DIMENSIONS OF THE ASPECT OF "LEGISLATIVE AUTHORITY" OF THE EXECUTIVE BRANCH

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Abstract: *The legislative delegation, based on which the legislative powers are transferred from the Parliament to other state bodies, is an exception to the principle of the separation of powers. According to paragraph 1 of Article 115 of the Constitution, the Parliament may adopt a special law enabling the Government to issue (simple) ordinances in fields outside the scope of the organic laws. Thus, the Constitution grants that the Government - an organ of the executive power, under certain conditions, may be vested by the Parliament with attributions of the legislative function, specific to the Parliament. The prohibition of the Government to issue legislative acts in the field of organic laws only refers to the government ordinances issued under a special enabling law. Even knowing all these facts, given the ampleness of the phenomenon to which we refer in this paper, the foreign investors invoke the instability of the business laws in Romania, increased by the frequency of the emergency ordinances and lack of transparency of the local legislative process. In our case, through this paper, we limit ourselves only to covering certain dimensions of the aspect of the "legislative authority" of the Executive branch, consistent with the period following the accession of Romania to the EU, of which several years have been included in the post-crisis period.*
Keywords: *Government ordinances, emergency ordinances, separation of powers, the Constitution, the Parliament*

1. INTRODUCTION

The government of democratic countries is based on the separation of powers; the power (of the state) needs to be divided into different compartments with separate and independent powers and responsibilities. Ideas related to this aspect have existed since the antiquity (Aristotel, 1924), but their perfection was encountered in the works of Montesquieu (Deleanu, 2006; Stratan, 2008; Crăiuţu, 2013; Nedelcu, 2009). The normal formula implies the separation of these powers - legislative, judicial and executive - and also the fact that the related functions should not be held in the "same hand" (Locke, 1690; Montesquieu, 1748). By the transfer of these functions separately, to the parliament, government/ administration and independent judges, the power of the state maintains its balance through mutual checks; thus defending the citizens against any despotic actions of the state. In the case of Romania, also, the philosophical thesis under pinning the rule of law, states that the power, in order to avoid becoming a totalitarian regime, must be controlled by the power itself, by way of separation of powers; according to the principle of the separation of powers, there are three powers (UCV, 2013):

- the legislative power exercised by the Parliament;

- the executive power, belonging to the government and exercised together with the president of the state at the central level and together with the local public administration bodies at the local level;

- the judicial power, belonging to the courts of law, such as First Instance Courts, Tribunals, Courts of Appeal and the High Court of Cassation and Justice.

According to Article 61 of the Romanian Constitution, the Parliament (consisting of two chambers - the Chamber of Deputies and the Senate) is the sole legislative authority of the country, which adopts constitutional laws, organic laws and ordinary laws. The executive branch consists of those governmental institutions which aim to organize the execution of the laws, as well as to put them into effect (by issuing Government Decisions - GD). Also, as an effect of the legislative delegation, functioning according to the provisions of article 115 of the Constitution, the legislative powers can be transferred to the Government by an act of will of the Parliament or by constitutional means, in exceptional cases. As for the judicial power, it is vested in the courts upholding the law. The separation of the three powers (with no hierarchy among them) does not imply their isolation (Andrew, 2009), but their interdependence and mutual control. According to this principle (Deleanu, 2003; Ionescu, 2004; Iancu, 2008; Călinoiu & Duculescu, 2008) none of the three powers prevails over the other, is subordinate to another and assumes the specific prerogatives of the others.But what we want to achieve through this paper is an “up to date” approach of the “legislative authority” aspect of the Executive / Government, by virtue of the legislative delegation mentioned above with reference to the issue of a large number of Government Ordinances and Emergency Ordinances during the recent years. We also mention here that this topic has been the subject of research of several prestigious Romanian jurists (Deaconu, 2013; Pivniceru and Tudose, 2012; Safta, 2014; Karoly, 2009; Şaramet & Toma-Bianov, 2012; Pepine, 2014), their works being considered in the development of the present approach. This comes after we have previously referred, in connection with the subject, to the legislative activity of the Government, also by way of legislative delegation, only that in those papers (Bostan, 2014a-c) we have focused solely on those normative acts issued by the Executive in the economic and financial field.

