Considerations regarding the unconstitutionality of articles 55[1] and 99[1] of the law on local public administration

Associate professor **Mihai Cristian APOSTOLACHE**[1]
Associate professor **Mihaela Adina APOSTOLACHE**[2]

Abstract

Since its entry into force and to date, Law no. 215/2001 on local public administration has undergone many amendments and completions. One of the questionable additions to this act is done by GEO (OUG) no. 41/2015, a regulation which brought two new articles to the body of the framework-law on local public administration, i.e. Article 55[1] and Article 99[1]. These two articles regulate a unique way of establishing the local or county council, namely by reconstituting these autonomous collegial bodies. This article examines the legislative intervention made by GEO no. 41/2015 and highlights the unconstitutionality aspects of this legislative intervention, recommending the legislature to urgently repeal the regulations governing the reconstitution of the local and county councils.

Keywords*: local administration; deliberative authority; election; reconstitution; unconstitutionality.*

JEL Classification: K10, K23

1. Preamble

By adopting the Emergency Ordinance no. 41/2015[3], the Government of Romania has completed several normative acts, among which there is Law no. 215/2001[4] on local public administration. GEO no. 41/2015 was approved, subsequently, by the Parliament with amendments and completions, by Law no. 112/2016[5]. The framework-law on local public administration was completed with two articles, Article 55[1], respectively Article 99[1]. These articles introduced in the law, refer to two of the three cases of rightful dissolution of the mandate of the local or county council provided by Article 55 paragraph 1, letter a) and b) of the law on local public administration. This is the situation in which the local or county deliberative does not meet in session for two consecutive months, even though the convocation was made under the law, and that in which the respective authority has not taken any decision in three consecutive ordinary meetings. The third case of

[1] Mihai Cristian Apostolache- Petroleum-Gas University of Ploiesti, Romania, mihaiapostolache5 @yahoo.com.
[2] Mihaela Adina Apostolache- Petroleum-Gas University of Ploiesti, Romania, mihapostolache @yahoo.com.
[3] Published in the Official Gazette of Romania, Part I, issue 733 of 30 September 2015.
[4] Republished in the Official Gazette of Romania, Part I, issue 123 of 20 February 2007.
[5] Published in the Official Gazette of Romania, Part I, issue 408 of 30 May 2016.

rightful dissolution of the local or county council, to which the completion brought by GEO no. 41/2015 does not relate, is that in which the number of councilors is reduced by half plus one and can not be completed by alternates.

The two cases of rightful dissolution of the local council mandate[6], which are valid for the county council as well, regulated by Article 55 paragraph 1 letter a) and b) and to which Articles 55¹ and 99¹ refer, were subject to the constitutional control conducted by the Constitutional Court. The rightful dissolution of the local council as a result of failure to meet for two consecutive months, despite the fact that it was convened under the law, represents, in the view of the Constitutional Court[7], *"a penalty for its inactivity, established in order to avoid the paralysis of the activity of public administration authorities by which local autonomy is achieved and public affairs are conducted in communes and towns"*. In this context, it must be emphasized that, initially, the dissolution of the local council intervened if it was not met for two consecutive months, with no condition for its convocation under the law, a legal provision which allowed the mayor to cause the dissolution of the local council, as it was able to act in bad faith and not to convene a session of the local council for two consecutive months, the mayor being the only legal subject authorized to summon the council in session.

Regarding the dissolution of the local council as a result of not adopting any decision for three consecutive ordinary meetings, the Constitutional Court ruled[8] that this sanction was imposed by the legislature for the failure of the council's constitutional role as outlined by the provisions of Article 121 paragraph 2 of the Constitution of Romania. Basically, by failing to take any decision in three consecutive ordinary meetings, there can no longer be performed the duties of the settlement and management of public affairs on behalf of and in the interest of the local community represented.

According to the rules contained in Articles 55¹ and 99¹, the local council or the county council is reconstituted by alternates if the rightful dissolution was caused due to the cases provided for by Article 55 paragraph 1 letter a) and b) of Law no. 215/2001 on local public administration.

The Government, as the initiator of the normative act, has motivated the need to complete the legal framework in matters of local public administration, citing the difficulties encountered in the administrative-territorial units determined by the dissolution of the elected deliberative authorities, and also by the termination or the suspension of the mandate, or the inability to exercise the mandate of the executive authorities, which led to *"a vacuum of public authority at the level of some administrative-territorial units and thus to the impossibility of*

---

[6] For details on the dissolution of the local council see Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing, Bucharest, 2016, p. 683, 684.

