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CONSIDERATIONS REGARDING THE APPLICATION AND INTERPRETATION OF ARTICLE 9, PARAGRAPH 2, LETTER F) OF THE LAW NO. 393/2004 ON THE STATUS OF LOCAL ELECTED REPRESENTATIVES

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ABSTRACT: *According to the provisions of the Article 9, Paragraph 2 from the Law number 393/2004, "the status of local or county councilor ceases lawfully, before the termination of the normal term of the mandate, in the following cases: Letter f) in the case of the conviction by a final court decision of a custodial sentence."*

And the text of Article 15, Paragraph 2 of the same normative act has the same wording: "the position of Mayor and, the one of the president of the County Council, respectively, ceases before the termination of the normal term of the mandate in the following cases: Letter e): in the case of the conviction by a final court decision of a custodial sentence."

Taking into account that in the doctrine until now the opinions on the application and interpretation of the provisions of the Article 9, Paragraph 2 of the Law number 393/2004 are not valorized, I chose this jurisprudential study, which valorize also the opinion of the author of the paper, mainly based on the application of Decision no. 18 of the High Court of Cassation and Justice, which makes the analysis of the provisions of the Article 15, Paragraph 2 of the same law and from which results that the law only refers to the type of punishment applied respectively, deprivation of liberty, without the distinction of the way of individualization of the execution of the deprivation of liberty punishment.

In the opinion of the author of the paper, this reasoning is applicable to the provisions of the Article 15, Paragraph 2, Letter e) from the Law number 393/2004 and the provisions of Article 9, Paragraph 2, Letter f) of the Law number 393/2004, the conclusion being that, through the decision of the local council, is established the lawfully cessation, before the termination of the normal term of the counselor's mandate, in the situation of the conviction, by a final judgment, to a penalty of deprivation of liberty, even if the legislator did not consider it and did not expressly assume the termination of the mandate of local councilor, in the case of imprisonment punishment under supervision.

On the basis of the same legal considerations, the Prefect finds, by order the lawful cessation, the Mayor's mandate before the termination of the normal term of the mandate, in the case of the conviction through the final judgment, to a custodial penalty.

In particular, the analysis of the provisions of the Article 9, Paragraph 2, Letter f) of the Law no. 393/2004, entitled us to conclude that the law refers only to the type of punishment applied, namely deprivation of liberty, without the distinction of the way of individualization of the execution of the deprivation of liberty punishment.

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KEYWORDS: *local status; termination of mandate; administrative act; imprisonment; jurisprudence*
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1. CONSIDERATIONS REGARDING THE APPLICATION AND INTERPRETATION OF ARTICLE 9, PARAGRAPH 2, LETTER F OF THE LAW NO. 393/2004 ON THE STATUS OF LOCAL ELECTED REPRESENTATIVES

By the action filed in at this Court on September 30th, 2015, the plaintiff, D. F., requested in contradiction with the Prefect Institution of the County of Arad, the annulment of the Prefect's Order No. 494 / 25.09.2015, through which it is established the legal termination of the mayoral mandate of village Ș ..., the restoration of the plaintiff in all the rights conferred by the Mayor's office until the expiration of the legal mandate, the payment of all salary rights until actual reinstatement in office, and the suspension of the order until the resolution of the present dispute.

In his statement of reasons, the applicant states that by the contested order no. 494/ 25.09.2015 was found the legal termination of the mayoral mandate as a consequence of his conviction through criminal sentence no. 38/ 10.03.2015 of the Chişineu-Criş Court, pronounced in the file no. 190/210/2015.

The applicant claims that the order is based on the decision no. 18 / 08.06.2015 of the High Court of Cassation and Justice, which stated that the provisions of Article 15, Paragraph 2, Letter e) from Law no. 393/2004 regarding the statute of locally elected persons are applicable in the case of the conviction, by final judgment, to a custodial sentence, with the conditional suspension of the execution of the punishment, with the application of the Articles 81-82 from the Criminal Code. He states that the provisions of the aforementioned decision of the High Court are not applicable since in the present case the plaintiff was sentenced to six months' imprisonment for committing the offense of conflict of interest by conditionally suspending the execution of the sentence.

