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## Legal Sciences in the New Millennium

### The Liability of Local Elected Representatives

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**Abstract:** In this study we propose, based on the laws and jurisprudence, to highlight the issues of the legal liability of local elected officials in their own behalf and joint and several. To this effect we consider that we have to start from the status of the local elected officials, established by article 51, paragraph (1) of Law no. 215/2001, which states that in “the exercise of their mandate, the local councilors are serving the local community.” This aspect is developed by the special regulation in the field, Law no. 393/2004 on the Statute of local elected officials, which in article 1 indicates the subject of this legislative act, namely “establishing the terms for the exercise of the mandate by the elected local officials, the rights and obligations under the entrusted mandate”.

**Keywords:** mandate; elected officials; liability; penalties

#### 1. Introduction

In article 3 of Law no. 393/2004 it specifies that “*the participation of the local elected representatives to the authorities’ activity of local public administration has a public and legitimate feature, being related to the general interests of the community in which they exercise their mandate. In exercising the mandate, the local elected officials are serving the local community and they are accountable to it.*”

These provisions are complemented by articles 20-23 of Law no. 393/2004, which highlight the fact that local elected representatives<sup>2</sup> cannot be held liable for the political opinions expressed in the exercise of mandate, at the meetings of local councils or county or within the assignments given by the council (in the case of councilors) and the exercise of duties provided by law (in the case of mayors and deputy mayors), being guaranteed the freedom of opinion and action under the mandate.

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<sup>2</sup> When referring to “elected local officials/representatives” we consider local councilors and county councilors, mayors, including the general mayor of Bucharest, vice presidents and vice presidents of county councils. Law on the Statute of local elected officials no. 393/2004 assimilates with elected local officials and village delegate (Preda, 2007).

Moreover, during the entire duration of the mandate, the elected local officials are deemed in the exercise of public authority and they enjoy protection under the law.<sup>1</sup>

But the elected local officials can no longer rely on that protection for the expressed opinions outside their mandate, i.e. for those that do not stem from the nature of the mandate, but they are expressed in a personal capacity. Also, the protection of local elected officials cannot be effective in the case of insults, slander, defamation and other acts of this kind, no matter what framework and in what form they would be committed, as they cannot be regarded as springing from the “nature of the mandate”.

As the renowned professor said in one of his works (Iorgovan, 2005, p. 508), “this does not mean that they and, then, the council as a whole are irresponsible.” The author continues by mentioning that all current regulations in the Western countries include provisions which establish a form of liability: political, disciplinary, criminal or financial.

## **2. The Regulation of the Local Elected Officials Liability**

Article 56, paragraph (1) of Law no. 393/2004 states: “*counselors are reliable in their own behalf for the conducted activity in the exercise of their mandate, and joint and several for the council activity to which they belong and for the decisions they voted. In the minutes of the board meeting the voting results shall be recorded and, at the request of counsel, it shall expressly be mentioned its vote.*”

We believe that this text develops the provisions of article 128 of Law no. 215/2001 on local public administration, establishing the legal liability of the local elected officials, secretaries and administrative-territorial units, the staff from the specialized department of local public administration, stating that they are held accountable, as appropriate, contraveniently, criminally for the acts committed in the exercise of their duties. (Preda, 2007)

In the specialized literature it is emphasized that in the case of local elected officials, for the acts committed in the exercise of the mandate, we must distinguish between political liability, for which political sanctions and legal liability are applied, under the law. (Preda, 2007)

In article 57 of the Statute of local elected representatives there are listed penalties to be applied to counselors. Renowned Professor Antonie Iorgovan noted that it is about administrative sanctions – disciplinary, which are in the category of the discipline related to the counselor function and the administrative - disciplinary sanctions are related to the discipline of the meeting (Lilac, 2005, p. 511). These are: a) warning; b) call to order; c) withdrawal of the words; d) removal from the meeting hall; e) temporary exclusion from the work of the committee and specialized commission; f) the withdrawal of the allowance meeting for 1-2 sessions.