2. THE ROMANIAN GOVERNMENT AS LEGISLATIVE AUTHORITY BY VIRTUE OF LEGISLATIVE DELEGATION. RECENT TRENDS

2.1. A look from the perspective of constitutional law

According to the provisions of Article 61 of the Romanian Constitution, the Parliament is the sole legislative authority of the country. However, as an exception to the principle of separation of powers, in the case of legislative delegation, the normative act is no longer issued by the legislature, but by the executive. Therefore, the Romanian Government as a collegial body of the executive power may adopt (Mărăcineanu, 2008): simple ordinances, under a special enabling law and emergency ordinances - in case of special circumstances, which both represent primary rules with the force of a law. Similarly, both of them represent a way to initiate a law, procedurally, the law being finalized by the legislature through a form of (1) approval of the Ordinance, (2) amending

and approving it or (3) rejection. The enabling by law of the Government by the Parliament to issue ordinances, is conducted according to Article 108 and Article 115 of the Constitution, stating as compulsory the establishment of the field - with the exclusion of the field of organic laws - and the date by which ordinances can be issued. By the same law, the Parliament reserves its right to approve such ordinances, according to the legislative procedure. It is worth mentioning the fact that the enabling act in question may refer to the periods of parliamentary recess (January 1st - 31st and July 1st - August 31st) as well as to the rest of the year, whereas (Deaconu, 2013): "no laws forbid the Parliament to empower the Government to issue ordinances while the Parliament is in session". Introducing in the context described here some aspects related to the control of (un)constitutionality, we reveal, first of all, that it falls under the competence of the Constitutional Court. The control refers to the ordinances or provisions of the ordinances, to the laws approving them as well as to the laws enabling the Government to issue simple ordinances, aiming to obey the limits set by the Constitution for the adoption of these acts. An analysis conducted by specialists in the field (Şaramet & Toma-Bianov, 2012) shows that in the case of (simple) ordinances, the Constitutional Court may declare them unconstitutional if they were adopted in the field of the organic laws or constitutional laws. Also, the Constitutional Court may declare the ordinances unconstitutional, if they were adopted by the Government in the absence of the prior adoption by the Parliament of the enabling law in this case or if the law was adopted and the ordinances refer to other fields than the ones expressly stated in the enabling law. In connection with the normative acts of the Executive, from the category of emergency ordinances, "the Constitutional Court has often had to assess whether the situation or circumstances invoked by the Government to support the adoption of the emergency ordinance(s) could have been considered as extraordinary and their regulation could not have been postponed, the urgency being motivated in the contents of the ordinance(s)" (Şaramet & Thomas-Bianov, 2012). According to the same authors, the consequences of declaring unconstitutional the provisions of the ordinances or laws of approval or approval with supplements and / or amendments assume that the Parliament or, where appropriate, the Government has to bring into line the unconstitutional provisions with the provisions of the Constitution within 45 days of the publication of the decision of the Constitutional Court in the Official Gazette of Romania. During that period, the provisions found to be unconstitutional shall be suspended de jure. Obviously, according to article 147 paragraph (1) of the Constitution of Romania (2003), in case of failure to be brought into line with the constitutional text, the provisions cease their legal effects.

2.2. Trends in the law-making process based on exceptions to the principle of separation of powers

Focusing on the legislative procedure based on delegation / substitution (Legislative-Executive), which is usually used in emergency situations when the ordinary or extraordinary legislative procedure cannot be applied, we notice that it has experienced an appreciable practicability during the recent years. Some specialists (Deaconu, 2013) in the context of the debate on the revision of the Constitution argue that it is necessary to restrict the number of ordinances issued by the Government, since during the last two

decades "the Parliament has become an annex of the Government and the legislating process was conducted by the Government rather than by the Parliament. The Parliament has lost its attribute of «sole legislative authority of the country» and became the one which approves the ordinances and emergency ordinances of the Government". With the argument that the situation can be considered to be acceptable for the years 1998-2006, the pre-adhesion period to the European Union of Romania, where a number of regulations at EU level had to be absorbed into the national legislation (Morariu, 2009), the same author argues that, however, "on many occasions, the legislative activity of the Government considerably exceeded that of the Parliament, which is «the sole legislative authority of the country»", exemplifying that only during the year 2000 the Government issued 138 ordinances and 300 emergency ordinances, while the Parliament adopted only 233 laws. Analyzing the same subject, two other authors - Mona Pivniceru and Marius Tudose (2011) - show that "there has occurred a substitution of the executive power in the activity of the legislative, taking advantage of the institution of legislative delegation introduced by article 115 of the Constitution by adopting emergency ordinances without going through any form of debate previously to their coming into force, thus amplifying the legislative instability as the majority of such ordinances are modified in less than a year following their adoption". The above mentioned authors have carried out the study referring to the period 2006-2011; they have also focused on the quantitative dimension, retaining that there had been adopted a number of 2080 laws, 225 Government ordinances and 863 Government Emergency Ordinances and a number of 1021 normative acts which amended previous normative acts (448 laws, 102 Government ordinances and 471 Government emergency ordinances); during the same period a number of 318 laws have been amended. All these allow the quoted authors to assert the concept of "normative inflation". Referring to this concept, they show that "it is likely to undermine the legal system, creating instability". In addition (also representing an alarm signal), the normative inflation, "in some fields, exceeds the national legal framework". Hence, the globalization of the economy multiplies the contacts with foreign enterprises, subject to other legal systems, prompting the dissemination of legal practices beyond the national territory, which can lead to conflicts involving various applicable rights and there are few general international regulations which can be applied to solve such conflicts. Also referring to certain parameters of the legislative process in question, using as a source the statistic studies conducted by the Chamber of Deputies (Parliament of Romania, 2004 ...) we show below, in Table 1, the evolution of the number of such normative acts issued during 10 years (2004-2013).

