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JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF ROMANIA ON THE ADOPTION OF EMERGENCY ORDINANCES

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Abstract

Although executively, to the Government is conferred by art. 115 of the Constitution of Romania a series of legislative provisions. This justifies the issuance of emergency ordinances in the context of the need for the exercise of power. However, the principle of separation in the state is not affected by legislative delegation, but this phenomenon is necessary for the purpose of carrying out, by the Government, a more dynamic activity in terms of simplifying the procedures for approving the laws when necessary.
In this respect, the present paper aims at reporting some justifying elements demonstrating the necessity of the constitutional text of art. 115 of the Romanian Constitution.

Keywords:

Constitutional court, emergency ordinance, government, legislative delegation.

JEL Classification: K11, K10

I. INTRODUCTION

In order to be able to approach the constitutional text of art. 115 of the Romanian Constitution, which refers to the thesis on the legislative delegation, we must take into account the text of the law that comes as a preamble in the conduct of this issue.

Thus, art. 61 par. (1) of the Romanian Constitution provides *expressis verbis* the principle according to which Parliament is the only legislative

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authority of the country, which unequivocally indicates that the act of law making is the exclusive competence of the Parliament. This text indirectly signals two situations as regards Parliament's legislative monopoly, namely [1: p. 274]:

(1) An exceptional procedure for the substitution of Parliament in the issuance of primary regulatory acts (Art.115 of the Constitution);

(2) The decisions of the Constitutional Court declaring unconstitutional certain legal regulations [2: p. 131] (Article 147 of the Constitution).

Thus, in the present study, we will try to present the value of art. 115 of the Romanian Constitution in the context in which this text of the law enshrines the procedure of legislative delegation, procedure which is carried out through the present two types of acts through which the executive has the competence to carry out the legislative delegation, namely:

- the simple ordinances, "which can be issued only on the basis of a law of empowerment, therefore, following a legislative delegation granted by the legislator, paragraph (1) of this article, and the emergency ordinances, provided for in paragraph (4), where the legislative delegation is granted by the Constitution itself" [5].

The phenomenon of legislative delegation is defined in the constitutional literature by a "transfer of some legislative attributions to the authorities of the executive power through an act of Parliament's will or by constitutional means, in extraordinary situations" [1: p. 275].

This transfer of powers does not unbalance the separation of powers in the state, each power being dominated by a well-defined function, because it is realized on the basis of the will of the constitutive power, power which has expressly delegated some legislative powers to the executive by the constitutional text of art. 115 [3: p. 43]. In this respect, it is noteworthy that delegation of powers in the area of law making is delegated rather than legislative power / function [3: p. 45].

Although the plenitude of legislative competence rests with the Parliament, the Government's action to start the procedure for accessing legislative competence cannot take place without the legislator's consent, because he is the one who grants the investment vote for the Government program, therefore his fundamental role is that, "*In accordance with its governing program accepted by Parliament*", to ensure the "*realization of the domestic and foreign policy of the country*" and to exercise the "*general management of the public administration*" [art.102 paragraph (1) of the Constitution].

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As a fairly permissive procedure, the legislative delegation has proven to be more useful in the context of legislating the legislative texts by Parliament. From a statistical point of view, it can be seen that the ratio of the number of ordinances and emergency ordinances of the Government to the number of laws adopted in recent years reveals a clear excess of legislation in the field of legislative delegation.[3]

II. THE LEGAL NATURE OF THE EMERGENCY ORDINANCE

The specialized literature and the jurisprudence of the Constitutional Court are consistent with the legal nature of the emergency ordinances. Given the issue, emergency ordinances are considered as legal acts, but if we look at their issuer, we should consider them as administrative acts [4: p. 713]. According to art. 115 par. (5) and (7) of the Constitution, they must be subject to Parliament's approval by law. But by the time of law approval, the effects of such an ordinance are assimilated to the law, with the Government acting as a positive legislator [3: p. 162].

Thus, in the case-law of the Constitutional Court, it has been held that emergency ordinances have the power of law[4] and, therefore, may contain primary regulation rules.

Following the approval by law of the emergency ordinances, according to the provisions of art. 115 par. (7) of the Constitution, they "cease to be normative acts in their own right and become, as a result of the approval by the legislative authority, normative acts of a law, even if, for reasons of legislative technique, together with the law approval, preserve the identification elements assigned to their adoption by the Government" [6].

The jurisprudence of the Constitutional Court has once again underlined that emergency ordinances, although not qualified as laws, have the consequence of a law. Under the jurisprudential aspect, we note that the Emergency Ordinance contains primary regulatory rules, which have a legal force assimilated to the law; and after its approval by law, the legal rules contained therein are at the level of law.

[3] www.clr.ro-repertoriu legislative

[4] See, to that effect, by way of example, Decision no. 5 of January 16, 2001, published in the Official Gazette of Romania, Part I, no. 94 of February 23, 2001, Decision no. 173 of May 23, 2001, published in the Official Gazette of Romania, Part I, no. 500 of August 24, 2001, Decision no. 260 of September 25, 2001, published in the Official Gazette of Romania, Part I, no. 3 of January 7, 2002, Decision no. 46 of February 12, 2002, published in the Official Gazette of Romania, Part I, no. 218 of April 1, 2002, Decision no. 258 of March 14, 2006, published in the Official Gazette of Romania, Part I, no. 341 of April 17, 2006.

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III. EXPRESS CONSTITUTIONAL DIMENSIONS PROVIDING THE ADOPTION OF EMERGENCY ORDINANCES

As stated in art. 115 paragraph (4) of the Constitution of Romania, "The Government may adopt emergency ordinances only in extraordinary situations, the regulation of which cannot be postponed, having the obligation to motivate the urgency within them". From the presentation of the constitutional text, we need to clarify the phrase "extraordinary situation".

