Constitutional Requirements Regarding the Law on Local Elected Persons

Sandra GRADINARU
"Al. I. Cuza" Universitaty of Iasi
sandra.gradinaru@yahoo.com

Abstract: The provisions of the Law no 249/2006 for the amending and completion of Law no 393/2004 on the Statute of the local elected include a new issue of cessation de jure of the mandate as a local or county councilor and mayor, before the expiry of its normal duration, reasoned by the resignation of the political party or of the organization of the national minorities on whose list he was elected. The Constitutional provisions enhance the representativeness of the local elected mandate, as with the parliamentary one, in the sense of an implied prohibition of any interference in the work of the elected that would come from voters, political parties, state authorities, NGOs. The independent status of the local elected receives extensive connotations if we relate up to their moving from one political party to another, and in the context in which this is sanctioned by law we face the restrictions of the representative mandate.

Key words: Status of the local elected, local autonomy, the representative mandate

The public right uses the notion of mandate in the sense of special empowerment conference of a particular topic of law, by a solemn procedure, under which it exercises responsibilities of authority for the purpose of building of some general interests. (Esmein, A., 1990, p. 261)

Under the constitutional provisions, in the mandate exercise, the deputies and senators are in the service of the people, any imperative mandate being null, these provisions being a synthetic expression of the constitutional principle of the representative mandate, which extends to the level of the local elected.

The mandate is, in this situation, a power of attorney, to represent, from the political point of view or, in another approach, a convention between the voters and those who aspire to achieving it.

From a legal point of view, a mandate (parliamentary or local) means a public function, in which the holder is invested through elections, with a content predetermined by law. (Deleanu, 1996, p. 230; Manda, 2007, p. 198 et seq.)

The assertion that the local elected are in the service of the local communities (such as deputies and senators are in the service of the people) it must be understood in the sense that from the moment of validation of the mandate, those elected represent the whole local community (including those who have voted for another list of political parties).

The purpose of the representative mandate at the local level, consists of one local investment with the right to speak and take decisions on behalf of that local community: the village, the town (municipality) and the county.

Of the representativeness of the elected local mandate, it flows the status of independent, too, and the independence is so total, that can be claimed even in front of his own political formation.

In such circumstances, in our constitutional system, the local elected are independent from the parties on whose list they have candidated, and vis-a-vis their voters. The consecration of the representative character of the Parliamentary mandate and implicitly the one of the local elected and therefore the establishing of the invalidity of the imperative mandate by the Romanian constituant was made to comply with the constitutional practice of the democratic states in Europe. (Lilac, 2005, p. 495-footnote)

Reported to the law no 393/2004 on the Status of the local elected, respectively art. 9, para. 2, the quality of local or county councilor, respectively mayor, ceases de jure, before the expiry of the normal duration of the mandate, but only in the following cases: resignation, incompatibility, the change of the address in another administrative territorial unit, including as a result of its reorganization, if he is absent more than three consecutive ordinary meetings of the board, the impossibility of exercising the mandate for more than several consecutive months, unless required by law, the conviction by final judicial decision, on a punishment of deprivation of freedom, putting under judicial restraint, the loss of electoral rights and death.

By art. 9 paragraph 2 letter h 1 of Law no. 249/2006 to modify and complete Law no. 393/2004 on the Statute of the local elected, was introduced a new case of cessation by right of the mandate as an local or county counselor, before the normal expiry date of the mandate, respectively *the loss of the membership of the political party or the organization of the national minorities on whose list he was elected.* These provisions violate, in our opinion, the provisions of art. 121 paragraph 2, art.122 paragraph 2, art.120, art.1 paragraph 5 of the Constitution and Article 3 of Protocol no1 of the European Convention on Human Rights, arguments in this respect being shown in the following.

The criticized provisions contradict to the principle of local autonomy, enshrined in the regulation of art. 120 of the Constitution

Thus, according to the provisions of art.120 paragraph 1 of the Constitution, the public administration and the territorial administrative units are based on the principles of decentralization, **local autonomy**, and deconcentration of the public services, and according to Article 3 paragraph 1 and 2 of Law nr.215/2001, the local autonomy is defined as being the right and effective capacity of the local government authorities to resolve and manage, on behalf of and in the interests of the local communities they represent, the public affairs, exercised by means of the local councils and mayors, as well as by the county councils, authorities of the local public government elected by universal, equal, direct, secret and freely expressed vote. Therefore, the principle of local autonomy, enshrined in art. 120 of the Constitution, signifies on one hand, that local government institutions should exercise the powers conferred by the law, free from any formal imposition from outside, being elected by universal, equal, direct, secret and freely expressed vote by the electorate, and on the other hand, that their activity is solely dependent upon the public interest, in this case, of the community.

