The Legislative Enabling Act within the Constitutional Framework

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THE LEGISLATIVE ENABLING ACT WITHIN THE CONSTITUTIONAL FRAMEWORK

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Abstract

The transfer of the legislative power from the parliament to the government is known as the legislative enabling act which represents a statutory procedure on the constitutional standard. From a conceptual point of view, the legislative enabling act refers to the transfer of legislative power from the parliament to the government through the ratification of a normative act by law. Based on this concept, the executive power through the given ordinances substitutes the activity of the parliament. In various instances, law research papers talk about the long debated legislative or attributions enabling act that keeps taking on different new interpretations. The legislative enabling terminology has been extensively studied. From this point of view, one can talk about the existence of the delegation of power functions, authority or prerogatives.

Keywords:

the principle of separation of powers; legislative institution; legislative enabling act; Parliament.

JJEL Classification: K11, K10

I. INTRODUCTION

Starting from the point of view that the principle of division of authority within the state has established the state’s three institutional functions, the manifestation of authority has clearly showed that it is possible for certain institutions to acquire under the form of derogation several positions than those that are individualised based on standards. In this respect, we would like to emphasize certain instances in which the
parliament’s activity - a legislative authority - is partly replaced by the
government – an executive authority. The transfer of the legislature towards
the executive is known in the doctrine as „the legislative enabling act,” a
phenomenon that is laid down on a constitutional level in all the modern
states, especially in article 115 in the Romanian Constitution.

The legislative enabling act that serves the executive authority is, in
fact, an artifice of the governing practice during special instances that call for
measures and public authority actions with a superior force [1]. Theoretically
speaking, the legislative enabling act violates the principle of separation of
the powers in the state or the principle of national sovereignty as, by
empowering the government to adopt laws, it gives an unjustifiable „importance” as regards to the manifestation of the three authorities by
switching the focus that balances the manifestation of any state’s legislation.

The legislative enabling act has manifested itself since the 19th
century in Europe. In this regard, we bring as a proof the French
Constitution from 1975 that stated that the president of the republic had the
power of lawmaking in certain domains based on these laws [2: p. 523]. In
spite of the fact that it had no solid background, the legislative enabling act
represented at that moment a controversial phenomenon that instituted the
freedom of movement of the political class. The social changes that followed
the Second World War allowed the new constitutions to introduce this
phenomenon indirectly, either through a form of authorisation or through
the establishment of substitution competencies. Thus, the specific reason
that lead to the introduction of the „legislative enabling act” refers to the
technicization of the leadership processes and the foundation of some
legislative solutions that strictly apply to extreme conditions. From this point
of view, this led to establishing the derogation on the grounds that the
transfer, be it conditioned, of the legislative prerogative from the Parliament
to the Government constitutes a change of theoretical and political outlook
of the attitude towards the constitutional theories and texts, it is a beneficial
act during the political crisis situations.

II ASPECTS OF THE LEGISLATIVE ENABLING ACT IN THE
EUROPEAN CONSTITUTIONS

The terminology of the enabling act is backed up by consistent
resources. From this point of view, we can talk about the enabling act of
powers, authority or prerogatives [3: p. 295].
The Legislative Enabling Act within the Constitutional Framework

This fact is justified by the existence of the enabling act in the presentday French constitutional system as a practise of the laws issued between 1875 – 1958 which nowadays are known as ordinances. The system is generally used for the budget in France [4].

In regards to the above mentioned facts, we found a similar situation in the Constitution of Greece in article 44. Thus, under exceptional and extreme circumstances, the president of the republic may be able to suggest the Council of Ministers to decree acts that have a legislative value. These acts that are based on the ordinance of article 72 paragraph 1 of the Greek Constitution are approved by the Chamber of Deputies.

The delegation process is also to be found in the Constitution of Spain that states in article 82 that the Parliament, also known as Cortesurile Generale, can authorize the Government through a framework law, an normative act with a law decisional power. According to the Constitution of Spain, the Government can also adopt a decree in case of „extraordinary and urgent matter.” In this regard, we emphasize the fact that the Constitution of Spain comprises at least 5 articles that support the regulation regarding the legislative enabling act.

