of the mandate of local councilor as a consequence to losing the quality of party member have their base in the dispositions of the article 8, paragraph 2 from the Constitution, according to whom the political parties contribute to defining and expressing the will of the people. The law body has as finality the prevention of migration of the local elected ones from one party to another, ending political tracks which occur based on opportunities of one party or another, ensuring the stability in local public administration that expresses political configuration, as it has resulted from the will of the electors. Or to accept that a local councilor, that while exerting his mandate leaves the party he was elected from and to keep his statute of elected person represents changing the political configuration of the respective local authority, configurations given by the vote of the citizens. According to article 147, paragraph 4, from the Romanian Constitution, the decision of the Constitutional Court are general and mandatory, for all public authorities, so thus for the local council, the lack of a decision to end a mandate of local councilor is equivalent to an abuse and is sanctioned accordingly.

The protraction of the finding through decision of the situation of fact brings into discussion even the legitimacy of the functioning of the deliberative gathering. As long as the law is not applied the problem of validating all the decision adopted in the local council is raised, decision to which's debates and adopting had an illegal participant in the corresponding councilor.

To eliminate this sort of accusations resulted from applying the law, we propose that *the procedure to ascertain the ending of the mandate of a councilor before the expiration of the normal functioning period of the council to be modified in the way of attributing this right to the prefect*. Thus the prefect, through order, that has at base the papers transmitted by the secretary of the administrative territorial unit and the documents proving the end of the mandate, he ascertains the

²⁰ Published in the Official Monitor no. 243 from the 13th of April 2009.

lawfully ending of the mandate of the local councilor as a consequence of losing his quality as party member or organization of national minorities from which's lists he was elected. Also, this solution was spoken of in the doctrine²¹, bringing arguments sustaining it. We agree to these arguments, except the one that sustains the fact that this attribute must be given to the prefect because he is a high clerk and non political one. The prefect is non political only in theory, because in practice he is a political clerk applying the directives established by the party that sustained him to obtain this function.

6. According to article 15, paragraph 2, form Law no. 393/2004 regarding the statute of the local elected persons, *the mayor end his mandate as a consequence of being condemned through a definitive decision, to a penalty depraving him of liberty*. This law body is interpreted and applied differently in administrative practice. There are opinions that sustain the thesis according to which as long as a definitive judicial decision is not given with execution of the penalty, but with suspension, the mandate of the mayor does not end by law. It is thus sustained that the persons condemned with suspension of the execution of the jail penalty are under a different juridical regime that the one regulated for the one that execute the penalty depriving them of liberty. Other opinions suggest the contrary, that no matter if the depriving of liberty is with execution or not, the mandate of the mayor ends by law.

To formulate an advised opinion regarding this problem, we will to the doctrine but also to jurisprudence. Thus, according to one of the opinions²² the ending of the mandate of the mayor happens no matter the result of the court if it with executing the depriving of liberty or not, because the previous article does not make any distinction, applying the principle of law *ubi lex non distinguit, ne nos distinguere debemus* (where the law does not make distinction, the interpreter does not make distinction). This opinion is also seen at another author²³ that shows that indifferently if by judicial decision the condemning of the mayor was disposed with definitive execution or with suspending the punishment, condemning to a punishment of depriving of liberty is enough to end the mandate of the mayor.

Relevant in the current situation is also the jurisprudence. According to civil sentence no. 2249/17.09.2010 pronounced at the Court of Tulcea²⁴, *the dispositions of Law no. 393/2004 do not make distinction by the means of executing the punishment is with jail time or suspending it but foresee only the situation of condemning at a punishment of depriving of liberty without taking interest in the means of execution, because relevant is applying the punishment that attract the ending of the mandate as local elected person and not the form in which the*

²¹ Virgil Panduru, *Puncte de vedere critice asupra reglementărilor legale în vigoare privind încetarea mandatului de ales local*, in "Dreptul" Magazine no. 6/2010, p. 186.

²² Verginia Vedinaș, *Drept administrativ*, the second edition, Universul Juridic Publishing House, Bucharest, 2012, p. 474.

