Theoretical and Practical Aspects Regarding the Simple Ordinances Issued by the Romanian Government

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Abstract: - Constitution of Romania contains provisions regarding the normative acts that are expression of legislative delegation – i.e. ordinances and ordinances - in art.108 par. (1), (3) and (4), and art. 115. However, the knowledge and correct application of these constitutional provisions requires corroboration with similar provisions of the same juridical force asuch as: art. 61 according to which Parliament is the sole legislative authority of the state and the laws it issues are in accordance with art. 73 para. (1), article that distinguishes three types of laws: constitutional, organic and ordinary; art. 73 para. (3) and in art. 75 which establish the distinct material jurisdiction of both parliamentary chambers, and the procedure to be followed in these new circumstances, by both chambers in adopting a legislative proposals or project.

Key-Words: - Ordinance, Government, Constitution, Legislative Delegation, Constitutional Regime

1 Introduction

The establishment of the constitutional regime of Government ordinances should, first of all, begins with the combination of the two articles of Constitution of Romania – namely Art.108 and 115 - whereas to explain their legal nature should be taken into account the provisions of Art. 146 letter d) of the normative act according to which the Constitutional Court has the power to decide on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration or brought up directly by the Advocate of the People.

Law No. 90/2001 with subsequent amendments does not specify, by means of Art.11 letter c), except that, in carrying out its functions, the Government issue decisions for organizing the execution of laws, ordinances, under a special enabling laws, and ordinances emergency. In doing so, the ordinary legislature only takes over the essence of the constitutional provisions mentioned above.

2 The legal grounds of the Government simple ordinances - the enabling law

Expression of a delegated legislative power, the ordinance is a method for Government to participate to the accomplishment of the legislative power [1]. If other constitutions have sought to use the following terminology - decree-laws and legislative decrees, orders, ordinances, regulations, decrees, such as can be seen from the provisions of Article 38 of the French Constitution, article 80 of the Fundamental Law of the Federal Republic of Germany, Section 99 point 3 of the Constitution of Argentina, article 80 of the Constitution of Finland and Art.201 of the Constitution of Portugal - our fundamental law preferred the term "ordinance, borrowed from the French constitutional system, to determine the normative act by means of which the Government exercises legislative delegation.

The Spanish constituent legislature, under the provisions of Art.82 and 86, preferred, like ours, covering both types of normative acts - expression of legislative delegation established also by our fundamental law - to distinguish between them in terms of name. Thus, the expression "decree-law" refers to the normative acts issued by the Government under the terms of the Constitution that has equal legal force with the law (the decree-law can be identified with the emergency ordinances of our system), while the phrase "legislative decree" denotes those normative acts issued also by the Spanish government but who are the "counterpart"

of the simple ordinances. of the Romanian system. It seems appropriate to point out that the settlements of the Constitution of Spain, as well as those of the Constitution of France, in this matter, rather than the constitutional provisions of other states, were a primary source of inspiration for the Romanian legislature.

Therefore, an important distinction between two types of orders is reflected in their origin, in their legal ground.

In order to issue simple, ordinary, ordinances, the Government should be authorized by an enabling law passed by Parliament in this regard. The necessity of adopting such a law is quite obvious since the issuance of a normative act that produces effects similar to the law and that is submitted to Parliament, makes out the Government, an executive body, "a genuine participant to the achieving of the legislative power specific to the Parliament ". [2]

The Constitution recognizes the right of the Government to issue normative acts *secundum legem* - Government decisions - which may be adopted, according to art.108 par. (2) only for organizing the execution of law, while its ability to issue "acts containing juridical norms of law's power" or, in other words, norms of primary nature, is permitted only under the conditions and limitations imposed by the enabling law which shall give legitimacy to the government “work of legislating” [3].

The doctrine stated that the achievement by means of the Constitution of shares, *expresis verbis*, the field of law, especially in the field of the ordinary law and of the Government decision would transform the enabling law in a “passport for crossing from a field to another, i.e. from the field of government regulation to the legislature one”. Or in the current constitutional context the enabling law only allows the Government to exercise, only under default conditions and only for a defined period, the legislative competence of Parliament [4].

On the other hand, as can be seen from our constitutional text, the enabling law can only have the Government as a beneficiary and not any other public authority, otherwise the law “would not have efficiency ad extra”, which signifies the fact that the Government is not recognized the ability of delegating the power "to legislate", as stipulated by the enabling law, to any other public authorities, or any other private body [5].

In terms of its legal nature, the enabling law is a ordinary law due to the fact that it cannot be found in the areas reserved for the organic law in Art.73 paragraph (3) of the Constitution, as well as it can not be regarded as a law that revises the fundamental law, laws that are the exclusive constitutional competence of Parliament.