Thus, we refer to article 82 that states the fact that the Parliament can empower the Government to issue norms or laws that refer to the issue of those statutory orders. Moreover, the constitutional text also states the very issue for which the norm was issued.

- Article 83 stipulates the fact that the framework laws cannot by any means: a) authorize the change of the framework law itself; b) authorize the endorsement of retroactive norms.

- Article 84 – in the event the law or the amendment is contrary to an existing legislative enabling act, the Government is qualified to oppose to its putting into practice. Thus, this aspect clarifies the circumstance in which a total or partial abrogation regarding the delegation law can be put into practice.

- Article 85 stipulates the fact that „the Government’s provisions that are the object of the legislative delegation are known as decree laws.”

- Article 86 refers to the situations regarding the extraordinary and urgent necessity during which the Government can issue legal provisions of the decree laws that cannot influence the organization of the state’s main institutions or certain rights or liberties of the citizens.

There is an eloquent resemblance between the Constitution of Spain and the Constitution of Portugal where the Parliament or the Republic’s
Assembly is qualified, according to article 165 paragraph 2 and 3, to abilitate the Government to issue laws.

Being thus empowered with a real legislative ability, the Portuguese Government can adopt decree laws in those domains that are not under the competency of the Republic’s Assembly [5]. The legislative enabling act is also part of Italy’s Constitution which, in article 76, stipulates the fact that exercising the legislative function cannot be given to the government unless the guiding delegation principles and criteria were previously established for a limited amount of time and based on clear objectives.

The Italian Constitution states in article 77 paragraph 2 that in case of extreme necessity and emergency, the government is fully responsible for taking provisional measures that act as laws. In this respect, the government has the obligation to present the Chambers these changes in the law. The Italian law of 1926, that reflects the possibility of the executive power to emit judicial norms, provides as an example the provision that states that through the ordinances the norms that become laws can be issued only when the Government is comissioned in this respect [6: p. 1283].

Another example of legislative enabling act is represented by the German constitutional system where the beneficiaries can be the Federal Government, a federal ministry or the lands’ governments. Their competency establishes the contents, the scope and the boundaries of the ability, whereas the act that confers this ability is represented by the prescribed provision. Also from this point of view, the Austrian Constitution in article 18 paragraph 1, indirectly states that the legislative enabling act is regulated in the benefit of the federal president.

As a result, we conclude that the legislative enabling act is a pretty popular phenomenon that refer to auxiliary measures in order to implement a coherent and unitary legislative process within the process of exercising the power.

The enabling act must be regarded in the present day constitutional context as an act of extending exercising the authority, a pliant technique in which the authorities other than the parliament are to decide on the text of the law by checking its effect beforehand. The justification of the legislative enabling act through a constitutional framework provides a certain degree of importance both to the administrative institution and to the issued legal document.
III. THE PHENOMENON OF THE LEGISLATIVE ENABLING ACT REGULATED IN THE ROMANIAN CONSTITUTION

The institution of legislative delegation is stipulated by the Romanian Constitution through the provisions of article 115. In a nutshell, it stands for a transfer of certain legislative attributes to the authorities of the executive power on the basis of an act of will of the Parliament or legally in extraordinary circumstances [7: pp. 45-46].

Both from the point of view of its evolution and a constitutional acknowledgement, the legislative enabling act stands out through its exceptional status. The Parliament as „the country’s representative supreme body of legislative authority” has the full capacity of promulgation of laws [article 61 paragraph (1) from the Constitution]. As for the Government, its fundamental role is, „based on its governance program that was agreed to by the Parliament”, to ensure „the putting into practice of the country’s internal and foreign affairs politics” and to put into practice „the general management of the public administration.” [article 102 paragraph (1) in Constitution] [7].

In regards to the constitutional legislative enabling act that is mentioned in article 115, one can talk about a real framework through which the Parliament has such a right to enable the executive, namely the Government, to issue „decrees in fields of activity that are not at the basis of the organic laws.”

Article 115 from the Romanian Constitution stipulates the existence of two types of norms through which the executive branch of the government is able to fulfil the legislative enabling act such as:

- the simple dispositions that can be issued on the basis of the empowerment law, thus based on a legislative enabling act issued by the legislator [article 115 paragraph (1)]. If it is required by the empowerment law, they are to be approved by the Parliament up to the end of the empowerment term [article 115 paragraph (3)];

- the emergency legislations [article 115 paragraph (4)] in which the legislative enabling act is stipulated by the Constitution itself are approved by the Parliament².