²³ Anton Trăilescu, *Drept administrativ*, the third edition, C.H. Beck Publishing House, Bucharest, 2008, p. 57.

²⁴ <http://legeaz.net/spete-penal>, accesed on 10 September 2013.

sentence is executed. Thus, applying the punishment of depriving of liberty, no matter in what form it is executed, the mayor becomes incompatible with the function of public elected one that one cannot exert if the person is condemned for a penal fact. Keeping in mind the opinions expressed in the doctrine, but also the motivation formulated by the judicial instance for such a case, we conclude that ending the mandate of the mayor should be done no matter if he must be deprived or not of liberty, if he is sentenced so. Such an interpretation also corresponds to the rule of interpretation of the norm of law, rule according to which to a general formulation of the full legal text there must be a corresponding general application, without the distinctions that that legal text does not contain.

7. The *Mandate of the mayor* is of 4 years and is exerted until the new mayor is sworn into position. The mandate of the mayor can end before term, situation where this is a ending by rightfully, based on the law and of ending the mandate as a consequence of the results of a local referendum. Regarding the procedure of lawfully ending the mandate of the mayor, before the expiry date of the normal duration, different opinions have appeared.

From a perspective it is sustained that in all the cases of ending the mandate of mayor and we are talking here about the cases stipulated by article 15, paragraph 2 from Law no. 393/2004²⁵, but also the ones stipulated by article 69, paragraph 2, from Law no. 215 of local public administration, the prefect is the competent authority to take act of ending the mayor's mandate, emitting an order in this sense, order that must be based on the document of the secretary of the administrative territorial unit, but also of the act that result from the legal reason for ending the mandate.

The order of the prefect can be attacked by the mayor in the instance of administrative contentious in term of 10 days from its communication, article 69, paragraph 5 from Law no. 215/2001, republished it settling that the instance of administrative contentious is obliged to pronounce in term of 30 days from it being notified. In this case the prior procedure is not done, and the decision of the first instance is definitive and absolute.

It is also sustained that the dispositions of article 69 from Law no. 215/2001, contains norms of special procedure, derogatory from common law, adopted by the lawmaker based on article 126, paragraph 2 of the Romanian Constitution and that do not end the exertion of the means of legal attack and are not against the principle of unrestricted access to justice.

From another perspective it is sustained that the procedure is similar for all the cases only until the instance of administrative contentious is notified by the mayor, as special procedure, derogatory from the common law in the matter of administrative contentious, being applicable only the two cases of lawfully ending the mandate stipulated in article 69, paragraph 2 of Law no. 215/2001, republished

²⁵ Published in the Romanian Official Monitor, Part I, no. 912 from 7 October 2004.

and no for the cases stipulated in art.15, paragraph 2 of Law no. 393/2004 regarding the statute of the local elected persons.

Unfortunately, even in this case the ambiguity of the regulation leave room for several different interpretations. Regarding this issue we rally to the tendency that the special procedure, derogatory from the rules established by Law no. 554/2004 of the administrative contentious is applied only to the tow cases stated in article 69, paragraph 2 from the Law of local public administration. If the lawmaker did not wish to dedicate a similar procedure for all situations of ending the mandate of the mayor, he would have included all of them in the same normative document and established the same rules regarding the authority that ascertains the lawful ending of the mandate, but also the conditions in which the ascertaining document is contested. For the lawmaker to stipulate these situations in two different normative documents and institutes form the cases stipulated in Law no. 215/2001 a special procedure, derogatory from common law in what regards administrative contentious in what regards contesting the order of the prefect and for the cases stipulated in Law no. 393/2004 regarding the statute of the elected persons it is limited to state who is the competent authority to ascertain the situation and the documents that must be at the base of the administrative decision.

An aspect that must be taken into consideration also the one that the lawmaker has expressly stipulated that this procedure is applicable only in the cases stipulated in the law of local public administration *(a) if it is in the impossibility of exerting the function because of a serious illness, certified, that does not allow the activity to happen in good conditions for 6 months of a calendar year; b) if he does not exert, in an unjustified way, his mandate for 45 day continuously*, but not in all the cases of ending the mandate of mayor before the term.