It is mandatory that the enabling law to contained, as settled in Art.115 paragraphs 1-3: the fields in which the Government shall legislate, the date up to which ordinances may be issued, or the possibility for the ordinances to be submitted to Parliament for approval, according to the legislative procedure, until the expiry of the enabling time limit. Basically, the enabling law settles the period during which the Government may adopt simple ordinance. Thus, Art.1 of Law No.873/2007 with regard to the enabling of the Government to issue ordinances provided that the Government is empowered to issue ordinances in fields not covered by the organic law, from the entry into force of the present law, still, this date can not be before the end of the second parliamentary regular session of 2007, and until Parliament resumes its work on the first regular session of 2008.

In practice of the State, it has been formulated the rule that the Government is empowered during parliamentary recess, though nothing else, not even any rule of constitutional law, does not stop the Parliament to empower the Government to issue such orders during parliamentary sessions [6]. In our opinion, by empowering the Government to issue ordinances in its regular sessions, the Parliament would deny, without justification, one of its constitutional functions, namely the regulation and, on the other hand there is the possibility for Parliament and Government to reach conflicting regulations while acting in parallel [7].

3 Fields in which the Government legislates by adopting simple orders

Art. 115 paragraph 1 of the Constitution of Romania settles expressly the fields in which the Government may be empowered to issue ordinances, therefore these fields are those that are not subject to organic laws. It can be inferred that such orders could be issued by the Government under a law of enabling, only in the field of the ordinary laws. The enabling law will not contain, however, a general rule that will allow the Government the opportunity to "legislate" ordinary law in specific areas, since par. (2) of Art. 115 further restricts the right of the Government to issue simple ordinances in the fieldss which are set by the enabling law, the Parliament being obliged to establish such these areas.

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In addition to the same effect, the Constitutional Court, being required to rule on the unconstitutionality of some provisions of the law enabling the Government to issue orders, described the nature of a field or more of these laws as being that of an ordinary law and not organic law, as wrongly appreciated those who stood exception or objection of unconstitutionality before the Court. The Court distinguished thus among the regulatory fields covered by the two types of laws, but it also stressed out that the fields that may be subject to legal ordinances are just those specific to the ordinary law.

Foreign constitutional rules do not contain unitary nor similar provisions with regard to the fields where a government or a council of ministers or even the president of the republic, where appropriate, and, generally speaking, the executive may be entitled to issue normative acts with the juridical force of a law . Thus, one can distinguish between fundamental laws that contain a general regulation of the domains in which the executive may issue normative acts with the juridical force of the law and constitution which by their regulations specifically and expressly provide the fileds where government can "legislate". An example of the first category of constitutions is the Hungarian Constitution whose provisions, ie Article 35 para. (3), does not specificy on legislative delegation excepting for emergency situations when Government, with the prior approval of Parliament, may issue decrees and adopt resolutions which may contain provisions contrary to the laws in force, no other provision refers to the fields in which the decree may be issued, being only specified the requirement to pay obedience to Parliament for approval of the law that settles the rules applicable to the danger situation that generated the approval of the Government to legislate. The provisions of Italian constitutional are quite similar, thus Article 76 regulating the normal constitutional order provides that the Government in exercising its legislative function may be delegated only by a law issued by Parliament, law that must establish not only the limited period of time for giving this delegation, but also "the guiding principles and criteria of the delegation, and the defined objectives" of it.

As part of the second identified category of constitutions, the Constitution of Sweden provides through various provisions (Sections 7-14 of Chapter 8 – "Law and other regulations"), the conditions under which the Government granted the legislative delegation. Thus, the Government can not issue juridical norms in the area reserved for the law otherwise than by means of a law of empowering issued by the Parliament. Section 7 of Chapter 8 provides, specifically, the fields that are "subjects of legislature" under the above mentioned these circumstances: such fields are, for example protection of life, health or personal safety, the right of residence and right of residence of foreign citizens in Sweden, import or export of goods, money and other assets Also, per a contrario, from the provisions of Section 7, Chapter 8 we can conclude that the Swedish Government has no right to "legislate" with regard to the legal consequences of crimes, except those concerning the establishment of fees, the Parliament refussing the empowering to that effect. Section 9 of Chapter 8 of the Swedish Constitution foresees the possibility for the Government to issue, all under a rule of empowerment, laws on customs duties on imported goods, this is an exception to the rule of the previous section of the same normative act which the Government can not issue specific regulations concerning taxes even under an empowerment of the Parliament.