[7] Decision of the Constitutional Court of Romania no. 708 of 27 October 2015, published in the Official Gazette of Romania, Part I, issue 885 of 26 November 2015.

[8] Decision of the Constitutional Court of Romania no. 13 of 18 January 2011, published in the Official Gazette of Romania, Part I, issue 232 of 4 April 2011.

adopting certain decisions absolutely necessary for its functioning", which generated an extraordinary situation that must be urgently regulated.

It should be remembered, however, that the entire Government has not wanted to organize, in the last year in office of the local authorities, partial elections, which caused certain administrative-territorial units not to dispose of elected local authorities, as these authorities were either justly dissolved, or the local or county executive authority mandate was suspended, or the mayor or county council president were unable to perform their duties.

Thus, the government found it necessary to bring a unique legislative solution to the legal order, a legislative invention[9], namely the *reconstitution* of the local or county council, with the help of alternate members. Such a legal approach is profoundly unconstitutional, an aspect which we will outline further.

2. The county and local deliberative authority – between choice and reconstitution

According to the Romanian Constitution[10], the local council and the county council are local public administration authorities which are formed by the designation of the voting citizens in territorial-administrative units. Therefore, the appearance of these authorities is due to the citizens' vote, the election being the only way to set up these local autonomous authorities. Analyzing the provisions of Article 121 paragraph 1 of the Constitution of Romania, which qualifies the local council and the mayor as elected authorities of the local public administration, through which local autonomy is achieved, Professor Antonie Iorgovan[11] appreciated that it is unacceptable for a law to establish another way of appointing a person to the position of councilor or mayor, other than the appointment by elections. Despite this constitutional reality and the doctrinal conclusions, the derived legislature has regulated a new way to set up a local or county council, namely *the reconstitution*. Thus, according to Article 55¹ paragraph 1 of Law no. 215/2001 on local public administration, in the case in which a local council was justly dissolved due to failure to meet in session for two consecutive months, even if convened by the mayor under the law, or for failing to adopt in three consecutive ordinary meetings any decision, the local council rightfully dissolved may be established by its reconstitution of alternate members.

A similar regulation was introduced by Article 99¹ for county councilors, the invoked Article referring to the rules contained in Article 55¹, which is why we shall analyze solely the content of Article 55¹.

---

[9] Mihai Cristian Apostolache, *Legea nr.215/2001 a administratiei publice locale comentata si adnotata*, University Publishing, Bucharest, 2015, pp. 170-171.

[10] Articles 121 and 122 of the Constitution of Romania.

[11] Antonie Iorgovan in Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tanasescu, *Constituţia României revizuită, comentarii şi explicaţii*, All Beck Publishing, Bucharest, 2004, p. 255.

The notion of "alternate" is governed by Article 100 paragraph 33 of Law no. 115/2015[12] for the election of local public administration authorities. The respective normative act defines the alternate as the candidate inscribed on the list of local or county councilors who has not been elected. This person can become a local or county councilor only if the mandate of an elected local or county councilor becomes vacant. The vacant place is occupied by alternates in the order they are listed if, until the validation of the mandate to fill the vacancy, the political parties or the organizations of citizens belonging to national minorities from whom the alternates have run, confirm, in writing, under the signature of the county leadership of the political parties or organizations of national minorities, that the alternates are part of the respective political party or organization of national minorities. Therefore, an alternate may become a councilor only if the local or county council exists and functions, and not if the local or county deliberative authority has been disbanded. If a local or county council was justly dissolved, under Article 55 paragraph 1 letter a and b of the law on local public administration, therefore has ceased to exist, there can be no question of the reconstitution of that local council through the alternates, as the new local or county council must be the result of new elections[13]. The constitutional text and the infra-constitutional regulations, except for Article 55^1 and Article 99^1, clearly outline the status of the local council and the county council as elected local authorities, thus resulting explicitly that any other way of establishing such authorities is placed outside the constitutional framework.

The public authority appointed by the legislature to assemble the alternates' meeting to reconstitute the local or county council is the county prefect. The county prefect is the public authority that also convenes the councilors for the meeting to establish the local/county council, a meeting to be convened after the local elections. Analyzing this prerogative of the prefect, as a representative of the state administration to summon the autonomous deliberative authority in a constitution session, the Constitutional Court emphasized[14] that this is not an interference of the prefect in the issues of local public administration, its role being solely an organizational one.

If in the constitutive meeting of the local council, the prefect summons the councilors declared elected, when reconstituting the local/county council we appreciate that the prefect's right to convene the meeting can not be exercised, as the local/county council disbanded and the prefect has nobody to convene to the meeting. The alternates have this capacity as long as the local/county council resulted from the elections functions. Once the local/county council is rightfully dissolved, both the persons elected and the alternates lose these qualities.

