THE CRIMINAL LIABILITY OF THE MEMBERS OF THE GOVERNMENT

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Abstract

The criminal liability of Government members is a fairly broad subject. Through this article we have tried to summarize some aspects from a constitutional point of view in the sense of concretely illustrating the sanctions imposed to the members of the Government in case of criminal liability.

Keywords:
Criminal responsibility, political accountability, executive, constitutional democracy, bicephalic executive.

JEL Classification: K10, K19

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I. Introduction

In order to outline the scope of ministerial accountability, it is necessary to determine the manner of liability of the members of the Government.

The Law no. 115/1999 by art. 7, stipulates that “(1) the acts committed by the members of the Government in the exercise of their office, fall under this Law and which, according to criminal law, constitute offenses. (2) For committing other offenses outside the exercise of their office, the members of the Government shall be liable according to the common law”, and art. 6 points out that, according to the law, there are members of the Government: Prime Minister, ministers and other members established by an organic law appointed by the President of Romania on the basis of a vote of confidence by the Parliament.

Legal provisions previously mentioned, together with the Law no. 90/2001 on the organization and functioning of the Romanian Government and of the ministries, by art. 3 establishes that “(1) The Government is made up of Prime Minister and Ministers. (2) The Government may also include state ministers, as well as delegated ministers with special duties to the Prime Minister, provided in the list of the Government submitted to the Parliament for granting the vote of confidence”, complete the constitutional framework of art. 102 par. (3) “The Government is made up of Prime Minister, Ministers and other members established by organic law”.

Therefore, all members of the Government for which Parliament has given a vote of confidence, whether they are ministers or have other ministerial quality, are subject to the rules of ministerial responsibility.

According to the constitutional legislative texts, the Government begins its activity only after the Parliament votes on the Prime Minister and the entire list of members.

II. Responsibility of the members of the Government appointed as a result of job vacancy or reshuffle

In view of this issue, we put our attention to an issue, namely the situation of the members of the Government appointed as a result of job vacancy or reshuffle.

The Constitution provides in art. 85 par. (2) “In the event of a government reshuffle or job vacancy, the President revokes and appoints, on the Prime Minister’s proposal, some members of the Government.” So new
members of the Government no longer have Parliament’s confidence vote. Parliament’s vote of confidence applies only in the situation where the Government’s total reshuffle takes place, a change in its structure, art.85 par. (3) states: “If the reshuffling proposal changes the structure or composition of the Government, the President of Romania shall be able to exercise the power provided for in paragraph 2 only on the basis of Parliament’s approval, upon the Prime Minister’s proposal.”

If new members of the Government no longer receive a vote of confidence from the Parliament, and as regards the President of Romania this is “authorized” by the Prime Minister in their appointment, which is the institution to which these members of the new Cabinet will answer penal.

Their criminal liability will be in accordance with constitutional and legal provisions, since the changes made by the ministerial team are only a way of organizing the executive in order to achieve the governance program (Constantinescu).²

The criminal liability of the Government members, has been in history since ancient times. Judicial actions are known against dignitaries of prestigious government offices that have been investigated for serious criminal offenses. The judicial precedent for criminal responsibility comes from the English Parliament during the Middle Ages, which was later taken over by the US Constitution.

As mentioned above, the political fault of a minister in the exercise of his legal prerogatives, which implies his responsibility for the proper conduct of the government program, triggers the control procedures by the Parliament, and for a guilty misconduct resulting from committing offenses in the exercise of its functions may require the initiation of criminal prosecution.

In the case of ministers, immunity cannot be mentioned as in the case of parliamentary dignitaries, because they are not elected by an electoral body, as proof of the constitutional text, the art. 109 explains quite convincingly the measure addressed in case of criminal deeds.

However, the Government is responsible for the management during its term of office of a large amount of resources, financial and material, which is why its members are required to be fair, to the citizens, and conduct in accordance with the Constitution.

Interestingly, although they do not have government immunity, the members of the Government fall within a constitutional protection measure, namely the condition for the right to request prosecution. Only the Chamber of Deputies, the Senate or the President of Romania may request the prosecution of members of the Government for acts committed in the exercise of their functions. Moreover, the Constitutional Court has established a jurisprudence on this thesis.

Judicial practice has held that only the Chambers are fully legitimate to demand the prosecution of members of the Government, as the Parliament as the public authority is the one that grants the vote of investiture for the formation of the Cabinet. Moreover, the Parliament is the representative body of the people being elected by the electoral body, so it has the political and civic quality to initiate the judicial procedure on the members of the Government if necessary.

Regarding the competence of the President, even if the Constitution attributes this ability, in my own opinion, it is not just. If the President appoints the members of the Government and is also an executive body, he can only request their suspension from office if the prosecution is started. The specialty literature argues this attribution of the President of Romania to have the right to request the prosecution of the members of the Government for the acts committed in the exercise of their office, from the hypostasis of the “sanctioning president”, which derives indirectly from art. 109 paragraph (2) of the Constitution (Deleanu).

In conclusion, the three public authorities (Safta) have the constitutional obligation to request prosecution if they have information that justifies such action. It should be noted that the three bodies are not judicial. As a result, studying the dossier containing evidence, information, evidence supporting the opening of the procedure, is politically accountable.

