

## **Considerations on Judicial Liability of the Romanian Diplomatic and Consular Corps' Members as Regulated by Law no. 269/2003**

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**Abstract:** Judicial liability, as a form of social liability, has specific features in what concerns the members of the Romanian Diplomatic and Consular Corps following the special statute granted to this professional group. In the following, we will make an analysis of the regulations referring to the judicial liability of the members of the Romanian Diplomatic and Consular Corps provisioned by law no.269/2003 on the status of the Romanian Diplomatic and Consular Corps, underlining the flaws of this law determined by the inaccuracy of the legislator in drafting the provisions regarding the condition for employing this type of liability in diplomatic and consular staff and the sanctions that should be applied, justifying thus the necessity of improving the legal frame in this matter. I have considered as opportune to first formulate some statements on the quality of being a member in the Romanian Diplomatic and Consular Corps, in order to be able to establish exactly the scope of the rules comprised in Law no. 169/2003 on judicial liability.

**Keywords:** Romanian Diplomatic and Consular Corps, public servant, judicial liability

### **1. Introductive considerations**

Judicial liability, as a specific form of social liability, interferes in case of violating norms of law. It is distinguished from the other forms of social liability (moral, political etc.) by the fact that it determines the obligation to support a judicial sanction (Humă, 2007, p. 152).

The content of the judicial liability represents a complex of related rights and obligations that, according to the law, derive from illicit actions and constitute the frame for state constraint by applying judicial penalties with the purpose of reestablishing social reports and respect of law order (Costin, 1974, pp. 31-32). In

the doctrine there are specific categories analyzed for each branch of law: criminal, civil, labor etc. (Boboș, 1994, pp. 257-258).

The judicial institution of liability has specific forms in what concerns the members of the Romanian diplomatic and consular corps, determined by their special statute, by the attributions and the tasks they have according to the general regulations. The analysis of these specific aspects of judicial liability of the Romanian Diplomatic and Consular Corps' members requires first the analysis of other elements, such as the definition of the quality of "member of the Romanian Diplomatic and Consular Corps" and the nature of the labor judicial relation of the Romanian diplomatic and Consular Corps' members.

## **2. The quality of member of the Romanian Diplomatic and Consular Corps**

The period of time following the events in 1989 has registered modifications in the legislative frame regarding the diplomatic and consular domain. There was a high necessity of modern legal regulations, reflecting the realities of that time. Accordingly, a number of normative acts have been adopted, to ensure the creation of a legal frame adequate to the accomplishment of external Romanian policy after the change of the political regime, taking in consideration of course the mutations at international level.

One of these documents was the Government Decision no. 1070 on October 6, 1990 on the approval of the Statute of the Romanian Diplomatic and Consular Corps<sup>1</sup> that in 26 articles tried to reform an important professional segment in the development of the new Romania. Even the term "statute" used to name the normative act was meant to draw the attention on the special regime granted to this category of personnel. Used for the first time in 1847, when the "Statute of the police clerks in the capital" (Ranta, 2008, p. 82), the concept of "statute" defines the ensemble of judicial norms regulating the rights and obligations, conditions of being admitted, attributions, incompatibilities, penalties etc. for some professional categories (teachers, deputies, senators, magistrates and lawyers etc.).

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<sup>1</sup> The Government Decision no. 1070/1990 for the approval of the Statute of the Romanian Diplomatic and Consular Corps was published in the Official Monitor of Romania, Part I, no. 119 on November 2<sup>nd</sup>, 1990.

These dispositions have proved to be insufficient to ensure the special professional frame of the members of the Romanian Diplomatic and Consular Corps. It was only 13 years later that the Government Decision no.1070/1990 is abrogated, together with the adoption by the Parliament of a new normative act regarding the statute of the Romanian Diplomatic and Consular Corps, namely Law no. 296/2003<sup>1</sup>. The elaboration of “complete norms regulating different aspects of these activities” became necessary, as presented in the Explanatory memorandum to Law on the Statute of the Romanian Diplomatic and Consular Corps; the new regulations were imposed following the new valences acquired by the diplomatic and consular activity in the context of Romanian integration within NATO and the EU; these regulations were meant to ensure the stability of the diplomatic and consular personnel, their promotion on professional and competence criteria, considering the “*specific attributions, the importance and role within the state administration*”.

