LEGAL OR MORAL ARGUMENTS FOR REGULATING SOME POLITICAL MATTERS IN THE STATE OF LAW

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Abstract

Politics is very important in a democratic state. Ensuring a healthy political life is an important issue as it aims to set the premises for a fair representativeness and a solid development of the country. There are no absolute rules, so, for a good result it is important to adapt the legal norms to the particulars of the society they apply to. The article is considering three problems, related with the autonomy of political parties, ensuring and maintaining representativeness of elected bodies and some incompatibilities for mayors and presidents of the county council. The article is pointing out that in all cases there are moral rules that generate legal rules with political signification. No Constitutional text may impose such a choice and some decisions of the Constitutional Court in this respect are commented.

Key Words: *Bodies / legal rules / politics / representativeness / political parties*

JEL Classification: *[K40]*

1. Introduction

The existence of multiple political parties and the freedom of their expression have been considered an expression of democracy. Political parties promote candidates for the national and local political bodies. Through the election system people designate their representatives in the bodies that decide upon the state's way of development in all areas of social life, and upon the development of local communities. This is why, in order to preserve a true democracy, rules regarding political life of the state should preserve the freedom of political parties and party life together with a general concept of democracy.

There are various election systems around the world, each of them trying to ensure the best representativeness. Important state or local positions are occupied through direct or indirect election. In a democratic state, legislation regarding elections always tries to find the best way of ensuring and maintaining representativeness. There are various choices and the legal system has to find the one that responds best to the tradition and particulars of the country.

At the same time rules against corruption for the elected representatives are important. Legal rules regarding incompatibilities for the elected representatives have moral roots and may differ from one state to another, depending on many factors.

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There are no unique solutions for the aforementioned issues, and each lawmaker will make the rules in accordance with the characteristics of the society it has to organise.

2. Autonomy of political parties

The autonomy of political parties refers to their power of setting the internal organisation and life rules. The legislator should refrain from setting other rules than the ones that are in the public interest and the courts should not interfere in their decisions concerning membership, respecting the freedom of association principle. Regarding to the increasing number of law-suites in the United States of America, where at least one of the subjects was a political party, it has been shown that "The state" is not a nonpartisan legislator that enacts unbiased rules for party membership and that the freedom of the parties to select members should not be controlled by courts, as far as there is not a race based discrimination, protecting the ability of the parties to define "the contours of the party association"[1] (Persily, 2001, p. 752). Such a view may lead to an authoritarian behaviour of a party within its internal matters that might be seen to be against the democratic values. Discussions about autonomy of political parties often envisaged the selection of candidates. A study of The European Commission for Democracy through Law (Venice Commission) showed that the strength of regulation concerning the selection of candidates depend on the democratic tradition of the countries. Countries with legal tradition have less regulation of political parties while in countries with new or transitional democracies need more regulation; the lack of requirements on the other hand may lead to the creation of exclusive party elites. The study concludes that "any limit on internal democracy must meet the conditions of proportionality test: the limits must be suitable to increase democracy; they must be necessary and the least detrimental to political party freedom; finally, the benefits for democracy that derive from the requirements must outweigh the potential harm to freedom" (Venice Commission, 2013, p. 17). The autonomy of parties should be regarded differently, points out the Venice Commission, and a greater autonomy should be given to the organisation of internal life than to the control of the internal democracy. In the latest case it is possible "to establish different types of controls over the compliance of political parties with the rules stated in the constitution, in the law or in their own statutes".

The Romanian Constitutional Court had a change of heart on this matter along the years. At first, when the dispositions of article 16 para. (3) from the Law of the Political Parties no. 14/2003, stating that the acquiring or loss of the

[1] The article cited is dealing with the freedom of parties to allow non-party members to vote in the primary elections.