**III. THE LEGAL RESPONSIBILITY**

In addition to political accountability, the members of the Government also have the legal responsibility, even though the latter have different forms such as civil, contravention, disciplinary or criminal.

From the analysis of the ministerial liability law, the criminal liability is surprising by several situations:
- The effect of the special law on ministerial accountability extends only to the members of the Government (Prime Minister, Ministers, State Ministers, Deputy Ministers with special responsibilities to the
Prime Minister, all those included in the Government list submitted to Parliament for the vote of confidence;

• Are subject to the ministerial liability law, only the acts committed by the members of the Government during the exercise of their office from the moment of the oath to the termination of office, under the conditions established by the Constitution;

• Are subject to the ministerial liability law the criminal acts that constitute offenses under the criminal laws, but also the acts that are classified as offenses under, but also the acts which are classified as offenses by the law mentioned above.

The Law on Ministerial Accountability provides the specific offenses to members of the Government, as well as the specific sanctions. According to art. 8, the following acts committed by the members of the Government in the exercise of their functions shall be constituted in offenses and shall be punished by imprisonment from 2 to 12 years:

• Preventing, through threats, violence or the use of fraudulent means, the exercise in good faith of the rights and freedoms of any citizen;

• Misrepresentation of inaccurate data to the Parliament or to the President of Romania on the activity of the Government or of a ministry, to hide the commission of facts capable of affecting the interests of the state.

The attempt of these actions is punished according to the law. It also constitutes offenses and the following deeds are punished by imprisonment from 6 months to 3 years:

• The unjustified refusal to submit to the Chamber of Deputies, the Senate or their standing committees, within the term stipulated in art. 3 par. (2), the information and documents required by them in the framework of Parliament’s activity of informing the members of the Government according to art. 111 paragraph (1) of the Constitution of Romania, republished;

• The issue of normative or discriminatory instructions on race, nationality, ethnicity, language, religion, social category, politics, wealth or social origin capable of infringing human rights.

The attempt is not punished. If the offense committed by a member of the Government is not found in the abovementioned text, it will be held criminally liable under the criminal law and not under the ministerial liability law.

The criminal liability is personal, each member of the Government is obliged to answer for his / her individual actions, just as personal is liability in civil law (Iftime, Pascariu).
The function of a member in the Government is a function which can be occupied by deputies or senators, meaning persons from the state apparatus, in this situation the procedure of initiating and prosecution is a special procedure (Carp), which is based on the law of ministerial responsibility.

Regarding the procedure for prosecution and judgment, the Constitution by art. 109 paragraph (2) considers that only the Chamber of Deputies, the Senate and the President of Romania have the right to request the prosecution of the members of the Government for acts committed in the exercise of their office.

The criminal prosecution procedure of the members of the Government must be unitary, regardless of the public authority that decides it. In this respect, the Constitutional Court by Decision no. 1.133/2007 creates the premises for the establishment of three different procedures depending on the public authority that initiates the procedure.

The triggering of criminal liability against a member of the Government is a problem of image of the ministry that he represents. The principle of innocence is operational from the time of the prosecution until the date of the final judgment of the conviction.

The three public authorities that have the power to trigger the prosecution may be heard by anyone, even citizens, about the possible culpable actions by members of the Government. Citizens who are aware of criminal offenses by members of the Government in the exercise of their office may address to the Prime Minister, to the Prosecutor General of the Prosecutor’s Office attached to the High Court of Cassation and Justice or to the Chief Prosecutor of the National Anticorruption Directorate, to request the notification of the President of Romania (Ionescu).

In exercising the right to request the prosecution of a member of the Government, the President of Romania shall address to the Minister of Justice a request for the commencement of legal proceedings concerning the initiation of criminal prosecution. The request is made by the last one, on a proposal of the special commission established for the analysis of complaints about the commission of a crime in the exercise of the function by the members of the Government.

The debate on the proposal to initiate criminal prosecution in the Chamber of Deputies or the Senate is based on a report drawn up by a standing commission which, within its competence, carried out an investigation that includes the work of the Government or members of the individual Government. The Commission does not have the role of court,
which is why no procedural exceptions can be invoked. The Commission does not have the right to go to criminal investigation, it has the role of analysing the referral, the evidence submitted in support of it, or the evidence and the declaration of invocation by the member of the Government against whom the prosecution is sought. Also, the Commission does not rule on the guilt or innocence of the person concerned, it is not a jurisdictional one. Instead, the commission is able to give clues or say whether the investigation should be continued by the prosecutor’s office.

As mentioned above, the criminal prosecution procedure is different, depending on the public authority that triggered it, as the member of the Government being investigated is a member of the Parliament or not.

IV. CONCLUSIONS

In conclusion, the criminal liability of the members of the Government affects the Government not only from a legal point of view but also from the perspective of the image in relation to the population. If a member of the Government is found guilty of committing an offense set forth in the Criminal Code or the Ministerial Responsibility Law in addition to the main punishment, a complementary punishment, namely the prohibition of the right to hold a public dignity or a public office of lead

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