

LEGAL ORDINANCES – FIELDS THAT MAY MAKE UP THE OBJECT OF THESE IN THE CONTEXT OF THE CURRENT CONSTITUTIONAL REGULATIONS IN ROMANIA

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Abstract: *In accordance with the provisions of Art.108 paragraph 1 of the Romanian Constitution, the Government shall adopt not only decisions, but also ordinances. These shall be issued under a special enabling law, within the limits and in conformity with the provisions thereof. All the more, Art.115 of Constitution has mentioned that this special law enabling the Government to issue ordinances may be passed by the Parliament. The enabling law shall compulsorily establish the field and the date up to which ordinances may be issued, but never in the fields outside the scope of organic laws.*

Key words: *Government, legal and emergency ordinance, fields, Constitutional Court.*

Within the literature in the field, legislative delegation is also defined as an institution through whose intermediary, either directly the Constitution, or the Parliament by law, based on a text from the Constitution, grants the Executive the prerogative to adopt normative acts with a primary character. The definition grasps the fact that although the Romanian Constitution, republished, through Art. 61, consecrates the principle of the legislative monopoly of the Parliament – this one standing for the only legislative authority of the country, however, on the basis of the same normative act, directly on the basis of the fundamental law or indirectly, the Government may issue judicial norms of a primary character, norms which have, consequently, the same judicial force as the law.

We considered appropriate the following

definition of the legislative delegation: the institution through whose intermediary, either directly the Constitution, or the Parliament by law, on the basis of a text from the Constitution, grants the Executive, under temporary delay and taking into consideration determined situations, the prerogatives to adopt normative acts with a primary character, denominated ordinances.

The expression of this delegated legislative competence is the Government ordinance; its legislative regime takes two forms, regulated by Art.108 and Art. 115 of the Romanian Constitution, republished:

- The constitutional regime of the ordinances that evoke the rule of habilitation – the normal regime
- The constitutional regime of exception – the regime of emergency ordinances.

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There also has to be mentioned that if the High Court of Cassation and Justice, the former Supreme Court of Justice, appreciated that the issuing of ordinances by the Government – both in the case in which there is a law of habilitation, and in the case of the emergency ordinance – constitutes a legislative delegation, the Constitutional Court of Romania defined even this delegation as an exceptional procedure for the substitution of the Government in the legislative prerogatives of the Parliament, so that through the ordinance, the Government may regulate primarily, may modify or even abrogate the existing regulation.

The Romanian Constitution, republished, regulates, therefore, the institution of legislative delegation through Art. 115, there being consecrated both the normal regime of ordinances, and the exceptional one – that of emergency ordinances.

Consequently, as regards the normal constitutional regime, so that the Government might issue ordinances – also called simple or regular – it has to be enabled through a law in this respect by the Parliament.

According to paragraphs (1)-(3) of Art. 115 in the Romanian Constitution, republished, this law of habilitation will determine, compulsorily, the field in which there may be issued ordinances which, by no means, can make the object of organic laws, the due date for the issuing of these ordinances and the possibility for these to be submitted for approval to the Parliament, according to the parliamentary procedure, until the falling due of habilitation. In the case in which this last condition is fulfilled, the non-observance of the delay for submitting ordinances for approval to the Parliament will attract the cessation of the effects of the ordinance.

These simple or legal ordinances must not be confused with emergency ordinances. According to Art.115 paragraph 4 of the Romanian Constitution the emergency ordinances can only be

adopted by the Government in exceptional cases, the regulation of which cannot be postponed, and having the obligation to give the reasons for the emergency status within their contents. Unlike simple ordinances, these emergency ordinances can be adopted in the fields of organic laws, but not in the field of constitutional laws, and cannot affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, or cannot establish steps for transferring assets to public property forcibly. Adjudicating on the constitutionality of enabling laws, before the promulgation thereof, or deciding on objections as to the unconstitutionality of laws and ordinances, usually brought up before courts of law or commercial arbitration, the Constitutional Court of Romania has certified that simple or legal ordinances can be adopted only in the fields of ordinary laws. Also, the Constitutional Court has confirmed that emergency ordinances cannot be considered a kind of simple or legal ordinances issued under a special enabling law.