² According to article 115 paragraph 5 “The emergency legislation comes into being only after its proposal for debate as an emergency procedure in the appointed Chambers and after its publishing in Romania’s Official Registrar. Both Chambers, if not in session, are mandatory gathered in five days after its deposition or after its remittance. If during 30 days after the deposition the notified Chamber does not passes the ordinance, this is considered...
The delegation is legitimate and continues to function only if the Government obeys the conditioning and the constitutional boundaries. The documents that testify the fact that the Government acts as a law maker are represented by the simple dispositions whereas the constitutional text mainly emphasizes the boundaries for the emergency legislations.

It comes out that the reference constitutional text establishes a series of boundaries regarding the promulgation of the decrees. The emergency legislations are endorsed in extraordinary circumstances that require no delay, the government having the obligation to motivate the emergency in their text [article 115 paragraph (4) of the Constitution]. They are not to be endorsed as part of the field of the constitutional laws. They are not to affect the functioning of the state’s main institutions, the rights, liberties and duties stipulated in the Constitution, the right to vote and are not to refer to the forced passage of goods in public property [article 115 paragraph (6) from the Constitution].

According to the text from the Constitution, the Government can endorse emergency legislations solely in exceptional situations whose settlement cannot be delayed. In this respect, the exceptional situation that requires the issue of a norm needs to be specified based on the existence of an emergency situation.

As regards to the definition of the „emergency situation” term, the constitutional text does not specify exactly the limits of this situation. A second aspect refers to the fact that the Constitution in its very essence, fails to specify the connotation of the term „extraordinary situation.” The Government, in this case, will be able to appreciate whether the conditions for such situation exist. Yet, in spite of the Government’s actions, the Parliament will always have the final option in case the executive has all the prerequisites to accede to the legislative activity.

According to professor C. Ionescu, the jurisprudence of the Constitutional Court stated the fact that the ordinances can be issued solely on the basis of an empowerement law, in other words as a result of a legislative enabling act granted by the lawmaker or, as a second option, they can be issued based on article 115 paragraph 4. In this case, the legislative enabling act is granted by the Constitution itself [3: p. 296].

The Constitutional Court decided that the emergency legislations are not a facet of the ordinance based on an empowerment law. They are a
constitutional measure that allow the Government, under the Parliament’s guidance, to have a say in exceptional circumstances. It is justified by the necessity and emergency of fixing a given fact which, due to its exceptional circumstances, calls for finding the immediate solutions in order to avoid the breach of the public interest.

From this point of view, the Constitutional Court decreeded that the emergency situation refers to an objective measurable situation which is independent of the Government’s will and which jeopardizes a public interest [8]. Moreover, from the point of view of the terminology used, the emergency situation also needs to be justified by taking into account the moment when the emergency legislation was released [9].

Based on the opinion of the researchers, the parliamentary legislative enabling act and the Government’s constitutional right to make use of pre-established legislative power during exceptional situations represent cases of legislative abnormality. This requires urgent special parliamentary debates on the Government ordinances in order to reinforce the role of the Parliament and its abilities.

We truly believe that the legislative enabling act stands for the situation when the Parliament takes a second position whereas the executive, thanks to the constitutional documents, acts as a substitute of the legislator.

**IV CONCLUSIONS**

As a phenomenon that is widely spread in the majority of the European constitutions, the legislative enabling act from the Parliament - as a legislator – to the Government – as an executive, is a procedure that measures in a high degree the ability of the executive to substitute the legislator.

Even though this legislative enabling act functions solely within a constitutional framework, one has to bear in mind those instances when the constitutional text is generous, indecisive and interpretative, lacking the interpretation of the terms. This fact gave the executive the chance to take advantage of the legislator’s substitute position.

One of the basic ideas of the principle of the separation of the powers within the state is based on the exclusive ability of each and every of the three powers in order to fulfil the duties of that particular power. Starting from the point of view that each and every power has its own domain, one has to admit that the exception to the rule, the possibility of...
enlarging the ability of a certain power is not accomplished detrimental to another one but on their mutual benefit in exercising the power.

**References**


