

## CRIMINAL-LAW LIABILITY OF MEMBERS OF A MUNICIPAL COUNCIL IN THE SLOVAK REPUBLIC

### ABSTRACT

Author aims the attention to a potential criminal-law liability of the members of a municipal council, who participate in the activities of the municipality especially by attending ordinary and extraordinary sessions as the members of a collective body, they take decisions. Their wilful or neglecting unlawful actions can be the basis for the criminal liability.

**KEYWORDS:** *member of municipal council, municipal council, criminal liability, public official, criminal offence*

### INTRODUCTION

The municipal council consists of members and “presents «a local parliament» under the local conditions from the point of view of its structure (a collective body), creation (election) and exercise of a mandate (representative mandate), as well as from the point of a competence specification” (Palúš, Jesenko, Krunková, 2010). The council as a representative body of the municipality fulfils many important tasks laid down mainly by Section 69/1, 2 of the Constitution of the Slovak Republic, Act No. 369/1990 Coll. on Municipal Establishment as amended by later regulations (hereinafter referred

to as the Act on Municipal Establishment) and other legal regulations. From our point of view of research, property management and budget management is important. Along with juridical subjectivity, which a municipality disposes of as a public corporation, it bears a resemblance to a trade company. "In contrast to a trade company managing, the members of council are not specially prepared or trained to be managers in the sphere of public administration. The members of the council undertake considerable liability that can be compared with (not substituted by) a liability of a management of a trade company of trade corporations. There is a civil, criminal-law and political liability. The member of council consciously undertook the obligation to carry out a function thoroughly, in the municipality and its citizens interest and he/she undertook to observe the constitution and law" (Klíma et al., 2014).

A municipal council is a collective body and ordinary and extraordinary sessions during which the decisions are taken in a board through voting, are the form of its activity. However, the municipal council does not bear the criminal liability as a collective body and despite the fact that Act No. 91/2016 Coll. on Criminal Liability of legal persons containing such liability, is going to become effective from July 1, 2016, at the same time this act excludes the criminal liability of a municipality as a legal entity. The importance of tasks, the fulfilment of which belongs to a municipal council, especially a municipality property management, a potential of a damage causing and a special position of the members of council on one hand and the role of penal code resulting from its position in the system of law on the other hand, brought us to considerations about the need of penal sanction of those members, who abused their positions or thwarted or made difficult a fulfilment of important tasks of a municipality.

## DISCUSSION

A criminal activity connected with fulfilment of tasks of a municipality occurs in the statistics of criminal activity, but it is especially the criminal activity of mayors of municipalities connected with a criminal offence of abusing the power as a public official pursuant to Section 326 of Penal Code<sup>1</sup>. However, the members of a municipal council participate in a committing of a criminal activity connected with a municipality economic management and

property management as natural persons by course of Penal code who hide themselves behind a collective decision. A member of a municipal council is considered to be a public official pursuant to Section 128/1 of Penal Code if:

- a) the post is specified in the provision,
- b) he/she participates in the fulfilment of tasks of a society and State,
- c) he/she uses an authority entrusted to him/and
- d) a criminal offence is committed in connection with his/her authority and liability.

Ad a) Penal Code states a facultative a list of natural persons in the quoted provision, who are considered as public officials; the list also includes a member of municipal council as “a member of a body of territorial self-administration”. Pursuant to Section 10/1a of Act No. 369/1990 Coll. on Municipal Establishment, a municipal council is the municipality body and “consists of members” (Section 11), what means that the assumption is met.

Ad b) The definition of a municipal self-government competence is contained in Section 4 of the Act on Municipal Establishment, according to which the municipality takes the decisions and implements all acts connected with the administration of the municipality and its property and all the matters, which are regulated by special law as its self-administration competence, autonomously. The municipality participates in fulfilment of state tasks, since it also performs the transferred execution of state administration (Section 5 of the Act on Municipal Establishment).