Accordingly, the Romanian legislator established in the first article the special character of these regulations, conferring the members of the Romanian Diplomatic and Consular Corps a specific socio-professional statute, determined by the attributions and the responsibilities related to the accomplishment of the external Romanian policy (article 1, al. 2).

This “professional elite corps”, as it was named in the doctrine (Leș, 2004, p. 3) comprises, according to the listing in article 2, al.1: the minister of foreign affairs, state secretaries and sub-secretaries with the Ministry of Foreign Affairs, general secretary and deputy general secretary with the Ministry of Foreign Affairs, diplomatic and consular personnel working within the central administration of the Ministry of Foreign Affairs, the embassies, permanent missions with the international organizations and the consular offices of Romania, including the individuals coming from the Department of External Trade and other ministries and institutions, during their sending to missions outside the state, with diplomatic or consular ranks. Interpreting al.2 of the same article we notice that the minister of foreign affairs, state secretaries and sub secretaries, general secretary and deputy general secretary are righteously part of the Romanian Diplomatic and Consular Corps, during the exertion of the corresponding tasks (Maftei, 2007, p. 178).

The members of the Romanian Diplomatic and Consular Corps are as a rule, following the wording of article 1 (b), career diplomats. They can acquire, according

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<sup>1</sup> Law no. 269 on June 17, 2003 on the statute of the Romanian Diplomatic and Consular Corps was published in the Official Monitor of Romania, Part I, no. 441 on June 23<sup>rd</sup>, 2003, amended and completed by Law 181/2004.

to the provisions of article 4 of the same normative act, the following ranks: ambassador, plenipotentiary minister, counselor- minister, diplomatic minister, 1<sup>st</sup> secretary, 2<sup>nd</sup> secretary, 3<sup>rd</sup> secretary, diplomatic attaché (diplomatic ranks), general consul, consul, vice consul, consular agent (consular ranks).

Therewith, the members of the Romanian Diplomatic and Consular Corps occupy diplomatic and consular functions within the central administration of the Minister of Foreign Affairs and the diplomatic missions, that are equivalent to the diplomatic and consular ranks they hold (article 5).

If we take into consideration all these dispositions, as well as the provisions in article 17, al. 1 (a) that establish that the quality of member in the Romanian Diplomatic and Consular Corps can be acquired by the individual “who has the right to occupy a *public office*, according to the provisions of the Constitution and the laws in force” and in 1 (c) it is stipulated the condition of not being politically affiliated<sup>1</sup>, corroborated with the provisions in article 2, al. 1 and article 5, al. 1 (d) in Law no. 188/1999 on the Statute of the public servants<sup>2</sup> that statutes that a public servant is the individual occupying a public office, respectively, the right to have statutes special to public servants exerting their tasks within the diplomatic and consular services resulting in the fact that the members of the Romanian Diplomatic and Consular Corps (except the dignitaries) are public servants with special statute. The same conclusion derives from interpreting paragraphs 2 and 3 in article 5, Law no. 188/1999, that establish the possibility of regulating using a special statute applicable to diplomatic and consular services, the rights, duties and specific incompatibilities, other than the ones provisioned by the law abovementioned, as well as the aspects related to career.

A similar opinion is shared by the doctrine and by Ștefan Beligrădeanu (Beligrădeanu, 2007, p.76) who considers that Law no.269/2003 “is fundamentally wrongly written and, *de lege ferenda* the qualification of the judicial labor reports of the Romanian Diplomatic and Consular Corps is imposed, other than dignitaries [article 2, al. 1 (a) and (b)] and others than the general secretary and his deputy in the Ministry of Foreign Affairs [article 1, al.1 (c)]” the author arguing that “all the members of the Romanian Diplomatic and Consular Corps (other than the

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<sup>1</sup> The Romanian Constitution established in article 37, al.3 that the interdiction for political affiliation is imposed for “the judges in the Constitutional Court, ombudsmen, magistrates, active members of the military, police officers and *other categories of public servants established by organic law*”

<sup>2</sup> Law no.188/1990 on the Statute of Public Servants was republished in the Official Monitor of Romania, Part I, no. 365 on 29.05.2007 and subsequently amended and completed.

dignitaries) would have been included in the category of public servants...”. Virginia Vedinaş also asserts that “diplomats cannot be something else than public servants” considering the fact that they exert their tasks “with the purpose of realizing the prerogatives of public power” (Vedinaş, 2007, pp. 148-149).