membership of a party may only be contested to the internal jurisdiction of the party, was contested as unconstitutional, the Romanian Constitutional Court ruled repeatedly that the norms form the statutes of political parties are not legal norms, but internal ethical, political and deontological conduct rules[2]. The increasing number of complaints to courts and the constant contestation of the constitutionality of the same article was proof to the Constitutional Court that internal democracy of parties was questionable. This is why, in 2013, it changed its position, admitting that article 16 para. (3) of the Law 14/2003 is not in accordance with the Romanian Constitution. The reasoning of the decision showed that a difference should be made between the statutory norms that impose deontological requirements and the ones imposing rights and obligations, sanctions and sanctioning procedures, the latest being of a legal nature. The dissenting opinion considered that the option to submit the winning or loss of the membership only to the internal jurisdiction of the party is sustained by the whole philosophy regarding to the existence of political parties (the cohesion factor is represented by options with psychological motivation regarding mutual ideologies and values). Although we have agreed previously with the dissident opinion on grounds of similarity of the autonomy of the religious cults (Fodor, 2015, p. 29), our opinion has changed too. The autonomy of the religious cults has ancient roots in the former connection between the state and the church. When this connection broke, the autonomy of the religious cults regarding their internal matters respected the philosophy of adhesion to such cults. For the political parties the view should be different, as they are instruments for promoting and maintaining democracy, and for such reasons a nondemocratic behaviour inside the party, with the possibility of breaching laws or its own rules, should be prevented by the courts control as independent jurisdictions. So, we believe now that the last decision of the Constitutional Court regarding the possibility of the judiciary to control the parties' decisions regarding sanctioning procedures and gain or loss of membership are consistent with the findings of the study of the Venice Commission.

3. Representativeness

A study of the Venice Commission asserted that "In whatever way democracy might be developed in the future, representation will stay a key element of any democracy. As a political principle, representation is a relationship through which an individual or group stands for, or acts on behalf of a larger body of people. ... Representative democracy, as an indirect form of democratic rule links the representatives and the represented in such a way that the people's

[2] Decisions of the Constitutional Court No. 197/2010, No. 209/2010, No. 1461/2011, No. 283/2012.

interests are secured and the people's views are articulated" (Vennice Commision, 2012, p. 4).

In Romania, in local elections, local councils and county councils are elected by direct vote (Law 115/2015, art. 1, para. 3). The election method is party-list proportional representation. Ballot lists are proposed to all the voters of a town, respectively county, by each party. The whole community of a city or county has to choose from the same lists. The number of persons from each list that will occupy a place in the council is proportional to the number of votes obtained by the ballot list.

The mayors are elected by direct vote (Law 115/2015, art. 1, para. 4). The deputy mayors are elected indirectly, by the local councilors. The president of the county council and its deputies are elected indirectly, by the county councilors (Law 115/2015, art. 1, para. 5). In the case of the president of the county council, legislation was fluctuant. Laws 70/1991 and 67/2004 established the indirect election of the president, by the county councilors. Later on, Law 35/2008 modified Law 67/2004 and the president of the county council was elected by direct vote, in the first-to-the-post system. In 2015, Law 115/2015 brought back the indirect election of the president of the county council. The deputy mayors, the presidents of the county councils and their deputies are elected from within the members of the local council, respectively from within the members of the county councils and maintain their place in the council throughout their mandate.

The election method determines the body that may terminate the mandate of an authority before the complete duration of the mandate. In the case of local and county councils, as in the case of the mayors, the electoral body has such a power, through a referendum organised according to art. 55, art. 70 and art. 99 from the Law 215/2001. The city council may terminate the mandate of the deputy mayors before time, and the county council can terminate in the same way the mandate of the president of the county council and its deputies. The majority demanded in each case is 2/3 of the number of the council members in place. Since during the mandate of a council seats may become vacant in different ways (resignation, death, changing of domicile etc.), the question that has often been risen was what is the meaning of the "number of the council members in place". Jurisprudence (Court of Appeal Cluj, 2007) stated that this is the total number of council members as it has been established by the prefect before the elections, according to article 29 of the Law 215/2001 for local councils and art. 88 of the same law for county councils. The reason for such an interpretation has to do with representativeness. The political structure of the local or county council is a result of the vote of the electoral body. Thus, in case of the indirect election, the political result of the vote is a reflection of the vote of the electoral body. If the reference number of the councilors is variable, being smaller if there are vacant seats in the council, the number of votes needed for ending the mandate of a position that has

been indirectly elected would also be variable. Since the pros and cons votes will be cast considering political reasoning, such a situation will not respect the representativeness criteria.