The complainant considers that, as far as he is concerned, has not been ordered to apply any additional punishment provided by Article 64 Criminal Code, decision no. 18/08.06.2015 of the High Court of Cassation and Justice, where a completely different factual situation was considered, cannot be the basis for the issue of the contested order, and it is absurd to enforce a decision of a general nature which in the present case, would be contrary to the law.

As far as the question of law under discussion is concerned, the jurisprudential examination has the following nuances.

Firstly, from a procedural point of view, the Order no. 494/2015 was issued in compliance with the legal provisions in the matter, having regard to the provisions of Article 69, paragraphs 2, 3 and 4 of Law no. 215/2001 regarding the local public administration in modified form, corroborated with the provisions of Article 15, paragraph 2, Letter e) and Article 16 of Law no. 393/28.09.2004 regarding the status of local elected representatives in modified form, as well as the Article 26 of Law no. 340/2004, republished.

On the basis of the issue, the order contested by the plaintiff is the report of the secretary of the territorial administrative unit, as well as the acts of which result in the reason for the termination of the mandate, respectively, the criminal sentence no. 38 /

10.03.2015 of the Chişineu-Criş Court, pronounced in the file No. 190/210/2015, the termination of the mandate intervening under the provisions of the law above mentioned.

Referring to the complainant's allegations concerning his particular situation, it is to be noted that if the Mayor is convicted by a final judgment, which has become a final one, a custodial sentence, but the Court orders the conditional suspension of its execution under the conditions of Article 81 and the following from the Criminal Code they become incidents with the provisions of Article 15, paragraph 2, Letter e), relate to Article 16 of Law no. 393/2004 as the legal provisions do not distinguish between the manner of execution of the respective punishment under detention regime or the conditional suspension of its execution, the principle of ubi lex non distinguit nec nos distinguere debemus point of view based on the provisions of the decision of the High Court of Cassation and Justice no. 18/08.06.2015 the Law Enforcement Unit for the dispensation of law issues, published in the Official Monitor no. 469/2015.

The plaintiff requests cancellation of Prefect's Order no. 494/25.09.2015 and in the light of the provisions of the Constitutional Court Decision no. 603/6.10.2015 stating that this decision was incriminated the sentence of Article 301, paragraph 1 of the Criminal Code, for which the plaintiff was convicted. It shows that against Criminal Sentence no. 38/2015 of the Chişineu Criş Court it was formulated a petition for revision based on the provisions of the Article 453, Paragraph 1, Letter f) of the Criminal Procedure Code.

The applicant served as Mayor of the village Ş..., acquiring this status in 2012.

According to the criminal sentence no. 38/10.03.2015 of the Chişineu Criş Court of Justice, final by non-voting, the plaintiff was sentenced to 6 months imprisonment for committing the offense of conflict of interest, provided by Article 253, Ind. 1 of the Criminal Code, with the conditional suspension of the execution of the punishment, according to Article 81 of the Criminal Code, for a period of 2 years and 6 months. The plaintiff has not been subjected to ancillary or complementary punishments.

According to the Order regarding the ceasing of the mandate of the Mayor of the village of Şimand no. 494/25.09.2015, the Prefect of the county of Arad, having regard to Criminal Sentence no. 38/10.03.2015 from the Chişineu Criş Court, definitive by non-voting, the report of the Secretary of Village of Şimand no. 4526/21.09.2015, Decision of the High Court of Cassation and Justice, The Law Enforcement Unit, no. 18/2015, the provisions of the Article 1, paragraph 2 Letter e) and Article 16 of the Law 393/2004, Article 69, paragraphs 2, 3, 4 of the Law 215/2001, found the lawful cessation of the mayoral mandate of the plaintiff's in the Village of Zărand.

For the annulment of this Prefect's Order, the applicant formulated an action in administrative litigation.