We believe that, such a prime issue of unconstitutionality of the regulations of art. 9 paragraph 2 letter h 1 derived from that it is recognized to the political parties the right to intervene in the local government, giving them the power to exclude, arbitrarily, counselors in the exercise of the mandate, through the loss of the membership of political party or of the organization of national minorities on whose list was elected, **event which cancels the very fact of the principle of local autonomy**, guaranteed by the Constitution.

A second issue concerns the fact that the mandate of the local elected is exercised on behalf and in the interest of the community, which invests him by voting, as shown in the provisions of art. 3 paragraph 1-2 of the Law no.215/2001. By applying the provisions of art. 9 paragraph 2 letter h 1, the community is sanctioned and the public interest disappears, being subordinate to the private interest, of the party, that the one who is mandated through vote ceases de jure the capacity of a local elected, so the effective possibility to ensure the public interest before the end of normal duration of the mandate, through the loss of membership of the political party on whose list he was elected.

Meanwhile, the local elected, as trustee, is responsible in exercising the responsibilities came together with the mandate in front of the to mandate, in this case the electorate, and not against third parties (such as political parties), these ones have no possibility for the revocation of his mandate.

The provisions of art.9 para2, letter h l contradict to the provisions of art.121 para 1 and art. 122 para 2 of the Constitution

In accordance with the provisions of art.121 paragraph 1 reported to the provisions of art.122 paragraph 2 of the Constitution, the local councils and county councils **are elected**, the means of choice being, according to article 2 paragraph 2 of the Law nr.393 / 2004, the universal vote, equal, direct, secret and freely expressed by the electorate, to consider the voting right of the citizens of Romania stated by the regulations of art.36 by the Constitution, and determining the composition of these institutions cannot be separated from their general functioning. Therefore, the electorate is one that mandates, **through elections**, some people to exercise the responsibilities of the office of local or county counselor, whatever the manner of voting, **and according to art. 9 paragraph 1 of Law no. 393/2004, this quality shall expire on the date when is declared legally constituted the new elected board.**

As apparent from the circumstances presented, **the composition of the elected institutions by vote cannot be changed otherwise than through a new electoral process**, the cases of cessation de jure of the quality of local or county counselor before the end of the normal duration of the mandate, listed limitatively by art.9 in paragraph 2 of Law letters a-i no.393/2004 aims only the **situations which are due to their own activity of the elected** and affects essentially the possibility of exercising mandate **in relation to the local organizations that mandated it.**

Contrary to what was stated by the constitutional regulations above mentioned, by the provisions of Article 9 paragraph 2 letter h indicative 1 of the Law no.249/2006, under the new conditions, the local and county councils are not elected any more, **but appointed,** this is on the vacancies, after the cessation de jure of the mandate of the local elected who lost the political support, **the new counselors are appointed**.

As a consequence, given that the overall functioning of these institutions cannot be separated of their composition, by applying the criticized legal regulations, the county and local are appointed, not elected, contrary to the fact shown by the dispositions in art. 121 paragraph 1 rap. to the dispositions in art.122 paragraph 2 of the Constitution. It also cannot be designed the right to vote of the citizens stated by art.36 of the Constitution without the guarantee that the free exercise of this constitutional right will produce its effects legally. Within the meaning of Article 9 paragraph 2 lit. h ^ 1 of the Law on the Status of the local elected, the electorate's vote is in fact canceled.

Another conclusion that detaches from the interpretation of criticized text is that the representative mandate is transformed into an **imperative mandate**, being hit by absolute nullity according to the provisions of art. 69 under paragraph 2 of the Constitution. Although regulated in Title III, Chapter 1, Section 2 of the Constitution, we appreciate that by means of analogy and for identity of reason this legal provision may be applied in this case, because the procedure of entrustment of the institutions (Chamber of Deputies, Senate, county councils , local councils) and of the elected is similar, whether they are parliamentarians or local councilors, respectively **by the vote of the electorate**.

Thus, under the provisions of Article 6 in conjunction with art. 8 paragraph 2 of Law no. 96/2006 on the status of the deputies and senators, **the office of Deputy or Senator may not be interrupted, suspended or revoked, the term of office being equal to the term of the office of the Chamber of which is part.**

It may therefore be found that, in accordance with the provisions of Law nr. 96/2006, the loss of membership of a political party or organization of the national minorities on whose list he was elected in the case of the Senators and the Deputies, shall not affect the exercise of their mandate, instead, in the case of the counselors and county councilors, the political support withdrawal triggers the termination of the mandate, before the expiry of its normal duration.

In these conditions, we consider that the provisions of art. 9.2 letter h indicative 1 of the Law on the Statute of the local elected, contravene the dispositions of art.1 paragraph 5 of the Constitution, in the context in which, the supremacy of law is one of the fundamental principles of the Constitution and assumes that any institution is operating according to the law. Also, the local and the county councils cannot be an exception, as shown in art.121 and art.122 of the Basic Law, being clear that determining the composition of these institutions cannot be separated from their general functioning.