A change in the traditional way of electing the mayors after 1990 has been brought by the Law 115/2015, that introduced the first-past-the-post system (Roş, 2015 a, p. 61). The change from the majority system brought vivid discussions in the political arena on the subject of representation. Both systems, the "first-past-the-post" and "two-round" can be considered as ensuring representativeness, and have advantages and disadvantages (IDEA, 2005, pp. 35-53)

In general elections, members of the Romanian Parliament are elected by direct vote, using the party-list proportional representation. The country is divided in constituencies and different ballot lists are proposed by the parties in each constituency. The political structure of each of the two chambers of the Parliament, the Senate and the Deputies Chamber, is in the end a result of the vote of the whole electoral body. The party-list proportional representation system established by Law no. 208/2015 (art. 5 para. 1) replaces the uninominal system described by the Law 35/2008 (art. 5 para 1 and art. 48). The system introduced by the Law 35/2008 was rather complicated (Iancu, 2012, pp. 163-172), and, in constituencies where no candidate obtained the majority, allowed the selection of a candidate placed on one of the last positions, based on the general score of the party at the country level.

Starting with representativeness issues, discussions regarding the situations where a member of the local or county council, or a member of the Parliament leaved the party that proposed the list he belonged to at election time. Finally, Law 249/2006 modified art. 9 of the Law 393/2004, introducing letter h^1) in para. (2), stating that loosing the membership of the party that proposed the list he belonged to at election time, will result in the termination of the mandate of the local or county councilor. The way the membership was lost made no difference. The same provisions were made for the mayor, art. 15 of the Law 393/2004 being modified too by Law 249/2006, introducing letter g^1) in para. (2). In the case of the mayor however, the mandate was terminated before its fulfillment only in case of resignation from the party that sustained him in elections. When the sanction was applied for councilors, the vacant seat was to be occupied by the first alternate from the ballot list belonging to the same party. This way, the political structure of the council was preserved.

A moral argument for introducing the sanctions was presented in the motivation of the legislative proposal for the Law 249/2006, as it was presented to the Chamber of Deputies (Chamber of Deputies, 2005). It was argued that the sanction of termination of the mandate before its fulfillment ensures the functioning of the local and county councils in accordance with the reality

expressed by the local community on the occasion of elections and respects the will of the voters.

The Constitutional Court has transformed the argument into a legal one. In Decision no. 915/2007 the Constitutional Court showed that art. 9 para. (2) letter h^1) and art. 15 para. (2) letter g^1) are in accordance with art. 8 para (2) from the Romanian Constitution stating that the political parties contribute to the defining and expression of the political will of the citizens. The Constitutional Court added the moral argument that the maintenance of the political configuration of the council is an expression of the political will of the voters. The moral argument was further developed by the Constitutional Court in Decision no. 1167/2007 showing that when the local dignitary is no longer a member of the party that presented the ballot list he was elected from, he/she no longer fulfils the conditions of representativeness and legitimacy necessary to complete the political programme the voters opted for. We have criticised that conclusion before, showing that a political programme for election purposes is very volatile, there are no legal provisions to make it mandatory and the alliances made between different political groups inside the council after elections can change significantly the political programme of each party (Fodor, 2015, pp. 31-35).

The Emergency Government Ordinance no. 55/2014, aiming to untangle a blockage that occurred in the possibility of occupying vacant seats in the local and county councils due to a factual dissolution of an electoral alliance, suspended the sanctioning dispositions of art. 9 para. (2) letter h^1) and art. 15 para. (2) letter g^1) from the Law 393/2004 for a period of 45 days. During the 45 days, the alternates from the ballot lists proposed by the electoral alliance could make an option for one of the parties and this way, they managed to be proposed for validation in the council with the approval of the local party leader of the party they have opted for. This way, the need for the other approval, belonging to the local party leader of the other party that formed the electoral election was no longer needed and the blockage was surpassed. At the time the Emergency Government Ordinance no. 55/2014 has been contested to the Constitutional Court we expressed the opinion that the sanctions provided by art. 9 and art. 15 from the Law 393/2004 are not really demanded by the Constitution, but they are a political option (Fodor, 2015, pp. 35-37). The disappearance of these sanctions, if such a thing would happen, would not be regarded as unconstitutional.