Thus, to avoid "double regulation", the Portuguese constituent legislator provides by art.167, for another solution, namely the explicit enumeration of the fields in which the Assembly of the Republic (namely, the Portuguese Parliament) has exclusive legislative powers, as well as those the Parliament has relatively reserved legislative powers. These latter fields are those that may be subject to legislative delegation because, according to par. (1) of art.168 of the Constitution of Portugal, the Assembly of the Republic will be able to pursue exclusively legislative function only if the Government was not authorized to do so. On the other hand, by corroborating the provisions art.169 par.(2) with those of art.167 letter a) and e) we arw allowed to stress that the Government may not issue normative acts with the juridical force of law in the fields of organic law precisely because only the Assembly of the Republic may legislate in these fields exclusively.

Moreover, as similar to the French Constitution in Article 37, the Constitution of Portugal recognizes the the statutory power of the Government in fields other than those reserved for the law, providing thus in art. 164 letter d), that the Assembly of the Republic may adopt legislation in all areas but, except those which the Constitution reserves to the Government. But, whatever the solution chosen by the constituent legislature, it will settle such material limits. Moreover, the legislature will prefer as a rule to determine by each law enabling the exact fields of which the Government,

the executive in generally, will be able to "legislate" even if those fields are set in general or specifically by the constitution. Consequently, no one can talk about white or permanent legislative delegation, the doctrine stressing that the enabling law should define with precision the purpose and effects of the delegation, as well as the principles and criteria to be observed in the exercise of legislative delegation [8].

Spanish Constitution, in Article 83, also provides that the enabling law - called the Framework Law by the legislature - can not stipulate any law change by the Government, consequence, in our opinion, of the fact that the legislative delegation may be granted only in pre-established constitutional limits by the Parliament, as an exception to the rule that legislation is exclusively the prerogative of the legislature. But the Spanish constituent expressly provided by paragraph. (2) of the same article, that by means of the framework law (in Romanian the constituent uses the expression enabling law, sn), it cannot be authorized the possibility of adopting juridical norms retroactively, settlement that, de lege ferenda, should be included in a future revision of our Constitution. The motivation for such a proposal lies precisely in the reason why the Government is empowered to issue legal ordinances for by means of enabling law, as already mentioned above, the Parliament is obliged to establish the period for which the Government is giving temporarily, "the right to legislate”, and, on the other hand, the purpose of such empowerment is determined by the need to regulate the basic legal rules in certain areas, regulation that can not be ensured by the legislature. . Such a need is ascertained by the Parliament and as well by the Government at the moment when adopting the enabling law, need that can not be assessed retroactively. More than that, the empowering of the Government to issue ordinances of retroactively nature would allow it to substitute the legislative work of Parliament, although the latter was in session and it was able to exercise its exclusive authority and even to exercise control over the way in which the former was exercising jurisdiction in question.

We consider appropriate the implementation in our constitutional system of another situation, provided by article 82 par. (5) of the Spanish Constitution, i.e. the Government may be empowered to issue legal ordinances, in which case the enabling law would not be authorize but with the authority to integrate and order into a single legal text the disparate legislation on a subject or a field. The fulfilling by the government of the role enshrined at the constitutional level depends on the legislation adopted by Parliament, or in most cases its source is represented by the bills issued in exercising the right of legislative initiative by the Government itself.

It is sufficient to recall in this context only the bushy law and, often contradictory, or at least interpretable with regad to the property i.e. with direct reference to the procedures for establishing or restoration of real property ownership, as well as for mobile one, abusively taken by the Romanian state after March 6, 1945, or the legislation on pensions on the public pension system with the entry into force on 1 April 2001 of the Law 19/2000 on public pension and other social insurance rights, law that repealed the old statutory No..3/1977, but even the new law in this area, Law no. 263/2010, which entered into force on January 31, 2010. Consequently, the interest for a better systematization of the law or at least of a sector of it, for a better knowledge, security or optimization, must lie primarily with the Government. This delegation does not pursue an innovative legal system, its role is just that of a technical legal instrument by means of which the Government is only able to classify, clarify and harmonize the legal texts subject to consolidation. However, the legislative merger will not be a mechanic one because it will, however, allow the Government to issue new legal provisions with respect to a single condition – the norms must be contained or retrieved or derived directly from the legal texts that are subject to consolidation [9].

The doctrine also pointed out that this form of delegated legislation whose result is the simple ordinance, can only be with regard to powers recognized to the Parliament by the Constitution and not to those of other authorities, even if it is the chief of state, the delegation can thus be extended to other tasks of the Parliament, as the regulation.
Such an assessment may, in our opinion, constitute an undesirable precedent that could result - into the possibility of Parliament to delegate its other duties to the Government, whether or not their fulfillment is completed with the adoption of a law [10]. In fact, in expression this opinion, we have embraced the view expressed in a dissenting opinion to a decision made by the Constitutional Court - Decision No.718/1997 - that has made a clear distinction between the power of ratification and the power to legislate for whether the legiferation may be delegated in the express terms provided for in art.115 of the Romanian Constitution, (art.114 of the Constitution prior to its review and its republication in 2003, the article having been mentioned in the

previous decision and, respectively, in the dissenting opinion), the delegation of other duties being contrary to the constitutional provisions.