Article 16 from Law no. 393/2004 does not establish the cases presented in article 15, paragraph 2 no procedure for contesting the order of the prefect in the instance of administrative contentious, thus the dispositions of the law of administrative contentious become applicable that is the common law in the matter and not the ones in the law of local public administration.

To strengthen the previous arguments, we bring to attention the stipulations of Law no. 161/2003 regarding some measures to ensure the transparency in exerting of the public figures, of the public functions and in the business environment, the prevention and sanctioning of corruption, more specifically article 91, paragraphs 3, 4 and 5 that do not establish a special procedure for contesting the law emitted by the prefect to end the mandate of mayor due to a status of incompatibility²⁶, but states that the order emitted by the prefect can be attacked in the competent instance of administrative contentious. Thus the lawmaker has wish that the action in administrative contentious to follow the law of administrative contentious, otherwise they would have stated expressly in Law no. 161/2003 that as it is said is a special law in matter of incompatibility and

²⁶ Incompatibility can be one of the cases to lawfully end the mandate of mayor stipulated in article 15, paragraph 2, form Law no. 393/2004 regarding the statute of the local elected persons.

conflict of interest, the special procedure stipulated in Law no. 215/2001 that is applied only for the 2 cases of lawfully ending the mandate of mayor.

To eliminate these ambiguities, we propose as *lege ferenda*, that all case of ending the mandate of the mayor before expiry term to be stipulated in Law no. 393/2004 regarding the statute of the elected body and the procedure to contenting the order of the prefect in the instance on administrative contentious to be stipulated in Law no. 554/2004 of administrative contentious. This does not mean that a special procedure to content a decision cannot be instituted for other situations. As example, a decision to invalidate the mandate of the mayor or the president of the county council, can be attacked based on a special procedure that stipulated shorter term and to give the possibility to the first instance to make the decision definitive and absolute, only so that it perfectly clarifies the juridical situation of the respective person and to not disturb the activity of the public authority in regard. Also, the Constitutional Court in jurisprudence²⁷ has decided that the lawmaker can institute, in considering some special situations, special rules of procedure, but also mean of exerting the process rights, without restricting access to justice. Also, ECHR in jurisprudence²⁸ has stated that the law to promote and action to judicial instanced is not absolute, limitations from the states being permitted, with the conditions that they follow of legitimate purpose and in between the means used and the purpose to exist a reasonable report of proportionality.

8. Article 77 from Law no. 215/2001 of local public administration stipulates the concept of “city hall”. Thus it is stated that the “city hall” of commune, town or city is a functional structure with permanent activity that carries out the decision of the local council and of the mayor, being formed from the mayor, the vice mayor, the secretary of the administrative territorial unit and the mayor specialty apparatus. Chapter VIII of Law no. 215/2001 is named “Public Administrator” and regulates in article 112, 113 and 114 the function of public administrator, function that can be formed at a base level, but also at a county level or at the level of associations from intercommunity development. This function represents a novelty for the Romanian public administration, thus being felt the Anglo Saxon model of administration.²⁹

Leaving aside the pros and cons expressed in the doctrine in regard to the establishing of this function, an important aspect can be observed from the analysis of the texts presented previously and meaning that there must not be a correlation between the texts in the contents of the same normative document. From the moment the lawmaker has established the function of public administrator to be

²⁷ The Constitutional Court’s Decision no. 246 from 4th of March 2008.

²⁸ The Bellet Cause against France, ECHR, 4th of December 1995, the Osman Case against Great Britain, ECHR, 28th of October 1999, the Garcia Manibardo Case against Spain, ECHR, 15th of February 2000, in Corneliu Bîrsan, *Convenția Europeană a Drepturilor Omului – Comentarii pe articole*, vol. I, *Drepturi și libertăți*, Bucharest, CH Beck Publishing House, 2005, p. 461.