“The autonomy of decision making about the tasks of self-government means that a municipality ensures the statutory self-administration competences on its behalf and on its own liability, while it is bound by the Constitution of the Slovak Republic, law or an international agreement or legal regulations issued for their implementation. From the point of view of a nature of the tasks entrusted into the original competence of a municipality, the legal regulation in force specifies that the autonomous competence includes especially the matters that, first of all, are connected with municipality citizens’ life the significance of which does not exceed the framework and which, by the given reason, the rule of law leaves within the relative autonomous decision making of the municipality. The significance

of the activities carried out within transferred competence usually exceeds the municipality framework, while the group includes the activities, the execution of which the state is going to influence more intensely” (Tekeli, Hoffman, 2014). It results from the above-mentioned that a member of municipal council that is a municipality body, participates in the fulfilment of the society and state tasks and fulfils the condition so as to be defined as a public official for the purposes of the Penal code.

Ad c) A member of a municipal council is liable for fulfilment of the tasks as one of members of the collective body, and law entrusted to him/her certain powers, from which the most important is voting, which represents the participation in a decision-making. The importance of powers of a member “to participate in decision-making” results from the importance of decision-making of a municipal council, which also determines the principles of finance management and municipality property management and state property, being used by the municipality, management, approves the most important acts related to the property and its management, approves the budget and its changes, approves the territorial plan of the municipality, makes decisions about implementation and cancellation of a local tax, settles on generally binding regulations, establishes and cancels trade companies, etc. It results from the examples that the council disposes of extensive powers (it takes decisions, determines, approves, establishes, settles on, disengages, cancels, etc.). The given powers are carried out by a council as a collective body on sessions through voting carried out by its members. We assume that voting of a member of municipal council, as a manner of application of entrusted power in decision-making is the activity for which law-maker has decided to classify a member of council as a public official for the purpose of the Penal code. By this way it is possible to protect the member of council as a natural person<sup>2</sup> better against the attacks of another natural persons and call the member to account in that activity.

Ad d) Penal Code also sets in Section 128/1 that for the criminal liability and the protection of public official under provisions of the act it is required that the criminal offence was committed in connection with their authority and responsibility. Based on the comparison of requirements set by the Penal Code for definition of a “public official” with legal regulation

of the position of a member of municipal council (especially in the Act on Municipal Establishment) we have concluded that a member of municipal council is a public official and thus, the condition of a connection is met if a criminal offence is committed in connection with an exercise of the right to participate in decision-making about the municipality matters by voting at the municipal council sessions. The members of a municipal council do not have material and legal exemption for statements presented on the sessions of municipal council. There is no provision in the given acts, nor in other legal regulations that would secure impunity for them for some acts that they are carried out as members within the council activity. It implies that they can also be criminally responsible if they participate in the decision-making by which a criminal offence was committed. Since the council is not criminally responsible as a whole, each its member as a natural person can commit an act, which has the characteristics of a criminal offence by the exercise of the power through which he/she participates in taking decisions by the council. The participation in decision-making of the council may also be a voting.

For the criminal liability of a member of council, it is necessary to demonstrate a fulfilment of all characteristics of the merit of criminal offence and to examine especially the fact whether the member of the council caused the act by specified form of a fault. Taking the unlawful decisions by the council, that fulfil the characteristics of an intentional criminal offence or a failure to fulfil important tasks due to negligence cannot be hidden by a collective decision-making and referring to the voting of majority of the council. Since the voting of council is mostly public, the results of voting are included in a the session minutes and the session is opened for public, a criminal activity can be demonstrated by knowledge obtained from the minutes, by witness testimonies of present citizens or by witness testimonies of individual members of the council. If there are facts which suggest that a criminal offence was committed, law enforcement authorities will proceed similarly like in the case of the criminal liability of individuals in collective bodies of private legal entities and do not reject a report on a criminal offence only due to the fact that the subject of examination is a criminal liability of the members of council. The voting majority of the members can also be a group of offenders (accessories) of intentional criminal activity, who have

agreed before the voting (for example, for the purpose of obtaining of illegal benefit for him-/herself or other person)<sup>3</sup>.

From the point of view of the problems we examine, i.e. criminal liability of a member of a municipal council as a public official, we are especially interested in the criminal actions, the offender or accessory of which is a special subject only: a public official. Penal Code contains two such criminal offences: abuse of authority by a public official (Section 326) and obstructing the role by a public official (Sections 327 and 327a)<sup>4</sup>. However, it is necessary to state that there were more suspicions of committing a criminal offence by members of council. Suspicions were connected with voting at the session of council and also related to other criminal offences of economic or property nature, or corruption.