The idea that the legislator sees through this phrase leads to an objective state, independent of the Government's will, which suggests the existence of a public danger, the lack of necessary regulation can degenerate into undesirable aspects of the governance process.

By Decision no. 15 of January 25, 2000[5], the Court considered that "the possibility for the Government, in exceptional cases, to adopt emergency ordinances, even in the field reserved for organic law, cannot be equated with a discretionary right of the Government, moreover, this constitutional empowerment cannot justify abuse in issuing emergency ordinances. The possibility of the executive to govern by emergency ordinances must in each case be justified by the existence of exceptional situations requiring the adoption of urgent regulations"[6].

Also in relation to this phrase, the Court held that it is defined in relation to the "necessity and urgency of regulating a situation which, because of its exceptional circumstances, requires the adoption of immediate solutions in order to avoid serious prejudice to the public interest"; "The public interest hurt by the abnormal and excessive nature of the exceptional cases justifies the intervention of the Government through the emergency ordinance [...]" [7].

In summing up, the jurisprudence on the phrases used by the constituent legislator, it can be noted that the Court held that "for the issuance of an emergency ordinance it is necessary to have an objective,

[5] Published in the Official Gazette of Romania, Part I, no. 267 of June 14, 2000.

[6] The previous wording revision of the Constitution, former art. 114 par. (4) provided that the Government may adopt emergency ordinances in "exceptional cases". After the Constitution was revised in 2003, the phrase in question was replaced, the current text of Art. 115 par. (4) of the Constitution stipulating that emergency ordinances are adopted in "extraordinary situations", which expresses an even greater degree of deviation from the ordinary.

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quantifiable state independent of the Government's will that endangers a public interest." [8]

Moreover, the Court's case-law appreciates some formality of form by which the terminology of "Extraordinary situation" is identified as a defining segment in the matter of the application of art. 115 of the Romanian Constitution.

By Decision no. 255 of May 11, 2005[7], the Court has determined that the Government may adopt emergency ordinances under the following conditions, cumulated:

- The existence of an extraordinary situation;
- Its regulation cannot be postponed;
- The urgency should be motivated in the ordinance.

As we have previously said, the existence of an extraordinary situation is defined by the Court's statutes which signal the phrase as being "*the restriction of the field in which the Government can substitute the Parliament, adopting primary norms in consideration of reasons which it is sovereign to determine*" [9]. The extraordinary situations express a great degree of deviation from ordinary or common, impose the exception to the rule, the reinforced aspect and the addition of the phrase "*whose regulation cannot be postponed*".

Also, by Decision no. 258 of March 14, 2006[8], the Court held that "the absence or non-explanation of the urgency of regulating extraordinary situations, [...] is clearly a constitutional barrier to the adoption by the Government of an emergency ordinance in the sense indicated. To decide otherwise is to empty the provisions of art. 115 of the Constitution on the legislative delegation and to allow the Government to adopt as a matter of urgency the legislative normative acts at any time and - taking into account the fact that by an emergency ordinance it can be regulated in matters subject to the organic laws - in any field".

Thus, through the provisions of the Constitution and the Constitutional Court jurisprudence, the adoption of emergency ordinances must be in line with the observance of at least four essential limits, two of which are expressly provided for by the Constitution, and two implicit ones:

- The existence of extraordinary situations whose regulation cannot be postponed, the Government having the obligation to motivate the urgency in their content [art.115 par. (4) of the Constitution];

[7] Published in the Official Gazette of Romania, Part I, no. 511 of June 16, 2005.
[8] Published in the Official Gazette of Romania, Part I, no. 341 of April 17, 2006.

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- The prohibition of their adoption in the field of constitutional laws can not affect the regime of the fundamental institutions of the state, the rights, freedoms and duties provided by the Constitution, the electoral rights and cannot refer to measures of forced passage of some goods in public property [art.115 par. (6) of the Constitution];

- The prohibition to alter or counteract the will expressed by the Parliament through the adoption of a law, an obligation that derives from the provisions of art. 1 par. (4) and art. 61 par. (1) of the Constitution;

- The prohibition of confirming / resuming intrinsic or extrinsic unconstitutional legislative solutions by amending or supplementing acts, otherwise, the unconstitutionality striking also the successive confirmation act.

IV. CONCLUSIONS

The circumscriptions made by the Constitutional Court are necessary clarifications of the constitutional reference text and their observance is an obligation imposed by constitutional law.

In conclusion, we mention that both the Government and the Parliament must exercise vigilant monitoring over the conditions under which the emergency ordinances are adopted because "the defect of unconstitutionality of an ordinance or emergency ordinance issued by the Government cannot be covered by the approval by the Parliament of that ordinance. Consequently, the law approving an unconstitutional emergency ordinance is itself unconstitutional" [10].

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[5] Decision no. 34 of February 17, 1998, published in the Official Gazette of Romania, Part I, no. 88 of February 25, 1998.

[6] Decision no. 95 of February 8, 2006, published in the Official Gazette of Romania, Part I, no. 177 of February 23, 2006.

[7] Decision no. 65/1995, published in the Official Gazette of Romania, Part I, no.129 of June 28, 1995.

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[8] Decision no.14 / 2011, published in the Official Gazette of Romania, Part I, no. 266 of April 15, 2011.
[9] Decision no. 104 of January 20, 2009, published in the Official Gazette of Romania, Part I, no. 73 of February 6, 2009.
[10] Decision no. 584 of June 13, 2007, published in the Official Gazette of Romania, Part I, no. 457 of July 6, 2007.
[11] Decision no. 421 of May 9, 2007, published in the Official Gazette of Romania, Part I, no. 367 of May 30, 2007.

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