---

[12] Published in the Official Gazette of Romania, Part I, issue 349 of 20 May 2015.

[13] Mihai Cristian Apostolache, *op. cit.* (*Legea nr. 215/2001 a administratiei publice locale...)*, 2015, p. 171.

[14] Decision of the Constitutional Court of Romania no. 10 of 10 January 2006, published in the Official Gazette of Romania, Part I, issue 132 of 13 February 2006.

As for the alternates, from the analysis of paragraph 1 of Article 55¹ it can be observed that the legislator uses a different term than the ensemble of the regulation and other normative acts. It is the term "alternate councilors" which, in our opinion, is misused as those persons do not have the status of councilor, but are *potential alternates* of the elected councilors. Also, as long as, for example, in Article 30 paragraph 3, Article 33 of the same law and in Article 100 paragraph 33 of Law no. 115/2015 for the election of local public administration authorities the term "alternates" is employed, it is natural for that term to be found throughout the law for regulatory unity.

In paragraph 2 of Article 55 it is stipulated that the reconstitution meeting of the local/county council is considered legally convened if attended by a number of alternates bigger than half plus one of the total number of councilors from the respective local/county council. This regulation is however in contradiction with the rules contained in Article 30 paragraph 2 of the local public administration law and to which paragraph 3 of Article 55¹ refers, norms that require a quorum of at least two thirds. We are dealing, in this case, with an ambiguous regulation, designed to create difficulties in the understanding and correct application of the legal text. This constitutes a genuine criticism of unconstitutionality, because, as known, a regulation must be clear and predictable. A deficient, ambiguous regulation violates the norms of legislative technique. The Constitutional Court appreciated, in its jurisprudence[15], that the *"failure to satisfy the norms of legislative technique causes situations of inconsistency and instability, contrary to the principle of security of legal rapports[16] in its component referring to the clarity and predictability of the law"*. Moreover, the Constitutional Court, as a guarantor of the supremacy of the Constitution, provided *"mentality legal reform in order to build a democratic society"*[17].

In addition to this claim, the Constitutional Court states in another decision[18] that *"the existence of contradictory legislative solutions and the cancellation of legal provisions by other provisions comprised in the same normative act lead to the breach of the principle of security of the legal rapports because of the lack of clarity and predictability of the norm, a principle that constitutes a fundamental dimension of the rule of law, as it is expressly enshrined by the provisions in Article 1, paragraph 3 of the Fundamental Law"*. The lack of coherence of the enounced regulation calls into question the quality of the law set forth in the components related to clarity, precision and predictability. The violation of the legislative technique legally enshrined leads to the violation of the

---

[15] Decision of the Constitutional Court of Romania no. 448 of 29 October 2013, published in the Official Gazette of Romania, Part I, issue 5 of 7 January 2014.

[16] The principle of establishing the legal rapports is defined in the ECHR jurisprudence as one of the fundamental elements of the supremacy of law – www.echr.coe.int.

[17] Catalin Silviu Sararu, *Legea Contenciosului administrativ nr. 554/2004. Examen critic al Deciziilor Curţii Constituţionale 2004-2014*, C.H.Beck Publishing, Bucharest, 2015, p. 1.

[18] Decision of the Constitutional Court of Romania no. 26 of 18 January 2012, published in the Official Gazette of Romania, Part I, issue 116 of 15 February 2012.

rule of law whose essential feature is the supremacy of the Constitution and the mandatory compliance with the law[19].

Paragraph 3 of Article 55¹ states that the provisions regarding the establishment of local councils, valid also for the county council also apply when reconstituting the local/county council. This is Article 30 paragraph 2-5 and Articles 31-35 of the local public administration law. These articles establish rules that are designed to regulate the stages to be completed and the operations that must be carried out for the establishment of the local council, as well as the procedure for appointing and changing from position of the Chairman of the local council meeting. It may be noted that the legislature has not set additional rules regarding the procedure to be followed within the meeting of reconstitution of the local/county council, but has merely made reference to the norms governing the establishment meeting of the local/county council resulted from the elections.

3. Conclusions and proposals

The current analysis was meant to bring to the attention the additions to the local public administration law by GEO no. 41/2015 and to highlight the fact that the rules established by this normative act are outside the constitutional framework. Articles 55¹ and 99¹ of the local public administration law, through the legislative solutions they set, and also through their ambiguous regulation, flagrantly violate the fundamental act, thus becoming necessary an emergency repeal. To maintain a regulation in the rule of law that does not meet the demands of the fundamental law is likely to infringe the principle of supremacy of the Constitution. As judged by the Constitutional Court in its jurisprudence[20], *"the legislature should exercise great care when adopting a normative act"* so that the respective normative act is compatible with the constitutional provisions.