In the Decision no. 761/2014, the Constitutional Court however maintained its view regarding the local and county councilors, adding that the existence of the sanction provided by art. 9 para. (2) letter h^1) from the Law 393/2004 is a direct consequence of the art. 8 para. (2) of the Romanian Constitution and the removal of such sanctioning dispositions would be possible only together with a change in the election methodology (para. 41). We disagree with such an opinion that leads to the conclusion that before the introduction of the sanctions mentioned above,

councilors that leaved their party during their mandate were behaving in an unconstitutional manner. The Constitution may be invoked in respect with an existing legal text, but not in respect with a need of lawmaking. So, generally speaking, the abrogation of a legal norm should not be regarded as unconstitutional, although the Constitutional Court of Romania has repeatedly stated the contrary (Fodor & Fodor, 2014).

The Court proved more flexible regarding the mayors' situation. It decided that due to the fact that they are elected on uninominal bases, the sanction of termination of their mandate before its fulfillment, in case they decide to leave the party that sustained them in elections, is purely a political option, having no connection with art. 8 para. (2) of the Constitution (para. 42). Also partly true, this conclusion of the Constitutional Court fails to consider that in Romanian real life the political affiliation of a candidate for the position of mayor is strongly considered by the voters.

The Constitutional Court also found a breach of art. 1 para. (3) of the Constitution (the state of law) in the way the Emergency Government Ordinance no. 55/2014 dealt with representativeness issues. The Constitutional Court said it was a "*sui generis*" method of lawmaking that could not be found in the Law no. 24/200 regarding the lawmaking techniques, as it was neither a pure suspension of the effects of the existing legal rules (as new dispositions were introduced during the suspension of the ones suspended), nor a change of the existing legal rules (as new dispositions were only temporary).

Following the decision no. 761/2014 of the Constitutional Court, Government Ordinance no. 41/2015 changed the consequence of the dissolution of the entire local or county council before its fulfillment. Dispositions of art. 55 para. (7) of the Law no. 215/2001 regarding the local public administration that demanded elections in 90 days for a new local or county council, were replaced with the dispositions of art. 55^1, introduced by the Government Emergency Ordinance no. 41/2015, stating that the council will be reconstructed by the alternates from the ballot lists presented in local elections, according to the votes expressed for each list. In this way, the political option of the voters will be reflected in the structure of the councils throughout the full length of the 4 years mandate of a local or county council.

The Constitutional Court failed to see the emergency of the situation that lead to the adoption of the Emergency Government Ordinance no. 55/2014, showing in the Decision no. 761/2014 that there was no emergency created by a "political rupture" that needed to be solved. The Court failed to realise that due to the lack of legal dispositions, in case of a factual break-up of an electoral alliance, the former allies will block each other's candidates from the list of alternates to climb into a vacant seat of a local or county council. The councils will not have a complete number of councilors and the political structure of the council, as it

resulted from the voters will, would not be ensured, changing the number of votes that might be casted by each party every time a document was subjected to the vote. Decision no. 761/2015 urged the Parliament to adopt a law that will give effect to its conclusion. That would mean that the Parliament was urged to adopt a law that will undo the effects of the Emergency Government Ordinance no. 55/2014 and sanction all the local and county councilors, as well as all mayors that have benefitted of its dispositions, with the termination of their mandate. The fact that no such law has even been proposed to the Parliament, proves that the Emergency Government Ordinance no. 55/2014 solved a real problem at the time and nobody wanted to go back to the blockage situation. But the Emergency Government Ordinance no. 55/2014 has solved a onetime crisis and did not provide a long time solution for similar situations. Unfortunately no other legislative rules have been adopted regarding representativeness solutions in case of ruptures inside electoral or political alliances, for future similar cases.