The first four penalties may be imposed by the Chairman and the other by the local council or county, where appropriate, by decision, with the vote of at least two thirds of the elected councilors in charge.<sup>2</sup>

For committing the first infringement, the warning applies when the Chairman draws attention the counselor at fault and he is advised to comply with the rules.

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<sup>1</sup> Law no. 393/2004 in article 23, paragraph (2) states that “Of the same legal protection it benefits the family members - husband, wife and children - where the aggression against them pursues directly the exertion of pressure on local elected officials in connection with the exercise of its mandate.”

<sup>2</sup> See Civil Decision no. 1895 of 03.06.2009, Cluj Court of Appeal, Commercial Division of administrative and fiscal contentious.

If the warning and the Chairman's advice is ignored by the counsels and they continue to deviate from the Regulation and also those who violate seriously, even for the first time, the provisions, they shall be called to order. This (call to order) is recorded in the minutes of the meeting.

However, before being called to order, the counselor is invited by the Chairman to withdraw or explain the words or expressions that generated the incident that would lead to a sanction.

The penalty will not be applied if the expression employed was withdrawn or if the explanations are considered by the Chairman as being satisfactory.

According to article 61 of the Statute<sup>1</sup>, where after the call to order a counselor continues to deviate from the regulation, the Chairman will withdraw the floor, and if he persists, he will be removed from the room. The removal from the room is the equivalent of unauthorized absence at the meeting.

In the case of serious offenses committed repeatedly or of particular seriousness, the Council may apply the sanction of temporary exclusion of the counselor from the activities of the council and specialized committees, a sanction which results in non-granting the meeting allowance for that period. The temporary exclusion of the counselor from the activities of the council and specialized committees may not exceed two consecutive meetings.

The Law no. 393/2004 contains special provisions on the penalties to be applied to deputy, presidents and vice presidents of county councils, for repeated serious violations committed in the exercise of their mandate.<sup>2</sup> Depending on the seriousness of the offense, the penalties shall be in compliance with the quorum established by the law. Thus, reprimand and warning applies at the decision of the board, at the mayor's reasoned proposal, that is the county council president. Judgment shall be taken of a majority of the elected councilors. For the other two penalties i.e. 5-10% salary reduction for 1-3 months and dismissal, the decision shall be taken by secret vote of at least two thirds of the elected councilors. The application of these two penalties can only be made upon the proof that the deputy mayor, chairman or deputy chairman of the county council violated the Constitution, other laws of the country or damaged the interests of the country's administrative-territorial unit or the inhabitants of the administrative-territorial unit.

As regards other forms of legal liability of the local elected officials, article 55 of the law states that the "elected local officials are liable, under the law, administratively, civilly or criminally for the committed actions in the exercise of their duties."

Therefore, these forms of legal liability mentioned in special laws, which apply only in the situation where the provisions regard the attributions of the local elected representatives, prescribed by law.

For facts unrelated to their duties, the elected local officials will be liable under the common law.

Regarding the suspension sanction of the council mandate in case of his prosecution, according to article 56 of Law no. 215/2001, the "local councilor mandate is suspended only if he has been taken into custody. The measure of pre-trial detention shall be immediately communicated by the court to the prefect who, by order, within 48 hours of communication, will decide the suspension of the mandate."

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<sup>1</sup> See Decision no. 564 of 28 May 2009 of the Court of Appeal Galati.

<sup>2</sup> These penalties are: a) reprimand; b) warning; c) 5-10% salary reduction for 1-3 months; d) dismissal.

Through this legal text it has been clarified a number of problems from practice, generated by the differences in interpretation of the previous law, which allows the prefect to apply the mandate suspension measure (Apostol Tofan, 2014, p. 333).<sup>1</sup>

According to the Statute of local elected officials (article 9), the quality of local or county councilor shall automatically be terminated before the normal expiry of the mandate in the following cases: resignation; incompatibility; relocation to another administrative-territorial unit, including as a result of its reorganization; absence from more than 3 consecutive ordinary meetings of the council; inability to exercise the mandate for more than 6 consecutive months, except the cases provided by law; conviction by final court decision to a custodial sentence; placing under judicial interdiction; loss of voting rights; loss of membership of the political party or organization of national minorities on whose list he was chosen (Stoica, 2011, p. 192);<sup>2</sup> death.