²⁹ Mihai Cristian Apostolache, *Primarul în România și Uniunea Europeană*, Universul Juridic Publishing House, Bucharest, 2012, p. 167

formed at the level of communes, towns and cities it has been given a special regulation and it was natural for it to be found in the concept of “city hall”. Even if the juridical norm is one superlative and not imperative, establishing that the mayor propose to the local council the forming of the function of public administrator, based on a law, at the level of many of the units in the country this function was created naturally and that should be part of the concept of “city hall”, being an executive function. Starting from this reality we consider that it is needed to have the lawmaker intervene so that article 77 from Law no. 215/2001 of local public administration to have the following content: “*The mayor, vice mayor, secretary of the administrative territorial unit, the mayor’s specialty apparatus and by case, the public administrator, to constitute a functional structure with permanent activity, named city hall of the commune, town or city, and that carries out the decisions of the local council and of the mayor, solving the current problem of the local community*”.³⁰

9. Another problem that appeared in administrative practice is that regarding *the vice mayor*. We do not bring up the discussion the changes in the statute of the vice mayor as consequence of legislative changes, but the fact that in certain administrative territorial units the vice mayor is not elected on the considerate that the public administration, in generally, the local executive, especially, can function without the vice mayor. Article 57, paragraph 1 establishes *through an imperative norm* the fact that at the level of commune, town or city there is a mayor and a vice mayor, and at the level of cities with function of county seats we have a mayor and two vice mayors elected in the conditions of the law. The same article regulates the way the vice mayor is named, but also how he is replaced, part of the right he has as a elected local candidate, but also the fact that he keeps part of the right as a local councilor with the having the patrimonial right that are born from this statute. Also in title III, where article 57 is included is named “The mayor and the vice mayor”. All these elements lead us to the conclusion *that local public administration cannot function legally without the vice mayor or vice mayor by case, be elected in the first meeting of constituting the local council*. If in the case of the public administrator, the lawmaker operates with a superlative norm, leaving at the latitude of the mayor to propose to local council to have that function established, in what regards the vice mayor the law states expressly that the base administrative territorial units have a mayor and a vice mayor, or two vice mayor for the county seats units. If in the case of the public administrator, the existence of the function depends on the option of the local public administration, in the case of the vice mayor his existence is expressly and imperatively stated in the law, and the non election of a vice mayor, represents and abuse with all its corresponding consequences.

³⁰ See also Mihai Cristian Apostolache, *op. cit.*, p. 173.

10. A problem that requires interest is also the one regarding *the relations between the local public authorities and the central ones*, because, based on the nature of this relation, we are talking about extended or restricted local autonomy.

The character of the relation between the central public administration and the local one is regulated by article 8, paragraph 1 from Law no. 215/2001 of local public administration. According to this article, the authorities of the local public administration will consult, before adopting any decisions, the associated local public administration structures, in problems that regard them directly. In our opinion we have a wrong regulation in what regards the relation between center and territory. We say that because in practice most of the times the government and the other authorities of the central administration do not consider the point of view of their associated local public administration structures. There are also situations in which this consulting does not happen, because on the one hand, the law body does not sanction the central public authorities for not respecting the legal stipulations, and on the other hand, in many situations, the executive structures of the associated local public administration behave like “speaking tubes” of central authorities and not as lawyers of the local public interests. To mend such a situation, we propose that *in the case where local public authorities are not consulted by the central authorities, the documents to be voided absolutely for that certain decision.*

Also we consider that it is indicated that the statute of these associative structures to be completed by a new norm that states the rule according to which, the president of the associative structure will be a representative of the opposition parties represented in the local public administration, so that when the government has a certain political color, the president of the associative structure to have a different political orientation than the government, through this being ensure a balance between in the reports center to territory, but also the independence of the associative structures in regard to the central public administration. Only in this way the principles that govern local public administration will be defended, and the documents adopted by the central authorities will have the fingerprint of the local will.

11. The last aspect that we wish to have under analysis regards *the validation committee of the local council*. Experience in practice has brought to our attention certain problems generated by the political interests through which the protraction of some decision taking or ascertaining some situations of fact by the local deliberative. As an example, if the validation committee does not meet to discuss the situation of one of the councilors.