For a correct application of these constitutional norms, we will have to take into consideration others too, such as Art. 61 of our Constitution, which consecrates the fact that the Parliament is the only legislative authority of our country, and the laws elaborated by it are, according to Art. 73 paragraph (1) of the same normative act, of three types: constitutional, organic and ordinary. A particular importance is held within the new normative context by paragraph. (3) of Art. 73 of the fundamental law, which specifies, expressly and limitedly, the fields of organic laws in which the Government may “pass a law”, too, through emergency ordinances.

Taking into consideration that the Art. 75 of the Constitution settles the distinct material competence of the two Chambers, specifying for what subjects and in what

fields the Chamber of Deputies will be the first Notified Chamber, there being understood that in the other fields this attribution will be held by the Senate; as well as the procedure that will be followed, under these new conditions, by the other two Chambers for adopting a project or a legislative proposition; the submittance or the transmission for approval of the emergency ordinances issued in fields of the organic laws, and also in the field of ordinary laws, will be carried out taking into account these provisions.

Also, will not ignore the fact that the ordinance is, together with the decision, according to Art. 108 paragraph (1) of our Constitution, a judicial act of the Government. Thus, in order to determine the constitutional regime of the Government ordinance, there have to be corroborated the two articles – 108 and 115 - and in order to explain their judicial nature, there has to be also taken into consideration Art. 146 lett. d) of the Constitution, according to which the Constitutional Court decides also upon the exception of non-constitutionality as regards the ordinances, raised in front of the Courts of Justice or Commercial Arbitration, the exception being also susceptible to be raised by the Advocate of the People.

As regards the Law of Habilitation of the Government to issue ordinances, as neither Art. 115 of the Constitution, revised, nor Art. 73 paragraph (3) of the same normative act, as well as no other constitutional text specify that it would be of the organic law or, although, such a possibility not be admissible, of the constitutional law, it is obvious, applying the argument of reduction to the absurd, that this is an ordinary law.

The law with respect to the organization and the functioning of the Romanian Government and of the Ministries does not specify the fact that, according to Art. 11 lett. c), in the accomplishment of its functions, the Government issues decisions

for organizing the execution of the laws, ordinances on the ground of a special law of habilitation and emergency ordinances, taking over the essence of the constitutional provisions mentioned above.

The Romanian constituent legislative body has understood how to use the notion of ordinance for determining the judicial act through which the Government exercises its administrative delegation which, being a power that the Parliament delegates to the Executive, implies an investiture law in this respect, that is a law of habilitation.

The regular ordinances, simple or legal, as the terminology used in the framework of the doctrine differs in their respect are, according to Art. 115 paragraphs (1)-(3) of the Romanian Constitution, republished, those ordinances issued on the basis of a special law of habilitation adopted by the Parliament, through whose intermediary, it gives the possibility to the Government to "pass laws" in fields which do not make the object of the organic law and which are, compulsorily, set by this law, as well as the due date for issuing ordinances. If the law of habilitation demands it, the ordinances will be submitted for approval to the Parliament, according to the legislative procedure, until the habilitation term. The non-observance of this term entails the cessation of the ordinance effects.

Through the law of review in 2003 of our 1991 Constitution, there have not been brought substantial modifications as regards the judicial regime of simple ordinances, more the less as regards the fields in which they may be issued. Consequently, the jurisprudence of the Constitutional Court until the review of the Constitution has remained in force so far.

Thus, it may be noted from the constitutional dispositions that simple ordinances, from the point of view of the field in which they may be issued, have to observe two limitations:

- These ordinances cannot be issued but in the field or in the fields expressly stipulated by the habilitation law;
- These fields cannot pertain to those reserved for the organic law.

The Constitutional Court, through its decisions, underscored once more these constitutional provisions both in order to clarify the possible uncertainties with respect to the judicial regime of these ordinances, and to enhance that the simple ordinances and the emergency ordinances stand for two distinct categories of ordinances, of different judicial regimes.

In respect to the facts mentioned above, we will endeavor to answer a few questions, which are:

1. Is there necessary a special habilitation law of the Government in order to issue simple, legal ordinances?
2. What is understood in fact through this field that will be settled through the law of habilitation? Which is the "range of comprehension" of this field?

1) The answer to this question is obviously an affirmative one, as through issuing an ordinance that produces similar effects to the law and that is to be approved by the Parliament, the "Government, chief of the executive power, is transformed into a genuine participant in the accomplishment of the legislative power specific to the Parliament".