Pursuant to Article 15, paragraph 1 and paragraph 2, Letter e) of Law 393/2004, "(1) The capacity of a Mayor and a president of the county council shall cease on the date of the oath by the new Mayor and, respectively, the new president of the County Council.

(2) The capacity of the Mayor and, respectively, of the president of the County Council, terminates lawfully before the expiry of the normal term of the office in the following cases:

e) conviction, by a final judgment, of a custodial sentence" and according to Article 16 from the Law no. 393/2004. "(1) In all cases of termination before the term of the Mayor's office, the Prefect issues an order for the termination of the Mayor's mandate.

(2) The order shall be based on a report signed by the secretary of the village or the city, as well as the documents from which the legal reason for terminating the mandate arises."

According to Article 53, paragraph (1), point (1) from the Criminal Code of 1969, including the sentencing of the defendant, the principal punishments that could have been imposed on him were life imprisonment, imprisonment or a fine from 100 to 50. 000 lei, meaning custodial sentences or pecuniary punishment.

The applicant was deprived of a custodial sentence of 6 months imprisonment by a final court decision, this being in the case provided for in the Article 15, paragraph (2), Letter (e) from the Law no. 393/2004 of lawful termination of the mandate, the cessation being legally established by the Prefect's Order of the County of Arad, on the basis of the report of the secretary of the Village of Șimand, according to Article 16 from the Law no. 393/2004. The conditional suspension of the execution of punishment under the Articles 81, 82 from the Criminal Code of 1969 does not have the effect of altering the deprivation of liberty of the punishment, but only an immediate effect of non-execution of punishment under Article 57, paragraph (1) of the Criminal Code and final effects, which occur upon the expiration of the probation period, the cessation of the obligation to execute the punishment and the lawful rehabilitation of the convict.

According to the decision no. 18/08.06.2015, published in the Official Monitor of Romania with the no. 469/29.VI.2015, the High Court of Cassation and Justice, the Law Enforcement Unit, ruled that the provisions of Article 15, paragraph (2), Letter e) from the Law no. 393/2004 regarding the Status of local elected representatives, with subsequent amendments and additions, are applicable to the conviction by a final court judgment of a custodial sentence involving the conditional suspension of the execution of the sentence under the Articles 81 – 82 and the execution under conditions other than those provided in the Article 57, Paragraph (1) from the Law no. 15/1968 regarding the Criminal Code of Romania, republished, subsequently amended and supplemented.

In this way, the High Court of Cassation and Justice ruled on the interpretation of the notion of "custodial sentence" within the meaning of Article 15 paragraph (2) Letter (e) from the Law no. 393/2004, stating that any custodial sentence – life detention or imprisonment – even if it is not enforced in places of custody or due to the conditional suspension of the execution of punishment or due to other causes, such as this one, it constitutes a punishment under this rule.

According to the decision mentioned it is obvious that the measure of judicial individualization of the execution of the sentence does not alter either the deprivation of liberty of the prison sentence, nor does it change the non-custodial nature of the penalty of the fine and that, consequently, it can be concluded that the conditional suspension of the execution of the punishment as a measure of judicial individualization of the execution of the punishment does not have the effect of altering the legal classification of the punishment applied in the sense of removing its deprivation of liberty but has the provisional effect of not executing the deprivation of liberty during the probation period.

The interpretation of the provisions which are the subject of the complaint in the sense that they only concern the situation in which the person which is holding the capacity of Mayor or chairman of the county council has been sentenced to a custodial sentence which he/she executes under the terms of Article 57 paragraph (1) of the Criminal Code from 1969 is based only on the reason of the actual impossibility of exercising the

mandate by a person which is deprived of his or her liberty because he executes the prison sentence, in the penitentiary.

If the legislature had considered such a hypothesis, he would have expressly provided that the mandate would cease on the assumption of execution under the deprivation of liberty, but the text of the law stipulates that the mandate ceases on conviction of a custodial sentence and not the execution of the custodial sentence.