Such assignments that are completed throughout the adoption of laws and which remain the exclusive power of Parliament, alogside ratification are: approval of the State budget and State social security budget, as well as, declaring a state of war.

4 The date by which simple ordinances may be issued

As regards with the date by which the Government can issue these simple ordinances, paragraph (2) of article 115 of the Constitution provides expressly and imperative that it must be determined by the enabling law passed by Parliament. Adoption of legal ordinances after the expiry of that period, even if they will cover areas for which the Government wasn't empowered, constitutes an argument in favor of their assessment as unconstitutional, the delegation becoming thus obsolete. The exceptional character of the ordinance determines for the enforcement of such time limits, the right to issue ordinances can not be granted to the Government for an indefinite period.

Unlike the provisions of our Constitution, art.168 par.(2) of the Constitution of Portugal provides that the period for which Parliament authorized the Government to issue legal acts with the same juridical force of the law – called decree-law in the Portuguese constitutional system - to can also be extended by the authority which granted it. On the period the empowerment is given, the Government can not just issue ordinances, but it can also modify or even repeal them, because once stopped the empowerment, the Government may do so only through the exercise of legislative initiative, but there is the risk the Parliament not to acquire the Government's point of view or to assume it with modifications and learn it.

Contrary to this view expressed also in our doctrine the Spanish constitutional juridical norm – i.e. Article 82 para.(3) of the Constitution of Spain - provides that the legislative delegation cease when the appropriate norm - the legislative decree - is published, the doctrine stressing also that in order to issue another decree law on the same subject, the Government needs a new enabling law.[11].

5 Ordinances submission for approval to the Parliament – the legislature option

The constituent legislature was not as categorical when he left, according to par. (3) of article 115 of the Constitution of Romania at the ordinary legislature's assessment the inclusion in the enabling law of the compulsory submission to Parliament for approval, according to parliamentary procedure, of the ordinances issued until the date of the enabling. If this last condition is provided, the failure to comply the term by which ordinances may be subject to approval by Parliament would bring the termination of their effects, their validity is basically subject to submission for debate and Parliament for approval.

It seems questionable, however, if by law for approval of an ordinance the Parliament can make changes or additions not only to its provisions, but even to the title of the ordinance, making it thus a new normative act (respectively, a new ordinance) whose legal effect shall entry into force from the date of entry into force of the law approving the ordinance which is according amended or even repealed. No matter to whom belongs the initiative – to the Parliament which proposes together with the debate for the law of approving, the inclusion of this amendment, or to the Government who expressed this intent in the note accompanying the ordinance or by the explanatory memorandum to the draft of the law of approving it - each of these authorities has the possibility of resorting to "traditional ways" to initiate a bill.

Such an example is the Ordinance no.105 from 30 August 1999 amending and supplementing the Decree-Law no.118/1990 on granting some rights to persons persecuted for political reasons by the dictatorship installed starting with 6 March 1945 as well to those deported abroad or in prison, republished, with subsequent amendments - Ordinance that was issued under article 1 lit.n) item 1) of Law no.140/1999 enabling the Executive to issue ordinances. Subsequently, by Law of approval of the Government Ordinance no.105/1999 respectively Law no.189/2000, the title of the normative act was changed to "Ordinance no.105 of 30 August 1999 concerning the granting of some rights to to persons persecuted by the regimes instituted in Romania starting from 6 September 1940 until 6 March 1945 because of their ethnicity. Basically by this change, in fact the only one made for Law no.189/2000 did not bring any other changes or supplement to the ordinance, it was adopted a new normative act - an ordinance that

regulated the categories of persons, others than those covered initially in the same ordinance, the conditions and the procedure applicable in which they were entitled to the rights expressly provided, the default initial order was abrogated and that the Government had been expressly authorized.

6 Conclusion

If the fashion of emergency ordinances tends not to be a seasonal one, but a permanent one, requiring urgent review of constitutional provisions embodied by the constitutional regime, the simple or regular ordinances issued by the Government under an enabling law are avoided by the authority of the executive power. Censorship that lawmakers can impose to the Government to issue such an ordinance makes it far from attractive.

Perhaps, at least temporarily, to stem the reprehensible momentum of the Government to turn into a genuine legislature contrary to the constitutional principles and norms, a further review of the Romanian Constitution should provide only the simple possibility of the Government to issue those ordinances. The shortcomings of current constitutional rules should be corrected by the same future review.

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