Criminal liability of elected officials

Abstract

The need for the existence of a professional, competent and responsible body of people, recognised by law, vested with power and coming from the local or national community, able to solve the local and national interest public works, as the community need to be represented in connection with other local or national entities, appeared as an urgent, objective need, which is constantly manifested regardless the historical context covered and regardless the government system of the national community. This is also the main reason why such institutions have kept their sustainability over time, but they also acquired consistency within the context of the entry into force of the current Constitution of Romania and of the laws of the local public administration.

In this context, given the important role played by elected officials within administrative and territorial units and at the top of the hierarchy of the state government, the apparition of indictments is necessary, which have the purpose of protecting the mandate of the elected officials against possible abuses or pressures that might be exerted against them but also, which require the exercise of the mandate abusively at public disinterest in obtaining illegal some personal benefits. However, this trial should be held with maximum attention, by carefully following the social realities, knowing the real needs of citizens, paying due respect to the authority and protection of the national interest, but also without omitting the standards included in the European documents in force.

The national and local elected officials identify as a separate category of power holders who have a special status. The President of Romania, senators and deputies form the category of national elected officials and the mayors, presidents of county councils and their assistants, as well as local and county councillors the category of local elected officials. A defining issue for the elected officials, irrespective of their status, is the fact that they establish with the national or, as applicable, local community a representation report that is in the sphere of public law and that has the single source of mandate, whose content is established by the Constitution, by the laws and by the organisation and operation regulations. Therefore, people who hold elected positions are not public servants and, subsequently, they are not applied neither the provisions of the Statute of public officials nor that of employee, and in their case, the provisions of the Labour Code are not incidental.

In the aspect of criminal responsibility, it is important to specify that local and national elected officials, thanks to the peculiarities of the mandate they hold, are identified in the conception of the Penal legislator as public servants, existing thereafter the possibility that they respond to these crimes for which this special quality of the active subject is required. The assertion is based on the fact that the notion of elected official strictly corresponds to the concept of public servant defined by Article 175, paragraph 1 a and b of the Criminal Code.

Local elected officials appear to us as autonomous administrative authorities invested with own competence necessary to solve public works of communes, towns and counties. These are

structures through which local autonomy is obtained, elected by the citizens with the right to vote, a fact which may even confer high legitimacy in administrative and territorial units they manage but also justify legislative action to provide a wide range of powers to achieve the purpose of the mandate: meeting the citizen's interest.

Crime among the elected officials of the communes, towns, municipalities and counties is at this moment, a largely extended social phenomenon, constituting a major issue the judicial authorities of the State face. This is due both to complexity of the phenomenon as a whole, given by the causes which determine it and the variety of illegal activities, and to high social danger they represent. Furthermore, if one has in mind the types of crimes for which the competent courts issued final judgments, we observe that local elected officials have been convicted for acts that used to refer especially to: fraud of public auctions for the benefit of certain legal entities, illegal restitution of properties, the undervaluation of properties belonging to the private domain of the administrative and territorial units in different business operations such as: enforcements or the conclusion of sale-purchase contracts and not least the fraud of European funds.

Regarding the consequences of the unlawful activity of local elected officials, we must emphasise that the most serious aspect is given by the fact that the consequences of such a phenomenon negatively reach all areas of activity of interest in the local community, also injuring the rights and legitimate interests of citizens and the administrative and territorial unit. Crime makes for the administrative and territorial unit to be less attractive when the problem of cooperating relationships at the local, regional, national and international level is put, and serious antisocial behaviour of local elected officials can also be a triggering aspect for crime among public servants of the specialty unit of local authorities, by the “model” it offers. It is even more severe the fact that the extension of the crime rod in the local interest public institutions facilitates also the performance of crime actions of elected officials by the possible cooptation, as participants or accomplices, of the public servants or of the subordinated contractual personnel.

As to the criminal responsibility of the President of Romania, we can say that it has always been an issue of the specialty literature because legal institution was regarded in an interpretable way. The major landmarks around the doctrinaire argument aimed the analysis of the “high treason” concept, the interpretation of the notion of presidential immunity and the meaning of the phrase “political opinion”, as the main “activity” of the head of State in the fulfilment of the mandate exonerating him of responsibility.

If the first problem has a solution once with the criminalisation of the high treason crime by the new Criminal Code, giving thereafter applicability to constitutional norms concerning the indictment of the President of Romania for that fact, the same cannot be said about the other two institutions that have continued to maintain the doctrine dispute. Relating to the establishment of presidential immunity, regulated by constitutional provisions contained in Article 84 paragraph 2, the interpretation alternative that we consider correct and opportune at the same time is that the protection is one of the exclusive benefits of the political views that the Head of the State expresses in the course of the mandate. Only by admitting such an interpretation one will avoid the damage of fundamental rights of Romanian citizens, the government act will be empowered and the confidence in the presidential institution will be strengthened and not least the provisions of the European Convention on Human Rights and of jurisprudence of its official interpreter in the matter of

immunity will be respected, which does not accept the existence of absolute immunity even though it recognises its role and importance in the performance of a selected function.

