

THE LEGAL LIABILITY OF LOCAL ELECTED OFFICIALS AND CIVIL SERVANTS IN THE VIEW OF LAW No. 140/2017. ASPECTS REGARDING THE CONTENT AND UNCONSTITUTIONALITY OF THE REGULATION

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Abstract:

Law no. 140/2017 introduces a new conception in the Romanian legal order regarding the liability of local elected officials and civil servants from the specialized body of the mayor or of the county council. Practically, the center of responsibility moves towards the servants from local public administration, the local elected officials being, in some cases, exonerated from liability. The newly enacted normative act will have multiple implications both on the rule of law and on the status of the civil servant and of the local elected officials. Through its legislative solutions, Law no. 140/2017 replaces joint and several liability with the exclusive liability of the subjects of law, in some cases removing the issuer of the administrative act from the liability equation. By the way it was adopted, and also by the legislative solutions it proposes, the law as a whole violates the constitutional provisions.

Keywords: *accountability, local elected, civil servants, contract staff, law*

Introduction

Law no. 140/2017 amended and supplemented the general norms regarding the legal liability of certain categories of local elected persons and of the staff from the specialized body of the mayor or of the county council, included in Article 128 of the Local Public Administration Law, as well as the norms stipulated in Article 55 of the Law on the Status of Local Elected Authorities.

From the analysis of the legislative path of the law, it follows that the initiators of the legislative proposal, which became Law no. 140/2017, sought to modify and complete only the Law on local public administration; the Chamber of Deputies adopted it tacitly in the form proposed by the initiators, but the Senate modified and supplemented this proposal, including amendments to Law No. 393/2004 on the Status of Local Elected Authorities.

Practically, the assumption that accountability pursues the decision-maker has been replaced by the exclusive responsibility of the signatory of the administrative act in the event of a damage caused by an unlawful administrative act. However, the signatory of the administrative act is not always the subject of law that has issued or adopted that administrative act.

The balance of responsibility from the local elected officials to the officers from the specialized body of the mayor or of the county council results in the replacement, in certain cases, of the joint responsibility with the exclusive responsibility of the signatories of the administrative act, a legislative solution that affects the status of the civil servant, a qualified civil servant, the doctrine[1] , as one of the most important institutions of public law and a fundamental element of the rule of law.

The activity of the institution itself depends on the activity of the public servant and, implicitly, on the satisfaction or non-fulfillment of a public interest, since a public institution, a public authority or a public service has the mission of serving the general public interest[2] . The doctrine, jurisprudence and regulation are the three pillars on which the legal institutions of the civil service and civil servant have been built [3].

Analysis of the content of the regulation

Law no. 140/2017, a normative act of organic character, has amended and completed Article 128 of Law no. 215/2001 on local public administration and supplemented Article 55 of Law no. 393/2004 on the Status of local elected officials. Both articles contain general norms on the institution of liability, except that in Article 128, we meet the liability of both local elected officials and the staff in the specialized body of the mayor and of the county council, and Article 55 concerns solely the liability of local elected officials.

In the form prior to its modification and completion by Law no. 140/2017, Article 128 of Law no. 215/2001 had the following content: “The local or county councilors, as the case may be, the mayors, the deputy mayors, the general mayor of Bucharest, the mayors and the deputy mayors of the administrative-territorial subdivisions, the presidents and vice presidents of the county councils, the secretaries of the administrative-territorial units and the staff from the specialized body of the mayor,

respectively of the county council, shall be responsible, as the case may be, for contraventions, administrative, civil or penal actions for the acts committed in the exercise of their attributions, according to the law”.

By the law adopted by the Parliament, to Article 128 were added several paragraphs, and, at the same time, Article 55 of the Law on the Status of Local Elected was supplemented.

Thus, the content of Article 128 became paragraph 1 of that article and was only completed with the deputy mayors of Bucharest. In our opinion, the regulation is incomplete. We appreciate that it was necessary to complete the paragraph with the village delegate, and also with the public administrator because, according to Law no. 393/2004 the category of local elected officials also includes the village delegate, with a status similar to a local councilor, and the position of public administrator is a distinctly regulated function in the law on the local public administration, whose status also implies liability. Moreover, we consider it necessary to abolish the contraventional liability in the enumeration of forms of legal liability, since administrative liability is governed by this, and contraventional liability is a form of administrative accountability. Last but not least, we consider that the norms regarding the civil servants' liability should have been correlated with those contained in Law no. 188/1999 on the Status of Civil Servants.