Furthermore, the legislator himself specified in the Explanatory Memorandum to Law on the Statute of the Romanian Diplomatic and Consular Corps that “when drafting the law, other statutes adopted in other states of the Euro- Atlantic structures have been taken into consideration, as well as the EU norms and practices on the exertion of *public offices, including the diplomatic and consular ones*”. Law no. 269/2003 refers to the Statute of public servants in article 3, establishing that: “The Statute of the Romanian Diplomatic and Consular Corps is completed with the provisions enlisted in the labor legislation and in the *Statute of Public Servants* if the present statute does not specify different”. This fact thus implies that they will be subjected to the provisions of Law no. 188/1990.

Supporting the argument of public servant quality of the Diplomatic and Consular Corps’ members, article 17 (g) on Law no. 269/2003 can be invoked that, similar to the provisions of article 57 in Law 188/1990, republished, together with the other conditions that have to be fulfilled in order to acquire the quality of member of the Romanian Diplomatic and Consular Corps, promoting the admission contest in the Romanian Diplomatic and Consular Corps, organized according to the regulation of organization and deployment of the admission contest in the Ministry of Foreign Affairs.

The dispositions of article 22-23 condition the acquirement of the quality of member in the Romanian Diplomatic and Consular Corps on the oath of faith to the Romanian state, similar to the rigorously article 62, al. 6 and 7 in Law 188/1990 establishing that when entering in the Public Servants Corps, the public servant has to make an oath of faith. Making this oath is mandatory and the refusal has the consequence of losing the quality of member of the Romanian Diplomatic and Consular Corps (Puşcă, Nistor, Negruţ & Maftai, 2005, p. 173).

The legislator invokes the provisions of the Statute of Public Servants in the content of article 3, al. 1 in Law 269/2003, but the manner in which this disposition was drafted creates confusion. Thus, there is a reference in what concerns the completion of the provisions of the Diplomatic and Consular Statute to the labor legislation and the Statute of Public Servants without mentioning the situations in which the regulations of either of these judicial instruments will be applied. A solution in

determining the order in which they could be applied would result from the wording of article 3, referring first to the completion of dispositions of Law no. 269/2003 with the labor legislation, then the regulations of the Statute of Public Servants. But, if we take into consideration the qualification of member in the Romanian Diplomatic and Consular Corps as special category of public servants, we assert that the lacunas of the special statute must be covered by regulations in the frame-statute, respectively in Law 188/1990 and in case neither these are sufficient, the labor legislation will be referred to.

### **3. Judicial liability of the members in the Romanian Diplomatic and Consular Corps**

Law no. 269/2003 regulates the judicial liability of the members in the Romanian Diplomatic and Consular Corps in chapter 8, named “Judicial Liability” in a laconic manner, in four articles, namely 57, 58, 59 and 60.

In our opinion, the provisions that have been mentioned are not able to cover all the aspects on involving the judicial liability in cases in which the career diplomats and the ones assimilated are guilty of breaking the state provisions. Thus, in the general wording of article 57, the legislator refers only to the liability of the members of the Romanian Diplomatic and Consular Corps, regarding their professional activity deployed within the central administration of the Ministry of Foreign Affairs or the diplomatic missions and consular offices of Romania:

*“The members of the Romanian Diplomatic and Consular Corps are liable, according to the law, regarding their professional activity deployed within the central administration of the Ministry of Foreign Affairs of the diplomatic missions and consular offices”.*

It is thus omitted the liability for the other obligations regarding the guilty violation of the rules on the incompatibilities and interdictions’ regime, of conduct norms and liability for actions that affect the prestige of the Romanian Diplomatic and Consular Corps.