The criminal offence of abuse of authority by a public official contains also a motive headed to damage causing to another person or procuring an illegal benefit for him-/herself or another person, in addition to the intentional fault in the subjective aspect. It can be committed by three ways: If a public official exercises his/her authority in a manner contrary to the law, or he/she exceeds his/her authority or fails to comply with an obligation under his/her authority or upon the decision of the court.

Examining the criminal liability of a member of municipal council for a criminal offence of abuse of authority by a public official, the first alternative is considered: a member of council acted (made decision by voting) by a manner contrary to the law. It is not simple to prove an intentional fault and a motive in the collective body that would demonstrate that the member acted with the intention to cause a damage or obtain an illegal benefit. If the voting is preceded by an agreement of members of the council to vote for the illegal resolution with the intention to cause a damage to another person or to obtain an illegal benefit for them or another person, it will be qualified as a complicity of the criminal offence of abuse of authority by a public official.

The decision-making of a member of council requires so that the member takes the decision with knowledge of the matter that is voted about and he/she must have the option to vote freely. To make decisions with knowledge of the matter does not only mean an assumption that a member of a municipal council (as for criminal liability of each natural person) knows Penal Code,

but he/she must know other legal regulations of other legal branches, which the Penal Code refers to. It is also required from the member in order “to apply a sufficient effort to disclose an illegality of a resolution or to know about the illegality of the resolution” (Richter, 2013). If, for example, any of member of the council or of other persons present at the session points out to the fact that proposed resolution is clearly illegal, proves his/her opinion, states, who will benefit or suffer a damage by such decision and despite this, the member of council will vote for the resolution, he/she can be made responsible for intentional action (at least in the form of a consent, what will suffice as a requirement of an intention for criminal responsibility).

Disclosing of a criminal activity of members of municipal council requires patience from the law enforcement authorities and courts, but this is very important, taking the amount of councils and importance of the tasks, which are fulfilled by the bodies of territorial self-government. The interest of citizens on participation in administration of public matters depends also on their knowledge about honesty of exercise of the power of bodies of territorial self-government and from elected representatives in a council of a municipality, who made a promise to behave correctly.

Agreement of several or all members of council, who intentionally vote about the resolution proposal by which clearly results in for example, a disadvantageous sale of lands with the intention to obtain for themselves or another person a benefit is the illegal act fulfilling the characteristics of abuse of authority by a public official.

The second mentioned criminal offence – obstructing the role by a public official, is a criminal offence caused out of negligence, which can be committed by a public official who fulfils all the conditions laid down by Penal Code. The given criminal offence consists of two basic merits, which occur in numerically different provisions. In the case of Section 327/1 of the Penal Code, the criminal liability of a member of council could be considered only if he/she obstructs or significantly hinders the fulfilment of important tasks by his/her action or failure to act. If it is the case, unknowing negligence as a degree of fault is enough for the commission of a criminal offence. Penal Code does not specify what should be considered as the important task and special publications often state that the importance of a task for the purpose

of application of this provision “is to be considered according to specific significance from the point of view of a state, enterprise or organization influenced by the task fulfilment” (Burda et al., 2011), from which it could be concluded that a municipality and its bodies can fulfil such important tasks or obstruct them or to hinder their fulfilment.

The criminal offence of obstructing the role by a public official rarely occur in statistics; there are one charge annually for recent ten years. There were opinions that there is incorrectly or insufficiently applied the merit or it is obsolete (Čaputová, Gyarfáš, 2011) or that it is connected with an anticipated latent criminality committed by public officials. There were considerations in back special publications (Novotný et al., 1995) that “in connection with decriminalization trends in criminal policy is to be considered, whether the negligent exercise by which a public official obstructs or significantly hinders the fulfilment of important task could only be a disciplinary delict that establishes a punitive responsibility, since this is not probably the action that is of criminal type”. The given authors are those, who consider the merit of given criminal offence to be “vague, what contains a potential danger of a calculated application”.