In the case of Parliament, the Constitutional Court expressed its view on representativeness issues at the time Law 35/2008 that introduced uninominal election for Parliament was in force. In the Decision no. 273/2009 the Constitutional Court showed that the uninominal vote is an expression of the option for the person of the candidate, considering its personal qualities and promises during the campaign; at the same time, although the candidates have the support of a political party, members of the Parliament are representative for the whole nation and act in respect of a mandate given by the whole nation, according to art. 69 of the Constitution. In other words, there is no direct link between the vote inside one constituency and the general result in the political structure of the Parliament. This assertion of the Constitutional Court became questionable since the Law 208/2015 entered into force establishing again the party-list system for parliamentary elections. However, even in such a system, there is no direct connection between the political result in one constituency and the general political structure of the Parliament. Nevertheless, it is obvious that in case several parliament members will migrate from one party to another, or will simply leave their party becoming independent, the political structure of the Parliament as it resulted from the general elections will change and there is no argument regarding the personal qualities to be sustained.

As a conclusion regarding the legislative solutions on representativeness, one can observe that political choices are more and more enforced with legal rules. The Law 115/2015 and the Emergency Government Ordinance 41/2015 consolidate the idea of representativeness and its maintenance in accordance with the result of the regular local elections, but weakens it in respect to the presidents of the county councils. At the parliamentary level the problem of maintaining the representativeness in terms of political structure of the Parliament as resulted from the general elections remains unsolved. Also, the consequences of the volatility of

political or electoral alliances at local level have remained unsolved. In our opinion, the way representativeness is maintained as well as the extension of its maintenance remains a political option, without any connection to the constitutional provisions.

4. Incompatibilities

Incompatibility rules generally prohibits the occupants of political functions to engage in certain occupations during their term of office, thus preventing their dependence upon the public authorities or private interests (Ameller, 1966, p. 66).

In 2003, preparing for the inclusion in the European Union, Romania adopted a Law 161/2003 that reunited the rules of incompatibility for all public political and administrative offices. Since the date of enforcement of that law, new rules regarding incompatibilities appeared scattered in different new legal acts, becoming quite difficult to follow. Changes have been made through other normative acts without a correlation with Law no. 161/2003. One example is the incompatibility initially established by the Law 161/2003 between the office of deputy mayor and the office of local councilor (art. 87 para. 1 letter a). This disposition was consistent with the ones of the Law 215/2001 stating that the deputy mayor was elected from among the local councilors (art. 38 of the original version of the law) and that the deputy mayor may not be a local councilor at the same time (art. 61 para 1 of the original version of the law). So, once elected as deputy mayor the person lost its mandate as a local councilor. This solution wanted to keep separated the legislative and executive offices of the local council. But, the same law provided that the president and vice-presidents of the county council were also elected from among the members of the county council. Although the offices of president and vice-president of the county council have an executive nature too, the law stipulated that they can keep their mandate of county councilor at the same time (art. 119 para. 1 of the original version of the law). So the "separation" argument was not very strong. In the case of the deputy mayors other discussions aroused. It was possible that the mandate of the deputy mayor was terminated by the political vote of the local councilors. In that case, the person could not go back and occupy the seat in the local council, because as soon as he was elected as deputy mayor the councilor mandate ended, the seat in the local council became vacant and the alternate from the same ballot list was validated on the vacant seat. The problem was solved by the Law 286/2006 that modified art. 61 of the Law 2015/2001 allowing the deputy mayor to keep the local councilor mandate. One can say that the solution considered the fact that the local councilor who later becomes deputy mayor got his seat in the local council by means of a direct vote, so there is no reason for losing it. This is not a strong enough argument, as the vote was given to a ballot list, so it made no real difference which one of the persons from the list got to be elected; the priority on

the list was an internal party decision, not a result of the elections. A more reasonable argument considered that the lawmaker just wanted to use the same solution for deputy mayors and vice-presidents of the county councils (Nicola, 2006, p. 267). Unfortunately, the legislator forgot to modify the dispositions of the Law 161/2003, but they may be considered implicitly abrogated, as both laws 161/2003 and 215/2001 have the same legal power.

The changes of law proves that the incompatibility of the function of deputy mayor with the one of local councilor was a simple political choice, as there is no threat of an influence from another authority (in this case the mayor) upon the vote in the local council of the councilor that is at the same time a deputy mayor.