As for the loss of membership of the political party or organization of national minorities on whose list he was elected, by the Constitutional Court Decision no. 915 of 18 October 2007 it was established that the provisions of article 9, paragraph (2) h1) of Law no. 393/2004 aimed at “preventing political migration of local elected officials from one political party to another and securing the stability in the local public administration to express the political configuration, as it resulted from the will of the electorate”<sup>3</sup>. Also, in a recent decision<sup>4</sup>, the Court reevaluated the arguments on the loss of membership of a political party or organization of national minorities on whose list he was elected by the local councilors, as a result of examining the constitutionality of the depositions of Law on approving the Ordinance Emergency Government Ordinance no. 55/2014 for regulating some measures regarding local public administration.

In paragraph 41 of that decision it states that: “the sanctioning of the loss of mandate, regardless of way in which it is lost the party membership (resignation or expulsion) it refers only to local and county and councilors, who are elected within an election list. So their vote expressed by the electorate regarded the political party, namely the list presented by him, and not individual candidates, which determined the political configuration of the local / county council reflected by the number of mandates obtained by political parties. As such, the legislative solution contained in article 9, paragraph (2), letter h1) of Law no. 393/2004 is a requirement arising directly from the provisions of article 8, paragraph (2) of the Constitution, a contrary legislative solution - that would not condition the cease of the local or county councilor’s mandate by the loss of membership quality of a party or a national minority organization or on whose list he was elected – it may be accepted only under the conditions of modifying the type of election, in which the local and county councilors are elected.”<sup>5</sup>

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<sup>1</sup> It is Law no. 69/1991.

<sup>2</sup> The specialized literature shows that the quoted legal text is incompatible with the legal regime applicable to the mandate in public law, the legal regime considered as being common, in terms of its defining features, all mandate categories that have this qualification. See (Stoica, 2011, p. 192). The author points out that “*The Law no. 393/2004 operates an unjustified distinction within the same category of mandate, namely of the local elected officials, setting different causes for termination of that quality, so the implicit termination of the mandate between local officials - local and county councilors, on the one hand, and mayors on the other hand, the latter due to the termination of the mandate (linked to political affiliation) being losing by resignation of membership of a political party or national minority organization on whose list they were elected (article 15, paragraph (2), letter g of the Law no. 393/2004. In the case of the mayors, ceasing of mandate due to loss of membership of the political party on whose candidate list the candidate in question has ran for, is conditioned by an act of will of the elected - resignation - in the case of local or county councilor the legislator makes no relevance on the will of the elected one, having cease their legal mandate by law.*”

<sup>3</sup> <http://lege5.ro/Gratuit/geydgbuga/decizia-nr-915-2007-referitoare-la-respingerea-exceptiei-de-neconstitutionalitate-a-dispozitiilor-art-9-alin-2-lit-h1-din-legea-nr-393-2004-privind-statutul-alesilor-locali>.

<sup>4</sup> Decision no. 761 of 17<sup>th</sup> December, 2014.

<sup>5</sup> [http://www.ccr.ro/files/products/Decizie\\_761\\_20141.pdf](http://www.ccr.ro/files/products/Decizie_761_20141.pdf).

### **3. Conclusions**

As stated in the doctrine (Iorgovan, 2005, p. 334), one can speak of the following forms of liability of a counselor: a) an administrative-disciplinary liability that may result in: declaring vacant the seat of councilor; suspension from office; other penalties provided in the statute of local elected representatives; b) an administrative-patrimony liability consisting of the compensation for the damage caused by the decision of the city council declared as being illegal by the administrative court; c) criminal liability.

Conversely, beyond the arguments constantly mentioned by the Constitutional Court in its decisions, we consider that it is necessary to amend the Law no. 393/2004, for the purposes of applying article 9, paragraph (2) letter h1) not only to councilors (local or county), but also to mayors.

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