Another argument may be the fact that to the Romanian Government, unlike the French Government, the Constitution does not acknowledge the right to issue judicial norms of a primary character, acknowledging, according to Art. 108 paragraph 2, however, its right to issue normative acts *secundum legem* – the Government, which may be adopted only for "organizing the execution of the laws". Thus, in the Romanian constitutional system, contrary to the point of view of a doctrinaire, the Government does not

dispose of the right of primary regulation of the social relations, as the French system, adopting only secondary legislation, the legislative delegation being a complex institution with its specific nature. These latter aspects may explain the necessity for the Government to be habilitated through a special law in view of issuing ordinances.

Another explanation starts from the idea that through the Constitution there has not been carried out a separation of the field of the law from the field of the Government decision, more the less as regards the ordinary laws, in which case the habilitation law "would have been the passport" for the passage from a field into the other, precisely from the field of Government regulations into the legislative area".

Consequently, the necessity of adopting a special habilitation law for the Government in order to issue ordinances is indisputable as through the intermediary of the ordinance this authority of the Executive "passes laws", exercising a competence which, according to the constitutional provisions in force, is does not possess by this one. The Law of habilitation, adopted by the Parliament, according to the dispositions inscribed in the fundamental law, will legitimize these activities of the Government. Thus, there cannot be questioned also the existence or the functioning of at least two principles: the principle of the separation/equilibrium of authorities in the State and the principle of legislative monopoly of the Parliament, the latter principle not being understood in a restrictive sense.

2) As regards the "range" of the field or of the fields in which the Government may be habilitated to pass laws, we will note that, in the first place, this cannot be the object of organic law, a fact expressly stipulated by Art. 115 paragraph (1) of the republished Constitution. Moreover, the Government will not be habilitated to pass ordinances in the field of constitutional laws.

Thus, the legislative delegation instituted by our Constitution is characterized by the fact that there cannot be made an intervention but in those areas of the social relationships which pertain to the field of regulation through ordinary laws.

This point of view is also supported by the decisions taken by the Constitutional Court, which, on the basis of Art. 146 lett. d) of the Constitution, republished, the former Art. 144 lett. c), was summoned to pronounce upon the non-constitutionality of several provisions within several laws of habilitation for the Government to issue ordinances.

Thus, through several decisions the Constitutional Court of Romania pronounced itself upon several legislative dispositions with respect to the validation of international treaties.

As a matter of fact, through the decision of the Court No. 43/1993 with respect to the constitutionality of several provisions within the Habilitation Law for the Government to issue ordinances, and with respect to the validation of contracting and guaranteeing external credits, as well as of contracting State loans, it has been stated that the granted habilitation exclusively regards urgent financial – banking agreements, and not the ratification of international treaties clinched in the name of Romania by its President. According to the provisions of Art. 72 paragraph (3), as well as of the current Art. 73 paragraph (3), these agreements are not part of the category of organic laws, so as they can form the object of the regulation of a regular ordinance, issued on the basis of a law of habilitation.

Through another decision, the Court reiterated the fact mentioned above, pronouncing itself upon the constitutionality of several norms in the law of habilitation for the Government to issue ordinances No. 22/1997, at the notifications of a number of deputies and

senators, the two notifications were connected. The Constitutional Court, with reference to Art. 1 lett. a) of the habilitation law, through whose intermediary the Government was entitled to ratify international agreements, against which there were raised objections with respect to its non-constitutionality as the ratification of these agreements pertains to the exclusive competence of the Parliament and cannot be delegated, stated that according to Art. 114 paragraph (3) of the Constitution (the current Art. 115 paragraph (3) of the Constitution, republished), if the law of habilitation required it, the ordinances would be submitted to the Parliament for approval, or, according to Art. 2 of the habilitation law, all ordinances issued by the Government on the basis of this law would be submitted to the Parliament for approval until its works were resumed in the first ordinary session the year 1998.

The Court noted, at that time, too, that the provisions of the habilitation law, were constitutional, a solution that was also adopted for the case in which the Court was notified by a number of deputies and senators with respect to the constitutionality of several provisions of the law with respect to the habilitation of the Government to issue ordinances.

There should be also specified that by no means, through a simple legal ordinance issued by the Government on the basis of a special law of habilitation, there will be modified or abrogated an organic law or the dispositions of such a law, an obvious fact, taking into consideration that Art. 115 paragraph.(1) of the Romanian Constitution, republished, specifies „*expressis verbis*”, that such ordinances cannot be issued in the field of organic law and, applying the principle of symmetry, such a provision or law cannot be modified or approved.

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