The Reality of the Impossibility to Apply the Disciplinary Sanctions Established for Local and County Councillors

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ABSTRACT

The category of "local elected officials" subject to analysis, namely local and county councillors, aims at exercising disciplinary liability for acts committed during the exercise of their duties by virtue of this function of public authority, under all incidental normative acts, including the provisions of the Administrative Code published in the Official Gazette number 555 of July 5th 2019.

Committing responsibility in one's own name for the activity carried out and at the same time committing joint and several responsibility for the activity of the council in whose structure they are found, are also of interest. At the same time, in relation to the real factual context, it is interesting to debate the responsibility for the acts to be adopted, as a member of the majority, dominated by the indications of the party or political alliance to which they belong or fraternize. The approach procedure aims to highlight the blockage created by the legislator, so that everything leads not only to a difficult decision-making process but also to the maintenance and development of a state of conflict. How, in these circumstances, would it be possible to ensure the possibility of applying a disciplinary sanction, as long as there is always a majority appointing a chairperson from among its members, and with the authority of the majority the chairperson or the council will never apply directly or by a decision adopted "by an absolute majority", a sanction for any councillor part of this majority? What is the meaning of the report to be made based on the research of the specialized commission responsible for legal issues, as long as it is not taken into account by the chairman of the meeting and is never accepted by the majority to sanction a counsellor?

KEYWORDS: *disciplinary sanction, liability in one's own name, joint and several liability, summons, withdrawal of the floor, removal from the meeting room, temporary exclusion from the work of the council and of the specialized commission.*

1. Introduction Achieving the finality of the sanctioning regime

From the decisions of the Constitutional Court we have become accustomed to the idea that there are regulations that are "silent" regarding a legal and effective application,

and in the practice we face we continue to identify situations where it is not possible to achieve the finality of legal provisions, cases that we can express as representing in the analysed context the assumption by the majority of a "tacit agreement" under the guise of the legislator's failure to provide guarantees in support of the norm.

The jurisprudence of the Constitutional Court also constantly emphasizes that a regulation adopted inconsistent with the aim pursued and its achievement facilitates the emergence of factual contexts that generally create inconsistency, instability and we could add in this case, a state of conflict in the deliberative authorities of administrative-territorial units, a state that results in a decrease in citizens' trust in the mechanism for adopting the decisions of the deliberative body.

The regulation submitted to attention and criticized from the point of view of the impossibility to reach the goal in such situations, does not contest the good faith of the legislator but aims to raise an alarm signal in the idea of correcting and modifying the norm accordingly. We emphasize that the character of a rule applicable to a single individualized case is not questioned, but even the legal obligation that the norm does not refer to individual situations, facilitating by defective wording the defence of a personal interest by the decisive vote of the majority which debates legal issues and thus the permanent evasion of the application of a sanction. Never in these conditions will we witness a compliance of the counsellor's conduct with the provisions of art. 222-224 of the Administrative Code, but on the contrary, by anticipating the vote of the majority of which we are part, we witness an indifference to the consequences of violating the law, its "look" only at the theoretical level, maintaining a state of conflict, persiflage good faith obligations and fidelity to any citizen, probity and professional discretion, fairness and honesty. We want to emphasize the reality "on the spot", to analyse the councillors in the communes and cities of Romania strictly in terms of reality and even the indisputable eternal evidence of local political group interests, in their interpretation of citizens' input sometimes by a discriminatory manner on political grounds, *and in this context, due diligence should be taken to prevent and correct these manifestations precisely through the precision component of the normative act.*

I found in a material for students an extremely clear explanation and rooted in the reality at the central level, ***stating, however, that the "local power"/political majority in a deliberative body should never be confused with the "political power in charge of a country",*** *and that is why the measures to correct and amend the rule in question are certainly necessary:* "....any political force that has come to power tends to dress in legal "clothes", so to give obligation to its own point of view regarding a certain institution, concept, phenomenon, idea, etc. In other words, *law as a set of legal rules, is the instrument by which the political power in charge of a country establishes binding decisions for its citizens.* Therefore, the meaning of the above notions, to which others may be added, varies according to the position of those in power, *not any activity of public interest representing a public service, but only that activity appreciated by the political power as being of public interest*"[1]. ***We reiterate, this is not adaptable to the logic of some majorities formed in the deliberative bodies at local or county level***! Let us remember in this sense that the responsibility of local and county councillors is administrative, civil or criminal "for the deeds committed in the exercise of their attributions, under the law", "in their own name, for the activity carried out in the exercise of the mandate, as well as in solidarity, for the activity of the council of which they are part and for the decisions they voted".