According to paragraph 2 of Article 128 of the adopted law, “the mayor, the president of the county council, the chairperson of the meeting of the local council and of the Bucharest municipality, as well as the person empowered to perform this function, by signing, invest with authoritative formula the execution of the administrative acts issued or adopted in the exercise of their attributions according to the law”.

Administrative acts are issued under the regime of public power and benefit from the presumption of legality, authenticity and veracity. The issuance of the administrative act under the regime of public authority distinguishes it from the acts of the administration issued under ordinary law or civil acts in general, and makes it obligatory, while its execution is done *ex officio*. Therefore, we appreciate the regulation in paragraph 2 to be devoid of foundation.

Paragraph 3 of Article 128 states that “the assessment of the necessity and the opportunity of adopting and issuing administrative acts belongs exclusively to the

deliberative and executive authorities and can not be controlled by other authorities”, and “the drafting of the reports provided by the law, countersigning or approval for legality and signing the substantiation notes engage administrative, civil or criminal liability, where appropriate, of the signatories, in the event of a violation of the law, in relation to their specific duties”.

Indeed, local public administration authorities[4] enjoy the power of appreciation, called discretionary power, based on the principles guiding their activity. The body issuing the act has the possibility to choose “from among several possible and equal solutions, to the same extent, the one that best corresponds to the public interest to be satisfied”[5]. As emphasized in the literature[6], this ability to choose from several possible variants “reveals the quality of the administrative act to meet both the strict rigors of the law as well as a determined social need in a given time and place”. But this freedom of appreciation must take into account the strict observance of the legal rigors and the satisfaction of the public interest, otherwise we will enter the sphere of excess power as defined by Law no. 554/2004 of the administrative litigation as representing the “exercise of the discretionary right of public authorities by violating the limits of the powers provided by the law or by violation of citizens’ rights and freedoms”[7]. Therefore, the prohibition of the opportunity control for the acts of local authorities has the effect of imposing a penalty on the excess power of these public authorities. However, for an administrative act to serve social good, it must be legal and timely. Legality evokes that the administrative act corresponds to the letter of the law, and the opportunity represents its compliance with the spirit of the law[8].

As regards the second sentence of paragraph 3 of Article 128 referring to the involvement of the legal liability of the signatories in the forms stipulated for “drafting the reports provided by the law, countersigning or endorsement for legality and signing the substantiation notes” in case of violation of the law, in relation to the specific attributions, it is necessary to emphasize something. This sentence can be considered as a preamble to the norms contained in the next paragraph, paragraph 4, which removes the decision-maker from the liability equation, i.e. the authority issuing the act in the case of an unlawful administrative act, and throws the burden of liability on the shoulders of the officials preparing the reports stipulated by the law, with the exception of the report drawn up by

the specialized committees of the local or county council, which approve or countersign for legality, such as the secretary of the administrative-territorial unit, or who sign the substantiation notes. The report of the specialized department is a technical and material operation which does not have legal effects, being of an advisory nature. It is necessary to exist, but the local authority is not involved in making the decision on this report. We must admit, nonetheless, the need for the intervention of the officials' accountability in the specialized department when, for example, local councilors adopt a decision that prejudices certain persons, an administrative act adopted in good faith, based on the opinion of the specialists.

Paragraph 4 of Article 128 states that "the acts of the local public administration authorities imply, under the law, administrative, civil or criminal liability of officials and contract staff, according to case, in the specialized body of the mayor, respectively of the county council which, in violation of the legal provisions, technically and legally issue or adopt them, or countersign or approve, as appropriate, for the legality of such acts".

In practice, the provisions of this paragraph exonerate from responsibility the local elected who issue or adopt an unlawful act, and the full responsibility will be limited only to civil servants and the persons with a contractual status in the specialized body of the mayor or of the county council, who have founded or approved the adoption or issuance of administrative acts. Nevertheless, the manifestation of will belongs to the issuing authority, and the administrative act is, as the literature suggests, a manifestation of express, unilateral will subjected to a regime of public power. The administrative act is the most important form in which the administration carries out its mission. This act is governed by the regime of public power.