Article 58 mentions the forms of liability (disciplinary, patrimonial, civil, contravention or criminal) that could interfere in case of not fulfilling the service duties and breaching the provisions of Law 269/2003 by the members of the

Romanian Diplomatic and Consular Corps, in the same general, ambiguous wording, without mentioning the conditions in which either of these forms of judicial liability could be applied:

*“Breaking the provisions in the present law by the members of the Romanian Diplomatic and Consular Corps and not fulfilling in good faith the service duties attracts the disciplinary, patrimonial, civil, contravention or criminal liability, depending on the case.”*

The imprecision is maintained in what concerns article 59:

*“(1) the conditions of attracting the applicable liability and the penalties are those provisioned by law and by the regulation of organization and functioning of the Ministry of Foreign Affairs.”*

This text, also unclear because of the general character of the wording, leads to the conclusion that the disposition mentioned takes into consideration all the liability forms. This conclusion is wrong for many reasons. First, criminal liability can be attracted only according to the criminal law; second, in what concerns civil and contravention matters, the dispositions comprised in the Statute of public Servants have to be taken into consideration; third, it is good to know that the criminal or contravention penalties cannot be comprised in the regulation of organization and functioning of the Ministry of Foreign Affairs.

Also, although in paragraph 2, article 59, it is mentioned that *“the facts generating liabilities and penalties for the members of the Romanian Diplomatic and Consular Corps are examined by the Council of Honor, who makes suggestions to the minister of foreign affairs”*, we consider that the scope of this provision has to consider a restrictive interpretation, as the its wording is too wide. The use, by the legislator, of the expression *“the actions generating liabilities”*, without specifying the forms of judicial liability taken into consideration to be examined by the Council of Honor<sup>1</sup> leads to the wrong conclusion that all the forms of liability are included. On the other hand, such a definition breaks the basic rules of law, at least in criminal matters: in cases in which the actions comprise the constitutive elements of a crime, the competent prosecution organs have to be referred to and not the Council of

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<sup>1</sup> The establishment and functioning of the Council of Honor of the Romanian Diplomatic and Consular Corps within the Ministry of Foreign Affairs, as a structure in which the cases of misconduct are analyzed, as well as other acts that bring prejudice to the quality of member in the Romanian Diplomatic and Consular Corps is provisioned as well by article 24 in the Government Decision no. 1070 on October 6<sup>th</sup> 1990.

Honor of the Diplomatic and Consular Corps within the Ministry of Foreign Affairs. In the same context, we must remind the provisions in article 3, al. 3 in Law no. 7/2004 on the Code of Conduct of Public Servants<sup>1</sup>

That establishes in a correct manner that “in cases in which the facts comprise the constitutive elements of a crime, the competent prosecution organs will be referred to, under the conditions of the law”. Thus, the only form of liability that could be employed, as regulated by article 59 can only be the disciplinary liability (Nicu, 2009).

In what concerns the penalties applied to the members of the Romanian Diplomatic and Consular Corps following the attraction of a form of judicial liability, article 51 in chapter named “*Termination of membership of the Romanian Diplomatic and Consular Corps*” mentions in article 1 (f) only one disciplinary penalty which is the disciplinary termination of employment with the Ministry of Foreign Affairs, situation in which the membership in the Romanian Diplomatic and Consular Corps ends. No provision is made, even as an example, regarding actions that could represent the basis for attracting disciplinary liability, such as: breaking the specific service obligation and the norms and regulations of proper behavior, breaking the regime of incompatibilities and interdictions provisioned for the members of the Romanian Diplomatic and Consular Corps, the unjustified refuse to fulfill the tasks, inadequate or immoral behavior that would prejudice the prestige of the Romanian Diplomatic and Consular Corps<sup>2</sup>, not respecting the confidentiality of the tasks, not respecting the working program, not respecting the regime of protecting the information and data the employer holds.

A future amendment of Law no. 269/2003 should include other disciplinary penalties as coercive means that end in defending the disciplinary order and development of the responsibility spirit in fulfilling the attributions and other service duties of public servants (Negruț, 2008, pp. 214-215), reported to the gravity of the disciplinary breach, the degree of guilt, the consequences of the breach and considering the principle of individualization of the disciplinary penalty: written

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<sup>1</sup> Law no. 7/2004 on the Code of Conduct of public servants was published in the Official Monitor of Romania no. 157 on February 23<sup>rd</sup>, 2004, amended and completed by Law no.50/2007 and republished in the Official Monitor of Romania no. 525/2007.