[1] Tofan, D., 2020, *Curs Drept Administrativ*, University of Bucharest.

2. Case study

The commune is defined as a basic administrative-territorial unit that includes one or even several villages, a legal entity under public law organized economically, socio-culturally, demographically and economically, with full legal capacity and its own patrimony. The deliberative and executive authorities (local councils and mayors), practically those that solve public affairs strictly under the conditions of the incident legislation, are elected under the conditions of the specific normative act by voting expressed freely, equally, secretly and directly.

According to official communications, currently in the country we have 2,685 communes (an average of five villages/commune) and 263 cities. Our case study concerns a concrete situation that for reasons imposed by the legislation on personal data protection we will present in a targeted manner by corroborating the events at the level of the local council with the provisions of the legislation, without naming or indicating any information that directly or indirectly could lead to the identification of those concerned.

The commune in question has the number of inhabitants according to the reported population, depending on the domicile, located between 10,001 and 20,000, which implies a number of 17 local councillors. In the last elections, the political majority was formed by elected councillors and validated among other cumulative conditions *and on the basis of continuing to be a member of the political party on whose list he was elected respectively of the political alliance.* But if during the election period, the electoral contestants carried out propaganda actions to convince the voters to cast their vote in their favour, *after the validation and the constitution of the new council, the purpose took on a different essence and a different contour determined by personal interests and party interests.* Thus, under the condition of the majority (by proposal even formulated in writing), for example, the budget for organizing the days of the commune was voted only with the inclusion of one of the local councillors in the artistic program and the imposition of financial support for the program. Prohibitions, incompatibilities, conflicts of interest, all remained at a theoretical level, being overcome by the power of the majority, interpreted in the fraud of the law. In this context, let us be aware that the resolution of a criminal complaint takes at least six months if not years, while the approval of the budget of a municipality cannot wait that long, such a decision affecting all residents. As a consequence, the difference of minority councillors, strictly balancing the smooth running of public affairs as a whole, willingly or unwillingly had only to move forward. Overall, the "courage" of the majority has increased, going through all the stages of harassing more vocal members of the minority, their politically unemployed family members, leading to misleading citizens by making comments, posts and online dissemination of false claims about them. Admittedly, those erroneous statements disseminated for the purpose of intimidation by unfounded and unjustified submission to public reproach were answered by those concerned *of a request supported by supporting documents to the Specialized Commission mandated with legal issues, together with the request to submit a report based on the evidence, research carried out and explanations provided by the majority through its representative.* The purpose of this procedure was the one regulated by the provisions of art. 231-239 of the Administrative Code, namely the exercise of disciplinary liability and implicitly of the disciplinary sanctions applicable to the local councillors in question.

With regard to the report of the Specialized Commission, although it was formulated for the purpose of applying the sanction, it remained without purpose even when the representative of the majority mentioned that those responsible for the press "did not accurately reproduce the content of the press release sent by him" and thus the erroneous information would have resulted. Why was it left without purpose? Because the chairman of the meeting, a member of the majority, tacitly, did not proceed to the application of the proposed sanction and in no way to the observance of the provisions of art. 233 paragraph 2 of the Administrative Code. Why? For the protection of the majority in the fraud of the law, *because the power of the local majority is confused with the political power at the head of a country or folds in the pattern of the eternal political struggle. Possibly because "individual decisions about people are always made by secret ballot" and there is an unacknowledged risk here. And because this possibility is conferred by the legislator, who offered a regulation in which there are no components of accuracy and predictability, which puts us in the situation of impossibility to apply in such a situation a disciplinary sanction.*

3. Conclusions Hiring the responsibility of local and county councillors

Accountability in the form of engaging the responsibility of local and county councillors, takes several forms, and for each of them it is necessary to have as a correspondent of finality, a predictable rule, specified procedurally in implementation, the "time" factor also playing an important role. depending on the type of liability.

