Unconstitutionality of Exoneration from Legal Liability of Local Dignitaries

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Abstract: The present study highlights the unconstitutionality of art. 128 of the Law no. 215/2001, as introduced by Law no. 140/2017, since the above-mentioned text only exonerates from liability a wide range of elected local dignitaries, depriving them of any responsibility and deleting from their content the competences and attributions assigned to them by the organic and ordinary laws relevant in this matter. It is for the first time in our legal system when serious legal and constitutional threats are being created, bringing over a lawful category of public officials, seriously infringing Article 16 of the Constitution. It surprises the inefficiency of the People's Advocate and of the Constitutional Court in analyzing the constitutionality of this text of the law both a priori and subsequent of its adoption. In the situation of the changes to Article 128, does it somehow place us in this paradigm of the elimination of liability, because there is "too much responsibility"? We think it is not appropriate to draw such a conclusion! The arguments invoked by us in this study do nothing to converge with the doctrinal opinions already expressed in the literature and to support the quasi-unanimity of the existing opinions regarding the unconstitutionality of the above mentioned law.

Keywords: disclaimer; liability; responsibility; local elected officials; breach of the principle of legality.

https://doi.org/10.18662/lumproc/gidtp2018/29
1. Introduction

Through the recent amendments brought by Law no. 140/2017, former Article 128 of Law no. 215/2001 has been substantially altered in the way in which, in our opinion, the local public officials are exempt from the legal responsibility which is characteristic of all law subjects who have powers and duties in the realization of the public power.

2. Theoretical Background

In a study published immediately after these changes [1], when commenting on the changes to art. 128 of the Law no. 215/2001, an excellent analysis of these changes is made, sending, argued and clearly, to the idea of unconstitutionality of these changes.

We do not wish to reiterate the arguments used by the author of these findings, but we want to bring additional and convergent arguments to these opinions, cherishing certain ideas and trying to point to I when we support the unconstitutionality of these uninspired changes brought by the Romanian legislature to the pressure associative structures of mayors of communes, cities and municipalities.

They now insist on the introduction of special pensions for this social category, which has nothing to do with the principle of contributory, forcing constantly the constitutional limits on the idea of supporting the public "dignity", especially through the pecuniary factor, without doing no reference to the definition of their status and forgetting that overloading them with too much administrative decision actually transforms them into senior civil servants and above all, in litigants in front of the courts.

3. Argument of the paper

Returning to the aforementioned changes, however, the legislator "forgets" that, for example, the mayor has three categories of main legal attributions resulting only from Law no. 215/2001, namely:
- Specific powers of the executive authority, supported by art. 63 and following of Law no. 215/2001;
- State responsibilities as representative of the state, supported by art. 64;
- Powers delegated by the local council.
To these attributions is added "other attributions established by the law", and this expression opens wide the gate of many other legal attributions, which the mayor has to accomplish.

By the amendments to Article 128 by Law no. 140/2017, relieves from the sphere of legal responsibility the elected local dignitaries, in the sense that they only "invested with a formula of authority the execution of the administrative acts issued or adopted in the exercise of their attributions according to the law", the liability resting only to those who counters the acts issued by the to these authorities, and the decision-makers of those acts are out of legal responsibility! [2]

"The purpose of liability in any branch of law is supported in doctrine, is to restore the order of law that has been violated and thus to return to the state of legality that has been disturbed by the antisocial deed but also to express a negative attitude towards the author of the illicit deed in order to make him aware of the significance of his deed, its negative character, to regret it in the future to eliminate it from his behavior. Thus, responsibility has a repressiv, sanctioning purpose, a preventive purpose, and an educational goal" [1].

We perfectly agree with the above-mentioned authors as regards the delimitation of the concepts of responsibility and liability. Yes, "responsibility precedes liability"[1], and then "when responsibility disappears, liability arises, but responsibility can eliminate liability if the subject of law consistently obeys the values protected by law, obeys them and shares them"[1]. The distinction between responsibility and liability "is not only theoretical, doctrinal, but has much deeper roots in the moral-law relationship, so that identifying the term of responsibility in defining the most important notion, that of the public function, leads us to the conclusion that the legislator attaches great importance to the attitudes and behaviors of individuals comprised by public authorities or institutions in order to achieve the purpose proposed by the legislator, namely the honest exercise of the public office in order to achieve the aim proposed by the legislator [3].

4. Arguments to support the thesis

After reviewing some doctrinal opinions on accountability and liability, let us see how the Criminal Code defines the notion of civil servant. Thus, art. 175 make the following qualification:

"(1) Civil servant, within the meaning of criminal law, is the person who, on a permanent or temporary basis, with or without remuneration:
a) exercises attributions and responsibilities, established by law, in order to achieve the prerogatives of the legislative, executive or judicial power;
b) exercises a public dignity or a public office of any kind;
c) exercises, alone or together with other persons, in an autonomous state, another economic operator or a legal person with full or majority state capital, attributions related to the accomplishment of its object of activity.

(2) A public official, within the meaning of the criminal law, shall also be considered to be the person exercising a public interest service for which he has been entrusted by the public authorities or who is subject to their control or oversight of the performance of the public service in question [4].

In this context, mayors, deputy mayors, presidents of county councils, vice-presidents of the county councils, in the conception of criminal law, "exert powers and responsibilities in the field of executive power and exert a public dignity function", and this text, in mirror with the text introduced by art. 128, is in total contradiction! [5]

Both the Criminal Code and Law no. 215/2001 are organic regulations, so how are the two statements compatible? Is this somehow an implicit change to the criminal text? Nevertheless, since this exemption from legal liability has been introduced into other legal regulations and concerns another bundle of social relations.