As for the concept of "politic opinion" of Article 72 par. 1 of the Constitution at which Article 84 par. 2 refers, the Romanian legislator understood to provide a limited interpretation of the phrase because only in this way, as he considered, the mandate of the Head of the State may be protected and, at the same time, the principle of equal rights between the Romanian citizens is respected. Consequently, the content of the expression "politic opinions" cannot include all the acts and facts that the President of Romania performs exercising the mandate, but only the politic manifestations of the President of Romania covering the form of political acts, without legal consequences, such as: messages, declarations, appeals or notices, acts which may be communicated in writing or orally and directly exposed by the Head of the State or by its representative, irrespective of the location.

As for the criminal responsibility of Romanian parliamentarians, it can be noticed that the place and method of accomplishment of attributions by the senators and deputies determine also their criminal activity sphere. The mandate of the national elected officials is exercised both within the Parliament institution, in the specialised committees or plenums and within parliamentary offices of the territory related to the electors. The parliamentarians will criminally be responsible for the facts committed excepting the expression of the vote and politic opinions which, as we know, are under the protection of immunity. One should remark that the service crimes, as well as the corruption crimes were the most frequent among the Romanian parliamentarians dominating, we can say, the criminal activity of the national elected officials. An evident in this respect is represented by the activity reports of the National Anticorruption Directorate, which mentioned that the Romanian parliamentarians were particularly condemned for the interventions made at different public institutions, such as ministries, justice and police bodies, in order to illegally solve different issues or for the illegal funding of political parties.

The criminality among the elected local officials of the communes, towns and municipalities represent, at this moment, a social phenomenon largely spread, constituting a major issue for the State judicial authorities. The cause of this rod may be identified, on the one hand, in the behaviour treats of the elected officials, as well as in their professional skills, and on the other hand, in the way the Romanian local public administration is conceived and how it collaborates with the other bodies of the State, all taking place on the background of the social and economic state of the territorial community. The crime impact is a very severe one, achieving by the effects produced all the levels of a local community life, fact which determines taking rapid and radical fighting measures. Thus, we consider that the high probability crimes to be committed by the local elected officials must also present aggravated forms providing a more severe sanction. Concretely, we militate for the generalisation of the "model" established by Article 7 letter a of the Law no. 78 of 2000 for preventing, discovering and sanctioning the corruption facts, which provides for the bribery and influence peddling crimes, committed by a person exercising a public dignity position, an increase with one third of the punishment limits. This increase should refer to all the corruption crimes, those assimilated to these, as well as the service or the forgery crimes, which have as active subject the dignitary local elected official. Such a measure would impose necessarily the extension of the pursuit competence of the National Anticorruption and Judgement Directorate of the Court for all the corruption, service or forgery crimes committed by the local elected officials, irrespective of

their status and of the administrative and territorial unit where they exercise their mandate and irrespective of the value of the prejudice produced by their illegal activity.

About the national elected officials: we may assert that the President of Romania, the senators and deputies of our country Parliament are constituted as fundamental institutions in the Romanian State which have the role of ensuring the operation of the decisional mechanism nationally. Thus, the specificity of the activity performed highlighted also the particularities of their criminal responsibility, as well as its limits. And if we speak about limits, then the largest attention was provided in our specialised literature to the immunity institution, analysing its role, the way it acts and the effects it produces. The immunity which protects the President of Romania and the parliamentarians ensure the protection only for the political opinions expressed in the elaboration of the mandate prerogatives, and in case of additional senators and deputies, it guarantees also the vote expression manner. It is a correct and natural solution as long as the Head of the State and the parliamentarians, national elected officials, must benefit from the same legal regime of the protection provided by the immunity. Moreover, the regulation of a limited immunity, as already made by our constituent, may bring multiple benefits. For example, we will have the guaranty that the Head of the State will correctly and honestly accomplish his attributions, but also that a simpler and more efficient control will be exercised on his activity. Moreover, an implicit protection of the natural or legal entities will exists, which may enter under the legal effect of the acts and facts of the Head of the State. One should not omit the fact that this regulation, in the interpretation proposed, brings also to an increased responsibility of the one with the highest dignity in the State concerning the way how he exercises the mandate, consequently determining an increase of the Romanian citizens' confidence in their President. All these cumulated benefits enhance the governing act, which is a good thing for the general interest of the State and of the national community. Nevertheless, in order to avoid different interpretations and at the same time the difficulties to apply the norm established by Article 84 par. 2 of the Fundamental Law, a clearer and more detailed regulation of the presidential institution in general and of its immunity in particular is preferred and we think that the legislator will make it once with the estimated modification of the Romanian Constitution. As for the parliamentarians, the constitutional norm included in Article 72 does not support interpretations, delimitating clearly the sphere of crimes for which their criminal responsibility may be engaged. An issue still remains to solve. How will work together the provisions of Article 72 par. 1 of the Constitution, which recognise the absolute immunity for the political opinions expressed in exercising the mandate, with the jurisprudence of the European Court of Human Rights in matters of immunity. Even if the Fundamental Law provides absolute immunity to the parliamentarians to express any political nature opinion, in the jurisprudence of the Court of Strasbourg, this rule was regarded in a nuanced way, being interpreted by the high court according to the principles of the European Convention of Human Rights. Thus, the Court recognises the role and importance of immunity of parliamentarians for expressing the opinions with political significance, but it does not accept that this constitutional right owned by the senators or by the deputies is used abusively in order to settle particular disputes or to solve private conflicts.