As long as the constitutional text establishes the election as the only form of establishing local and county autonomous deliberative authorities, the legislature can not institute new ways of establishing the local or county council. The doctrine[21] has qualified the local and county council as deliberative authorities of collegial nature of local autonomy, composed of councilors elected by universal, equal, direct, secret and freely expressed vote. As such, the local or county council represent the result of elections and can not be established by reconstitution. In case of a rightful dissolution of a local or county council, that deliberative collegial body permanently ceases its existence, new elections being required to form a new local or county council.

---

[19] Decision of the Constitutional Court of Romania no. 232 of 5 July 2001, published in the Official Gazette of Romania, Part I, issue 727 of 15 November 2001; Decision of the Constitutional Court of Romania no. 234 din 5 July 2001, published in the Official Gazette of Romania, Part I, issue 558 of 7 September 2001; Decision of the Constitutional Court of Romania no. 53 of 25 January 2011, published in the Official Gazette of Romania, Part I, issue 90 of 3 February 2011.

[20] Decision of the Constitutional Court of Romania no. 1 of 10 January 2014, published in the Official Gazette of Romania, Part I, issue 123 of 19 February 2014.

[21] Verginia Vedinas in Ioan Muraru, Elena Simina Tanasescu et. al, *Constituţia României. Comentariu pe articole*, C.H.Beck Publishing, Bucharest, 2008, p. 1180.

Bibliography

Doctrine

1. Apostolache, Mihai Cristian, *Legea nr.215/2001 a administratiei publice locale comentata si adnotata*, Universitara Publishing, Bucharest, 2015;
2. Iorgovan, Antonie in Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tanasescu, *Constitutia Romaniei revizuita, comentarii si explicatii*, All Beck Publishing, Bucharest, 2004;
3. Săraru, Cătălin-Silviu, *Legea Contenciosului administrativ nr. 554/2004. Examen critic al Deciziilor Curtii Constitutionale 2004-2014*, C.H.Beck Publishing, Bucharest, 2015;
4. Săraru, Cătălin-Silviu, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing, Bucharest, 2016;
5. Vedinaș, Verginia in Ioan Muraru, Elena Simina Tanasescu et al., *Constitutia Romaniei. Comentariu pe articole*, C.H.Beck Publishing, Bucharest, 2008.

Legislation

1. Law no. 215/2001 on local public administration, republished in the Official Gazette of Romania, Part I, issue 123 of 20 February 2007;
2. Law no. 112/2016, published in the Official Gazette of Romania, Part I, issue 408 of 30 May 2016;
3. Law no. 115/2015, published in the Official Gazette of Romania, Part I, issue 349 of 20 May 2015;
4. Emergency Ordinance no. 41/2015, published in the Official Gazette of Romania, Part I, issue 733 of 30 September 2015.

Romanian Constitutional Court Decisions

1. Decision of the Constitutional Court of Romania no. 708 of 27 October 2015, published in the Official Gazette of Romania, Part I, issue 885 of 26 November 2015;
2. Decision of the Constitutional Court of Romania no. 13 of 18 January 2011, published in the Official Gazette of Romania, Part I, issue 232 of 4 April 2011;
3. Decision of the Constitutional Court of Romania no. 10 of 10 January 2006, published in the Official Gazette of Romania, Part I, issue. 132 of 13 February 2006;
4. Decision of the Constitutional Court of Romania no. 448 of 29 October 2013, published in the Official Gazette of Romania, Part I, issue 5 of 7 January 2014;
5. Decision of the Constitutional Court of Romania no. 26 of 18 January 2012, published in the Official Gazette of Romania, Part I, issue 116 of 15 February 2012;
6. Decision of the Constitutional Court of Romania no. 232 of 5 July 2001, published in the Official Gazette of Romania, Part I, issue 727 of 15 November 2001;
7. Decision of the Constitutional Court of Romania no. 234 of 5 July 2001, published in the Official Gazette of Romania, Part I, issue 558 of 7 September 2001;
8. Decision of the Constitutional Court of Romania no. 53 of 25 January 2011, published in the Official Gazette of Romania, Part I, issue. 90 of 3 February 2011;
9. Decision of the Constitutional Court of Romania no. 1 of 10 January 2014, published in the Official Gazette of Romania, Part I, issue 123 of 19 February 2014.