Therefore, the inclusion and exclusion of some members, the conditions and mechanism for taking such decisions must be determined by law. Or, the provisions of art.9 paragraph 2 letter h index 1 provides that a counselor may be excluded after a final decision taken by the party, and the parties, according to Article 40, are formed as a result of freedom of association. It results that the internal organization of parties, including the manner in which decisions are taken, cannot be determined than only by a domestic statute, adopted by the party members and not under the law. *In conclusion, we believe that a party entitled to intervene formally in the functioning of a institution of the local government, means either switching internal decisions of a party under legal control, which would violate the provisions of Article 40 of the Constitution, or the removal of the institution under the control of the law, contrary to the fact that art. 1 alin.5 of the Constitution is providing.*

The provisions of Article 9 paragraph 2 letter h ^ 1 violates the dispositions of art.3 Protocol No.1 to the European Convention on Human Rights concerning the right to free elections and freedom of exercise of the mandate

According to Article 3 of the Protocol of the Convention, “the High Contracting Parties undertake to organize, at reasonable intervals, free votes with secret ballot, under the conditions that ensure the free expression of people's opinion on the legislative body choice.

Therefore, in view the provisions of art.3 of Protocol No.1 to the ECHR, the Contracting States have the obligation to ensure the right to exercise voting, the right of eligibility and the right to actually pursue a mandate by the candidate elected by the electorate.

As shown by the EU, although the states benefit of a wide margin of discretion, the conditions they would require to the exercise of these rights **must not lead to deprivation of their effectiveness, necessary to achieve the purpose for which they were recognized** - the free expression of the will of the people in choosing legislative body (ECHR 18.02.1999, Matthew c / Royaume-Uni, Labita c / Italy).

Or, the purpose of exercising the office of a county counselor and local counselor is the interest of the community which invests by vote, as follows from the Law no.215/2001 („**the local mandate is exercised on behalf and in the interest of the community that invests him in voting**."). In this regard, Article 9 paragraph 2 letter h ^ 1 affects the substance of this right, since the restrictions imposed do not pursue a legitimate aim and are not proportionate with the pursued aim, the public interest, of the community, being subordinate to the private interest, of the party. Thus, the criticized text of the law does not represent some reasonable measures to exercise the mandate of the local elected, but they are some conditions designed to lead to the deprivation of effectiveness necessary to achieve the purpose for which were recognized these rights. European Court of Human Rights has stated that all the conditions imposed by the constitutional order of the Member States on the effective right of exercise of the mandate by the elected, should be without prejudice **to ensuring their independence and the guaranteeing of the freedom of voters**. And in this regard, the provisions of Article 9 paragraph 2 lit. h ^ 1 contravene Article 3 of Protocol 1 in that **the local elected independence in the effective exercise of the mandate ceases**, as long as it is conditioned on membership to the political party on whose list he was elected.

In this sense, the criticized text of law creates the possibility of a political party to intervene in the sphere of the local public government, in that, the local elected will be in a position to choose between losing the mandate and the adoption of an administrative solution imposed by the political party on whose list he was elected, a situation which violates the provisions of art.3 of Protocol No. 1. We believe that the criticized provisions are not in the spirit of Article 3 of

Protocol No. 1. We bring as an argument the cause Castells against Spain, where the European court concluded that termination of the mandate of a parliamentarian, as a consequence of dissolution of the political party of which those elected who were part, without that the **revocation to be due to their own activities**, is a disputable measure incompatible with the very controversial substance right to be elected and the pursuit of the mandate, guaranteed by the provisions of art.3 of Protocol 1, because it "**wounds in this way the sovereign power of the electorate that has elected its deputies**".

However, by the provisions of Article 9 paragraph 2 lit. h ^ 1 of Law no. 249/2006 just this measure, incompatible with the substance of the right to be elected and the pursuit of the mandate is established, in the sense that the local elected cease de jure the ir mandate, not as a result of their own activities, but as a consequence of the loss of the membership of the political party on whose list they were elected, thus wounding the sovereign power of the electorate which has chosen its local and county counselors.

Judiciously was hold in the reasons of Decision no. 61/2007 of the Constitutional Court by means of which were declared unconstitutional provisions art. II paragraph 1 and 3 of Law

nr.249/2006, the fact that the criticized provisions, including those of Article 9 paragraph 2 lit. h ^ 1, lacking clarity, precision, ponderability and predictability, by how poor the writing is, being inconsistent with the requirements of the European Court of Human Rights.

Regarding the demands of legislative technique, specific to the legal rules, the European Court of Human Rights, has ruled consistently that acting "a rule is only **predictable** when it is drafted with sufficient precision so as to enable to any person who, if necessary, can call on specialist advice-to correct his own conduct "(Rotaru case against Romania, 2000).

In conclusion, the Constitutional Court, as it states in the name of the constitution, it has also, the role to restore the popular will, ensuring that the rights and freedoms of citizens are respected, thus shading the utility of the vote.

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