A controversy aroused around the incompatibility between the office of mayor or president of the county council and the quality of representative of the administrative unit in the general assembly of a commercial enterprise of local interest or the one of state representative in the general assembly of a commercial enterprise of national interest. The incompatibility is mentioned by art. 87 para. (1) letter f) from the Law 161/2003. When regional associations for providing community services were created by the association of several local administrative units, the National Integrity Agency considered that a mayor could not be a member of the general assembly of such associations, due to the incompatibility established by the Law 161/2003. The High Court of Cassation and Justice ruled against the interpretation of the National Integrity Agency. In several decisions the High Court decided that "local interest" is different of a "regional interest". In the case of regional associations for providing community public services, there is no incompatibility if the mayor of one of the local administrative units involved is the representative of the local community in the general assembly (High Court of Cassation and Justice, January 2015). The High Court decided that the interest pursued by the regional enterprises, where all the associates are local communities, is an undivided regional interest, unsubordinated to any local interest that one or another associate might have (High Court of Cassation and Justice, February 2015). The High Court referred to the conclusions of Decision no. 739/2014 of the Constitutional Court of Romania. In this former decision, the Constitutional Court pointed out that it is not possible to exercise a public service that obliges to transparency regarding the use and administration of public funds and to be involved at the same time into a business activity, as cumulating the two positions may result in damages to the general interests of the community and the principles of the state of law. Also, the Constitutional Court found that the incompatibility rule was an option of the lawmaker in order to attain the goal of preventing the causes and conditions that generate corruption, In this respect, the position of representative of the local community in the general assembly of an enterprise of local interest was seen a possible corruption generator (High Court of Cassation and Justice, May 2015).

The Constitutional Court decided that the dispositions of art. 87 para. (1) letter f) from the Law 161/200 are in accordance with the Romanian Constitution and the courts have to interpret them and find out in what cases these dispositions apply.

One can observe that the Constitutional Court considered that the business environment may generate corruption endangering the interests of the community and this is why mayors and presidents of county councils should not be part of the general assembly of an enterprise. On the other hand, the High Court of Cassation and Justice thought that the danger relied in the pressure exercised by the local interest.

Following the decisions of the High Court of Cassation and Justice, the Parliament adopted Law 313/2015 that modified art. 10 para. (8) from the Law 51/2006 regarding the community public services, in the sense that by derogation from art. 37 and 92 of the Law 215/2001, mayors and presidents of county councils may represent their communities in the general assembly of an intercommunity association for providing community public services. Comments upon this change considered that intercommunity associations for providing community public services were not commercial enterprises, but associations of administrative units for promoting the public interest; they do not provide directly public services, but through local or regional operators. This way, the mayor or the president of the county council is allowed to implement the development strategy voted by the people (Centrul de resurse juridice, n.d.).

We do not agree with this opinion. Associations of intercommunity development, including the ones for community public services are legal persons of a private nature and have a status of public utility deriving directly from the law (Vedinaş & Mirică, 2007, p. 25). It has been underlined that Recommendation No. R(2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials shows in art. 13 that a conflict of interest arises from a situation in which the public official has a private interest, that might be any kind of advantage to himself or organisations with whom he has business or political relations (Roş, 2015 b, p. 138). The relationships between economic goals, politics and legal rules are very close (Boboş, 2011, pp. 13-14). So, *strict senso*, since the intercommunity association are private persons with economic goals, related to political goals, that might influence some decisions of the mayor in local matters, or may appear to do so, considering that the regional interest may differ from the local community interest, as the High Court of Cassation and Justice pointed out. A constant possibility of conflict of interests, may be seen by the lawmaker as a state of incompatibility.

Again, we consider that the problem is not necessary linked to a legal rule, but a question of moral political choice. According to articles 37 and 92 of the Law 215/2001 the local and county council designate their representatives in the general assembly of commercial enterprises or intercommunity associations in

respect of their political structure as resulted from the local elections. So, in the end, a political representativeness has been replaced with the legal representative of the community.

5. Conclusions

Romanian legislation tried to find the best moral solutions in regulating political activities in accordance with democracy and the rules of the state of law. The situations presented proved this point. One must not try to give necessarily constitutional and legal arguments in trying to impose the best solutions, but find the strong moral ones and the alternatives that suit best to the history and characteristics of Romanian society.

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