Their coexistence is, however, inadmissible in a rule of law! Law in general is coherent and logical, and it operates in a unitary system at the level of a democratic state. As it can be seen, the attempt of the legislator to exempt the local public dignitaries from criminal liability fails, in the context of the provisions of art. 175 of the Penal Code are applicable.

The same result has the modification of art. 128 of the Law no. 215/2001 and regarding the periodic damages to the heads of public authorities and institutions when they do not comply with the provisions of Law no. 554/2004. Thus, "if the public authority fails to send the required works within the time limit set by the court, its leader shall be obliged by interlocutory order to pay to the state, by virtue of a fine, 10% of the gross minimum wage for each day of unjustified delay" [6]. And" If the term [irrevocable enforcement within 30 days] is not observed, a fine of 20% of the minimum gross salary per day of delay shall apply to the head of the public authority or, as the case may be, to the liable person, and the claimant is entitled to compensation for the delay"[7].

As the author of the comments of Law no. 215/2001 [1], the futility of the attempt of the legislator to exempt the elected dignitaries from legal liability becomes exemplary, in the context in which even the law on the Statute of local elected representatives no. 393/2004, in art. 69 sets a number of sanctions against them [8].
It is true that art. 128 refers directly to the administrative act of authority as the emanation of that authority, introducing a sui generis legal situation in our legislation. On the one hand, the respective authority issues the administrative act of authority under the regime of public power, but on the other hand it diminishes the responsibility of the decision-maker, i.e. the issuing authority, the burden of which is exclusively on the shoulders of civil servants [1].

In the wavelength of unconstitutional changes, the culmination of constitutional violations is par. 4 of art. 128, stipulating: "The acts of the local public administration authorities employ, under the law, the administrative, civil or criminal liability, as the case may be, of the officials and contract staff in the specialized apparatus of the mayor, respectively of the county council which, in violation of the legal provisions, technically and legally, issue or adopt, or countersign or approve, as appropriate, for such acts" [1].

As the author of the above comments states, the provisions of this paragraph relieve the local elected representatives or adopts an unlawful administrative act, and all liability will be limited only to civil servants and persons with contractual status in the specialized apparatus of the mayor, respectively the county council, who have substantiated or approved the adoption or issuance of administrative acts.

The manifestation of will is the issuing authority, the administrative act being a manifestation of express will, unilateral, and subjected to a regime of public power. Therefore, the decision does not belong to these people. The decision-maker also bears responsibility for violation of the legal norms." The action of regressing the leader in the event of any liability against the guilty official does not, in our opinion, have any relation, because the liability for the issuance or adoption of such illegal acts belongs exclusively makers.

"An administrative act shall not be signed by any person other than those expressly provided for by law"[1].

Of the few arguments highlighted by both us and the authors invoked, it is clear that there is a violation of Art. 16 of the Constitution, which expressly states: "citizens are equal before the law and the public authorities, without privileges and without discrimination". What makes art. 128 of the Law no. 215/2001? Introduces privileges and discrimination, exonerating the most important decision-makers from local government.

Thus, we draw the conclusions drawn by the author of the comments regarding the unconstitutionality of art. 128 of the Law no. 215/2001, as introduced by Law no. 140/2017.
In fact, the Legislative Council, in its opinion, spoke of this anomaly, considering that "The adopted legislative solution can affect the guarantee of respect for the principle of legality"[4], and from the doctrinal perspective "unconstitutionality is treated as a case of aggravating illegality, taking into account of non-compliance with fundamental law [4]".

The author of the commentary also rightly points out that this amendment violates the rules of legal technique specific to legal norms and as a crowning of the unconstitutionality of the amendment of art. 128 of the Law no. 215/2001, the same author states that: "From the analysis of the legal route of this normative act it is found that the legislative proposal was adopted by the Senate, as the Chamber of Decisions, in a completely different wording than the content of the original legislative proposal, the form proposed by the initiator and tacitly adopted by the Chamber of Deputies ...", thus violating, as a consequence, the provisions of art. 61 corroborated with art. 75 of the Constitution [9].

5. Conclusions

In conclusion, we wish to emphasize the convergence, at the doctrinal level, of the opinions of the specialists in the field of public law regarding the modifications brought to art. 128 of the Law no. 215/2001 by Law no. 140/2017, and our arguments mentioned at the beginning of the analysis only converge with those already expressed in the specialized literature, so that at this moment the constitutional correction of the legislative text can only be made by invoking an exception of unconstitutionality, raised in before a court of law, an exception to be then examined by the Constitutional Court in order to resolve this constitutional litigation.

The head of state has not surpassed this constitutional anomaly so that at this moment we do not have the hope that in a litigation, before a court in the country, to invoke the unconstitutionality of this text and the dismissal of liability of this category by the Constitutional Court is denied, and this unfortunate regulation, of which I have previously spoken, is in the past. It seems that in this case the influence of the associative structures of the mayors was that which determined the legislator to make such discrimination and incrimination of the legal liability of a very important category at the level of the local public administration's decision-making. If they wished for a "defense" of these local dignitaries and a strengthening of their status, it would have been better if they rethought their state and involved the respective local dignitaries only in the political decision and in
the formulation of local development strategies and a possible rethinking of their involvement in the administrative decision circuit.

References