<sup>2</sup> Among the obligations assigned to the members of the Romanian Diplomatic and Consular Corps, Law 269/2003 provisions in article 32 respecting the state and service confidentiality, according to the law as well as confidentiality related to facts, information or documents used in exerting the functions, the obligation to have a irreproachable professional and moral conduct in any circumstance, prove dignity and responsibility in fulfilling attributions.



reprimand, diminishing the salary rights for a certain period of time and/or the driving compensation, removal from the office, exclusion from the Romanian Diplomatic and Consular Corps, following the disciplinary termination of employment concluded with the Ministry of Foreign Affairs.

Article 60 provisions the measure of suspending the work reports if “*the prosecution terminated against a member of the Romanian Diplomatic and Consular Corps for a crime<sup>1</sup> that would make him/her incompatible with his/her status*”. The measure of suspending the work reports of a member of the Romanian Diplomatic and Consular Corps will be taken by the minister of foreign affairs.

We assert that the specification “a crime that would make him/her incompatible with his/her statute” is inconsistent with the one provisioned in article 17, al. 1 (h), regarding one of the conditions that has to be cumulative for acquiring the quality of member in the Romanian Diplomatic and Consular Corps: the person “that hasn’t been convicted for committing a crime”. We consider that if the acquirement of the quality of member in the Romanian Diplomatic and Consular Corps is conditioned by a conduct that excludes committing any crime, that rigor has to be maintained regarding the suspension of the quality of member in the Romanian Diplomatic and Consular Corps for identity reasons and for respecting the norms of legislative technique.

More than that, the disposition comprised in article 60 should be detailed as well in the sense that the suspension can be disposed also as a disciplinary penalty not only in case of starting the criminal proceedings against a member of the Romanian Diplomatic and Consular Corps. The mentioned legislative text has to be completed by the name regarding the finding of innocence of the person in cause that has to be followed by the renewal of the activity depending on the position held before the suspension and the retroactive granting of all the suspended rights.

Solutions for solving the problems regarding judicial liability of the members in the Diplomatic and Consular Corps have to be searched for now, according to article 3 in Law 26/2003, in Law 188/1999 or in labor legislation. This listing has to be completed by other normative acts relevant in what concerns the judicial liability of public servants: the Code of conduct of public servants, with the additional amendments, Government Decision no. 1344/2007 on the norms of organization and

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<sup>1</sup> The crime represents, according to the provisions of the Criminal Code, the action presenting social danger, committed with guilt and provisioned by the criminal law.

functioning of the discipline commissions, amended by Government Decision no.787200 and Government Decision no. 1268/2008.

The distinctive socio-professional statute that the members in the Romanian Diplomatic and Consular Corps have imposes a detailed regulation within the special law.

#### **4. Conclusions**

The complexity and importance of the activity fulfilled by the members in the Romanian Diplomatic and Consular Corps represents, in our opinion, solid arguments for the legislator to offer a special attention to the regulations of the their statute in all it comprises. The actual form of Law no. 269/2003 that comprises incomplete regulations creates confusion at least in what concerns the judicial liability of the Romanian Diplomatic and Consular Corps. A review of these regulation is imposed that would exclude the imprecise and often ambiguous formulations regarding the judicial liability, the employment conditions and applied penalties respecting in the same time the principles of legislative technique. Law no. 251 in 2006<sup>1</sup> for the amendment and completion of Law 188/1999 introduced a new article (art. 91<sup>2</sup>) within the latter that establishes the obligation of the authorities and public institutions that have special statutes to harmonize “with the provisions of the present law, with the consultation and the opinion of the National Agency of Public Servants”. This provision obliges the Ministry of Foreign Affairs to proceed in harmonizing the Statute of the Romanian Diplomatic and Consular Corps with the Statute of the Public Servants, subsequently amended and completed, but this obligation hasn’t been fulfilled yet. The Romanian Diplomatic and Consular Corps needs a modern, rigorously regulated statute, that would correspond to the exigencies and standards of the specific attributions and responsibilities that assigned to its members.

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<sup>1</sup> Law 251 on June 23, 2006 on the amendment and completion of Law 188/1999 on the Statute of Public Servants was published in the Official Monitor of Romania no. 574 on July 4<sup>th</sup>, 2006.

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