By Law no. 88/2019, Law no. 393/2004 on the Statute of local elected officials (in force at that date), in the sense that Article 57, paragraphs (1) and (2) have acquired a new content that regulates, in addition to situations of violation by councillors of the provisions of Law no. 215/2001 (r), of the provisions regarding the regulation of the respective conflict of interests of the regulation of organization and functioning of the deliberative body. Thus, it was distinguished that in addition to the following sanctions: warning, call to order, withdrawal of the floor, removal from the meeting room, temporary exclusion from the work of the council and the specialized commission, withdrawal of the meeting allowance for 1-2 meetings to be included and reduction of the sitting allowance by 10% for a maximum of 6 months. Their application was to be carried out by the chairman of the meeting, namely by the council. Decision of the Constitutional Court no. 647/2018 regarding the lifting of the objection of unconstitutionality of the provisions of the Law for the amendment of Law no. 393/2004 on the Statute of local elected officials, was given in the sense of rejecting the objection of unconstitutionality, being established that the provisions regarding the training of disciplinary liability of local councillors are constitutional compared to the criticisms formulated on the line of conflict of interests.

Currently, regarding the administrative-disciplinary liability, by Government Emergency Ordinance no. 57/2019, the same content formula is maintained, including regarding the procedural way of proceeding for the training of disciplinary sanctions applicable to local councillors. We emphasize that administrative liability is defined as "that form of legal liability which consists of the set of rights and obligations of an administrative nature which, according to the law, are born as a result of committing an illicit act which usually violates the rules of law administrative". In conclusion, regarding

this form of liability, it is involved in the conditions of non-compliance, violation of the provisions of the Administrative Code (norms of administrative law), legal provisions regarding the conflict of interests namely the content of the regulation of organization and functioning of the local council. county. *From training to the end, however, it is a difficult path to follow, with a horizon that you always see and never reach, as we exemplified in the case study presented above. Obligations such as those relating to proper conduct, honesty, fairness, responsible and decent language, abusive conduct or the expression of numerous undocumented votes remain in most cases not disciplinary, as the possibility of imposing a sanction is not regulated even in the event of non-compliance. legal provisions regarding the submission of annual activity reports*[2)].

Reported to the commitment of responsibility in one's own name for the activity carried out and at the same time the commitment of joint and several liability for the activity of the council in whose structure they are found, *it is also of interest to involve other forms of social responsibility regulated by the state in the context of non-compliance with legal norms by committing illicit acts, such as: other forms of administrative liability (administrative – patrimonial liability, administrative – patrimonial liability jointly and severally for damages caused by administrative acts) or from a civil or criminal point of view.*

We thus exemplify a case of *individual administrative-patrimonial responsibility*, the only one identified by correlation with a sanction directly applicable to local and county councillors, namely the one provided by the provisions of article 225 par. (4) and (5), which describe the consequence of not appearing on the date of the first ordinary meeting of the local council as a result of returning from a delegation abroad, an information on the trips made, the sanction consisting in bearing the expenses caused by that trip. Regarding *administrative-patrimonial joint and several liability* for damages caused by administrative acts for the activity of the council of which they are part and for the decisions they voted, it operates under the condition of retaining guilt or abusive behaviour that would have caused harm to legitimate interests, as a local elected official.

Rooted in the palpable and sometimes overly publicized state of affairs, *the criminal liability* it is closely related to a real range of crimes whose "touch" is often coordinated by the indications of the party or political alliance of which the councillors are part or with which they fraternize. It is important to emphasize, however, that civil servants are considered, within the meaning of the criminal law (art. 175 of the Criminal Code), persons who perform a function of public authority, respectively local councillors. Art. 231-232 of the Administrative Code, also provide for the criminal liability of local elected officials for acts committed in the exercise of their duties, local councillors answering in their own name, for the activity carried out in the exercise of the mandate. We also list by way of example two such crimes that can place local and county councillors in the criminal sphere, the other categories no longer needing to be mentioned being well known in relation to the level of media coverage.: – *the crime of using the function for favouring some persons provided by art. 301 Penal Code*, consisting in the exercise of the attributions of advisor, respectively of manifestation of the personal vote in order to adopt a decision

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2) See the provisions of art. 225 in the Government's Emergency Ordinance no. 57/2019: „Provisions on information obligations for local elected officials
(2) **Each local councillor, respectively county councillor**, as well as the vice-mayors, respectively the vice-presidents of the county council **are required to submit an annual activity report,** which is made public by the secretary general of the administrative-territorial unit/subdivision.

to obtain a patrimonial benefit for oneself, contrary to the obligations imposed by the regime of conflicts of interests and incompatibilities imposed by the incident legislation;
– the harassment offense provided by art. 208 of the Penal Code, consisting in the act of the person who, as it appears from his Facebook account, unjustifiably and without right subject to public disgrace certain persons, misleading citizens by making comments, posts and online dissemination, infringing their image and causing them a state of fear.

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5. Law no. 393/2004 on the Statute of local elected officials.
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