The criminal liability for obstructing the role by a public official is to be useful for the protection of municipality property pursuant to new basic merit specified under Section 327a of the Penal Code: A public official who, out of negligence, fails to comply with an obligation arising from their authority when managing State property, municipality property, the property of higher territorial unit or the property of public institution, although being aware that they may violate or endanger thereby an interest protected by Penal Code but believing, without adequate justification, that they would not cause such violation or endangerment, and thus cause damage of a large extent (i.e. at least of Euro 133,000) to the given property or cause grievous bodily harm of several persons or the death of several persons (i.e. several persons for the purpose of the Penal Code mean at least three persons) shall be punished by a prison sentence of one year to five years. There is remarkable requirement of a conscious negligence in this merit, what occurs rarely in the Penal Code (usually a negligence is sufficient), damage extent and very moderate sanction compared to, for example, the criminal offence of general danger caused out of



negligence pursuant to Section 285/4, where the sanction is four to ten years. The provision of Section 327a is a demonstration of law-maker interest about fulfilment of important tasks by public officials also before their negligent actions. The legitimacy of both merits of the criminal offence of obstructing the role by public official can be derived from the abovementioned.

## CONCLUSIONS

1. Citizens perceive the actions of public officials very sensitively and they expect from those persons, especially from elected office holders, a conduct in accordance with law and moral. Their expectations are based on the fact that those officials are specially protected by Penal Code and many of them have very good financial income, therefore their increased criminal liability for actions connected with the exercise of their office is proper.
2. Despite the fact that there are voices from the part of laic and professional public that sanctions given to public officials are not sufficiently<sup>5</sup>, we assume that it is not the way which is definitely beneficial to the society. We consider a prevention the criminal activity of public officials to be more important. One of options consists in electing persons (in our case, members of councils), who are sufficiently knowledgeable for exercise of the office and are disposed to pay sufficient attention to materials, about which they decide by voting. If this is not possible, then it is necessary to search a way how to systematically educate those elected office holders so that they be able to be well versed in their duties, what is not simple at instability of our rule of law.
3. The significant preventive mean could also be a requirement of an integrity of a candidate for an elected office in a territorial self-government. The candidate would demonstrate the integrity by the extract from the crime register issued at most three months ago.
4. So as a criminal sanction fulfils a role of a general and individual preventions, it is required to conduct a criminal proceedings timely and thoroughly. It would be useful for law enforcement bodies and courts to have the sufficient amount of proofs. We consider minutes from the council sessions to be a significant source of information about potential criminal activity. In the case of a public voting, the minutes could also

include (especially at important and questionable matters) a name list of voting persons and it could be possible to document a minority opinion of a member of council which differ from the resolution adopted, if possible, with reasoning if it does not result from the discussion before voting. “It is possible to consider a record on voting that allows to clearly determine who and how votes quite verifiable”<sup>6</sup>.

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## Endnotes

- <sup>1</sup> Act No. 300/2005 Coll. Penal Code as amended by later regulations, hereinafter referred to as Penal Code.
- <sup>2</sup> A municipal council as a collective body is protected against attacks especially by Sections 321 and 322 of Penal Code. The council is considered to be a body of public authority and attacks on it, consisting in using of violence or threatening with the intention to affect the execution of powers of public authority, can be considered as a criminal offence of attack on a public authority.
- <sup>3</sup> The possibility is pointed out also by another authors, e.g. Tekeli, J., Hoffman, M. (2014). *Zákon o obecnom zriadení. Komentár (Act on Municipal Establishment. Comment)*, Wolters Kluwer, p. 368.
- <sup>4</sup> The commission of a criminal offence is also particularly aggravating circumstance (e.g. criminal offence of accepting a bribe pursuant to Section 329/2, electoral fraud pursuant to Section 336a/3/b, obstruction of the preparation and holding of elections and referendum pursuant to Section 351/3/b of Penal Code and other).
- <sup>5</sup> It is not possible to always agree with the opinion, since the sanctions are imposed according to certain principles and they are included in a whole system of sanctions, what laic public does not know, or does not perceive as being important.
- <sup>6</sup> This is the opinion presented in Information about activity of Division of Supervision and Control of Public Administration of Ministry of Interior of the Czech Republic in the area of supervision and control for 2013, Ministry of Interior of the Czech Republic. Praha 2014, p. 19. ISBN 978-80-86466-41-5.