In other words, the provisions of Article 15 paragraph (2) Letter e) from the Law no. 393/2004 refers to the punishment applied and not to the way the punishment is enforced.

The provisions of the Decision no. 18/2015 of the Law Enforcement Unit, is binding on the Courts from the date of its publication in the Official Monitor, pursuant to the Article 521, paragraph 3 of the Code of Civil Procedure, on which the court fully accepted the arguments mentioned.

As such, the claimant's opinion cannot be upheld on a legal basis, the arguments put forward concerning the defective judgments of that decision are groundless and contrary to the provisions of Article 521 paragraph (3) from the Code of Civil Procedure.

We also consider that the ceasing of the mayoral mandate is based on the Law no. 393/2004 and not under any provision of the criminal court regarding the execution of any additional or complementary punishments of the nature covered by Article 64 from the Criminal Code.

The nature of the main punishment – deprivation of liberty – is the one that results in the termination of the mandate, regardless of the additional or complementary punishments accompanying it or the way in which the main punishment is executed.

The High Court of Cassation and Justice did not take into account in this decision either the amount of the penalty or the offense for which it was enforced, but only the existence of a final decision to condemn a custodial sentence, which is the only condition imposed by the provisions of the Article 15 paragraph (2) Letter e) from the Law no. 393/2004.

The publication of this decision after the final decision on the plaintiff's conviction has ceased does not renders inapplicable the interpretation is given by the High Court of Cassation and Justice, Article 15, paragraph 2, letter e) from the Law no. 393/2004 by the Decision 18/2015, nor does it constitute a retroactive application thereof.

The decision pronounced in the settlement of certain legal issues does not constitute a new normative act in order to discuss its retroactivity, but merely obliges the courts to assume a certain single interpretation, an existing legal norm, the courts being able or not to give such interpretation to the legal norm in question, according to the judge's own reasoning and prior to the publication of the decision.

The request for revision of the criminal sentence and its admission in principle does not remove the final character of the conviction sentence, and the provisions of Article 15 Letter e) of the Law no. 393/2004 and the decision of the Constitutional Court no. 603 / 06.10.2015 refers to the unconstitutionality of an offense whose existence cannot be analyzed by the court of fiscal administrative contentious.

It is noteworthy, however, that the plaintiff was not convicted of the offense covered by Article 301 paragraph 1 of the Criminal Code adopted by Law no. 286/2009, but for the offense covered by Article 253, Ind. 1 of the Criminal Code of 1969, and even if we were considering the identity of the two offenses, it is noticed that he was not convicted

for the manner of the offense declared unconstitutional regarding the commercial relations, but for the last way of committing it - "benefited from services ".

Accordingly, the interpretation of the provisions which are the subject of the applicable application of Article 9 paragraph (2) Letter f) from the Law no. 393/2004 in the sense that they concern only the situation in which the counselor was sentenced to a custodial sentence, a penalty which he enforces under the terms of Article 57 paragraph I from the Criminal Code of 1969, is based only on the reason for the actual impossibility of exercising the mandate by a person deprived of his liberty because he executes the detention penalty, in prison is erroneous and legally unfounded.

In fact, if the legislature had considered such a hypothesis, it would have expressly provided that the mandate would cease when the execution of the custodial sentence was enforced.

However, the text of the law provides that the mandate ceases when convicted to a custodial sentence and not to the execution of the custodial sentence.

It must be concluded that the provisions of Article 9 paragraph (2) Letter f) from the Law no. 393/2004 refers to the punishment applied and not on the manner of execution of the punishment applied, as the High Court of Cassation and Justice has held in the interpretation of the Article 15, paragraph (2), Letters e) of the same normative act referring to the capacity of Mayor and chairman of the county council, but the determined condition of the conviction to a custodial sentence is the same in both cases, from which it is clear that the legislator's intention to enact the legal norm is that the provisions of Article 9, paragraph (2), Letter f) from the Law no. 393/2004 are applicable in the case of conviction, by final judgment, to a custodial sentence with the conditional suspension of the execution of the punishment under supervision.

REFERENCES

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