Starting from these realities, the problem of if the components of the validation committee can be modified and if the local council can validate the mandate of a local councilor without the report of the validation committee that proposes the mandate of the respective councilor.

To answer these questions we must analyze the legal dispositions regarding the validation committee of the local council. Thus, according to article

31 from Law no. 215/2001 of local public administration, to validate the mandates, the local council elects through open vote, from its own members, for the whole term of the mandate, a validation committee formed out of 3 to 5 councilors.

The validation committee thus constituted is legally attributed to examine the legality of the election of each councilor, and based on this process, proposes to the local council the validation or invalidation of the mandates. The invalidation of the mandate of a councilor is proposed in the situation in which it is ascertained that the eligibility conditions were broken or is the election of the councilor was done through electoral fraud, ascertained in the conditions of the law regarding electing local public administration authorities. The validation or invalidation of the mandates of the local councilor is done, in alphabetical order, with the open vote of the majority of those present at the meeting.

These stipulations of Law no. 215/2001 is completed by those in article 4, 5, 6 and 7 of the Governments Decree no. 35/2002 for approving the organization and functioning of local councils frame regulation³¹, that results from naming candidates for the validations committee by the constituted groups of councilors according to the statute of the local elected body. The number of seat belonging to each group is determined by the number of mandates obtained by the corresponding group. Electing the members of the validation committee is done individually, though open vote of the majority of the councilor presents at the constituting meeting.

Analyzing the legal stipulations regarding the incidents in cause we can advise that the statute of the validation committee is that of a specialty committee of the local council in the minimal and maximal limits stated in the law and in whose body the proposed local councilors from the groups enter according to the number of mandates detained by each political group and validated through open vote by the majority of councilors present at the constituting meeting of the local council. Thus, in the body of the validation committee there can come changes determined by certain objective situation appeared while exerting the mandate (resignation, death, incompatibility), the place of a councilor from the validation committee can be occupied by another councilor only if that local councilor is from the same political group and if that proposal is voted in the local council with the majority required by law (majority of the councilors present at the meeting).

In what regards the possibility or impossibility of the local council to validate the mandate of a councilor without the report of the validation committee, we express our opinion that the deliberative authority can take into consideration the validation or invalidation of the mandate of the councilor without the report of the validation committee in this sense, if it is ascertained that the members of the validation committee action with bad faith and do not gather in meeting to formulate a proposal to the council to validate or invalidate the mandate of the respective councilor, invoking certain reasons.

³¹ Governments Decree no. 35/2002 for approving the organizing and functioning of the local public administration frame regulation, modified and completed by Law no. 673/2002, published in Romanian Official Monitor, Part. I, no. 953 from 24 December 2002.

The protraction of the validation of the mandate of a local councilor leads to breaching the will of the citizens expressed through vote, will that has resulted from a certain political configuration of the local council that must be maintained until the mandate expires.

That is why we sustain that *the mandate of a local councilor can be validated by the local council without a report from the validation committee*, but it is important that such a decision is *to be used only in special cases*, as the one presented previously, and the local council to follow the procedure stated by Law no. 215/2001 but also the Governments Decree no. 35/2002, in the sense that it must adopt a decision to validate the mandate through open vote with the majority of the councilors present in the meeting.

Conclusions

The present study has tried to bring to the attention of the doctrine certain problems regarding applying certain constitutional and legal dispositions from the domain of local public administration and that would attract attention to the necessity to improve the normative frame in the matter of local public administration, that would keep up with the permanent changes from the society, but also with the tendencies appeared at an European level. We express our belief that the proposition penciled down by us will represent a starting point to adapting the legal frame to the necessities of the present and the unfamiliarity of the future, so that this answers to the doctrine imperatives according to which law, including its normative dimension, to be viable and to represent a factor of stability, but also of progress, to be adequate to the social realities, but also the purposes for which the juridical norm is adopted, and by case, interpreted and applied³².

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