The civil servant or the person in the specialized body does not initiate acts of the local public administration authorities and does not participate in the adoption or issuance of such acts. These persons do the procedural forms (advise, substantiate, document, ensure the communication and publication etc.) of the issuance or adoption of administrative acts, do not adopt or issue administrative acts. Therefore, the decision does not belong to these people. The person who has the decision is also responsible for breaching the legal rules. Of course, in turn, the staff from the mayor's specialized body or from the county council needs to be made accountable, but we do not think that this is

the best legislative solution. According to paragraph 5 of Article 128, “the acts of the local public administration authorities approved or issued without being substantiated, signed, countersigned or approved from a technical or legal point of view, shall produce full legal effects, and in case of harmful consequences, the legal liability of the signatories is exclusively committed”.

These provisions raise at least two issues. First of all, these legal provisions are inconsistent with those contained in Article 44 paragraph 1 of the law, which stipulates that “the draft decisions on the meeting agenda of the local council can not be debated unless they are accompanied by the report of the competent department within the specialized body of the mayor, which is elaborated within 30 days after the registration of the project, as well as the report of the specialized committee of the local council, except for the cases provided by Article 39 paragraphs 2 and 4”. As long as a draft decision can not be debated unless it is accompanied by the documents provided by the law, how can it become an administrative act and produce full legal effects? Secondly, if the act was likely to produce legal effects, why should the signatories and not the decision-maker answer legally? For example, according to Article 47 paragraph 1 of the Local Public Administration Law “the decisions of the local council shall be signed by the chairperson of the meeting, elected under the conditions provided by Article 35 and countersigned for legality by the secretary”. In this case, the signatories of the administrative act are the chairperson of the meeting of the local council and the secretary of the administrative-territorial unit. Therefore, in the case of harmful consequences, the responsibility does not belong to those who adopted the respective administrative act, but only to the signatories of the act, which is unnatural. Even more interesting is the fact that the chairman of the meeting did not vote in favor of that draft decision. How can that person take responsibility for something he did not agree with?!

According to paragraph 6 of Article 128 “the refusal of the public servants and the contract staff from the specialized body of the mayor, respectively of the county council, to sign, respectively to countersign or approve the administrative act, as well as any objections regarding the legality, shall be made in writing within 3 working days from the date of receipt of the document and shall be recorded in a special register for this purpose”, and paragraph 7 stipulates that “the persons referred to in paragraph 6 who refuse to sign,

respectively to countersign or to endorse or those who object to the legality, without legal basis, are liable to administrative, civil or criminal liability, as the case may be, under the law”.

The administrative act shall be signed by the mayor, the president of the county council, the chairman of the meeting of the local council or its substitute and countersigned for legality by the secretary. For example, the mayor's order is signed and countersigned for legality by the secretary. An administrative act shall not be signed by any person other than those expressly provided for by law. Therefore, we do not understand what may be the refusal of other civil servants or persons with a contractual status. As for the secretary, the law already regulates in Article 48 paragraph 1 of their right to refuse to countersign an administrative act in the situation in which they consider it illegal. In such a situation, they are obliged to submit and expose to the deliberative local authority their reasoned opinion, which will be recorded in the minutes of the meeting. This legal regime is valid also for the decisions of the county council, the provisions of the mayor and of the president of the county council.

It is, therefore, unnatural for the same legal act to regulate the same legal situation differently. Moreover, if in the case of civil servants the legal liability appears in the forms mentioned in paragraph 7 of Article 128, in the event that their refusal would not have legal cover, for example, in the case of the chairperson of the local council meeting, who refuses to sign a local council decision, the law no longer provides for a means of coercion, stating in Article 47 paragraph 1 only that the decision will be signed by 3-5 local councilors. From this point of view also the regulation is deficient, as it is not normal for the local elected to benefit from a permissive regulation and the civil servant to be subject to a constraint legal regime.

The distinct, privileged legal status in terms of the right to refuse the signing of the administrative act contravenes the principle of equal rights of citizens, enshrined in Article 16 paragraph 1 of the Constitution of Romania, according to which “citizens are equal before the law and the public authorities, without privileges and without discrimination”. The previous assertion is reinforced by the jurisdiction of the constitutional litigation court, which in Decisions no. 148/2001 and no. 685/2012 stated that “the violation of the principle of equality and non-discrimination exists when differential treatment is applied

to equal cases without objective and reasonable reasoning or if there is a disproportion between the aim pursued by the unequal treatment and the means employed”.

Related to Article 55 of Law no. 393/2004[9] on the status of local elected representatives there has been added by Law no. 140/2017, in the end, the phrase “under the law”, a phrase which had already existed regulated, at the beginning of the article, so that Article 55 has the following wording: “The local elected persons are answerable according to law, from an administrative, civil or criminal point of view, according to the case, for the deeds committed in the exercise of their duties, under the law.”

Conclusions and proposals

The law, through the legislative solution contained, limits the legal liability of local elected officials or, even in certain circumstances, exonerates the local elected officials from liability and extends, unacceptably, the liability of civil servants and of the contract staff from the specialized body of the mayor or the county council.

Given that one of the basic principles of the functioning of local public administration is the principle of legality, the observance of which involves the protection at legislative level of the juridical responsibility for both local elected officials and civil servants and contractual staff, the legislative solution adopted may affect the guarantee to respect the principle of legality, an aspect underlined in the opinion of the Legislative Council as well.

By affecting the insurance to comply with the principle of legality, the legislative solution is unconstitutional. At the same time, the poor regulation, the legislative parallelism, the non-correlation of the newly introduced norms with the existing ones, affect the quality of the regulation, leading to the conclusion that the analyzed legal provisions “do not meet the requirements of clarity, precision and predictability”, being thus incompatible with the fundamental principle regarding the observance of the Constitution, of its supremacy and that of the laws provided by Article 1 paragraph 5 of the Romanian Constitution. By Decision no. 447[10] of 29 October 2013, the Constitutional Court has raised predictability and clarity at the level of an “essential condition for the quality and constitutionality of the legal norm”.

The law analyzed by the poor drafting procedure does not correspond to the requirements of legislative technique specific to the juridical norms. The law violates Article 61 paragraph 2 of the Law no. 24/2000[11] regarding the norms of legislative technique stipulating that “the provisions amended or supplementing the normative act must harmoniously integrate in the act subject to modification or completion, ensuring the unity of style and terminology, as well as the normal sequence of the articles”. In the same respect, by Decision no. 838/2009[12] , the Constitutional Court has stated that the observance of the norms of legislative technique is an obligation opposable to the legislator, the mayor or the delegate.

Last but not least, the lack of correlation of the norms will create interpretation problems for the law, which may have consequences in the field of legal certainty, leading to lower confidence of the public servant in the legal security provided by the state, by the norms developed and adopted. The issues raised, plus the fact that the law was adopted in violation of the principle of bicameralism, make us believe that this normative act must be urgently submitted to the constitutional review exercised by the Constitutional Court.

It was desirable that the notification of the Constitutional Court be made before the promulgation of the law by the President of Romania, but if this has not been done, the constitutional litigation court may also be notified after the enactment of the law by raising an exception of unconstitutionality before the court[13], or directly to the Constitutional Court, by the People’s Advocate based on Article 146 letter d of the Constitution.

According to its jurisprudence[14] , the Constitutional Court has established that the principle of bicameralism is reflected not only in the institutional dualism within the Parliament, which is made up of the Chamber of Deputies and the Senate, but also in the functional one. The Constitutional Court also held that the parliamentary debate of a draft law or of a legislative proposal can not ignore its assessment in the plenary of the two Chambers of Parliament. Therefore, the amendments and additions made by the Decision Chamber to the draft law or the legislative proposal adopted by the first notified Chamber must relate to the matter envisaged by the initiator and the form in which it was governed by the first Chamber. Otherwise, it comes to the situation that only one Chamber, namely the Chamber of decision makers, can legislate exclusively, which is contrary to the principle of bicameralism[15] .

From the analysis of the legal path of this normative act, it is found that the legislative proposal was adopted by the Senate as a decision-making chamber, in a completely different wording than the content of the initial legislative proposal, ignoring the form proposed by the initiator and tacitly adopted by the Chamber of Deputies, as well as the initiator's intention, highlighted by the explanatory statement that says the initiative is meant to "stop the intimidation and corruption actions of the decision-makers in local public administration".

We appreciate that the Constitutional Court, within the extrinsic constitutional control, will find the violation of the provisions of Article 61 corroborated with Article 75 of the Constitution, which enshrines the principle of bicameralism. This procedural deficiency affects the quality of the normative act, thus violating the imperative requirements of legislative technique. Having found the flaws of extrinsic unconstitutionality by the Constitutional Court calls for the declaration of unconstitutionality of the law as a whole.

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