Table 1The evolution of the number of GO / GEO issued during 2004-2013

Year	GO	GEO
2004	94	142
2005	55	209
2006	64	136
2007	47	157
2008	28	229
2009	27	111
2010	29	131

2011	30	125
2012	26	95
2013	32	113

To form a more complete picture of the regulatory activity of the Executive of Romania, during the same period of time, we present in Chart 1 the evolution of the number of decisions issued by the Government.

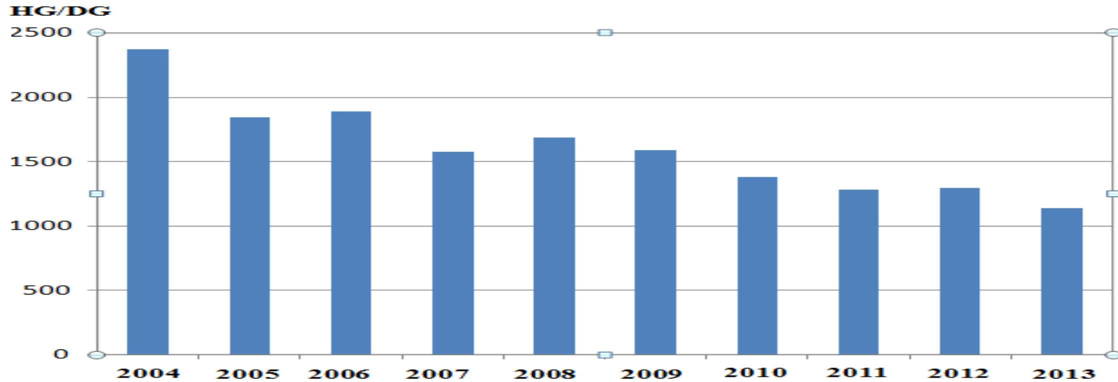

Chart 1 The evolution of the number of Government decisions issued during 2004-2013

What we want to highlight is that the data presented above show that the anti-crisis measures implemented by the Government by normative acts in its jurisdiction, did not represent by far a reason to amplify the total number of GO / EO, during the period that followed the major moment of the crisis - 2009 (Stoica & Capraru, 2012). Thus, we can notice that the annual number of GO evolved in a relatively constant manner - approx. 30 (2009-2013), the annual number of GEO was in the range of 110 / year, in contrast with the years of economical growth when the number of annual ordinances exceeded 200 (209 GEO in 2005, 229 GEO in 2008). Also, the number of Government decisions, decreased - approx. 1/3 - during the period that followed the major moment of the crisis: 1592 GD in 2009 and 1138 GD in 2013. In connection with the maintenance of the issue of Emergency ordinances to a high number (Pepine, 2014), the Venice Commission argued (2012) that "the problem is probably that the Constitution itself provides the motivation to appeal to emergency ordinances as they remain in force if the second chamber of the Parliament (the decisional chamber) does not explicitly reject the law on the correlative approval submitted by the Government. To maintain a Government emergency ordinance in force, the governmental majority of the Parliament simply has to delay the vote in both Chambers of the Parliament. Such a possibility almost encourages the abuse and may explain the high number of Government emergency ordinances issued in the past". On the other hand, the quoted author notes that in the context where an emergency ordinance can be appealed to the Constitutional Court exclusively by the Ombudsman, there should not be neglected, in the future, the solution consisting in the "ability of other institutional parties to make an appeal against an ordinance", which would lead to a decrease of the number of such normative acts. Also, "under the circumstances when the Government definitely needs

a faster regulatory procedure and as the Parliament always seems to act very slowly", the healthy solution is not represented by the adoption of a GO / GEO, but - with reference to the Constitution of France - to empower the Government with "the right to intervene more in setting the agenda of the Parliament". However, "the almost constant use of the Government emergency ordinances is not the most appropriate means" to the urgent adoption of certain regulations (Safta, 2014 - quoting from documents of the European Commission for Democracy through Law, which also retained such issues in the Opinion adopted at the 93rd Plenary Session, Venice, December 14th - 15th, 2012). So far, what is clear is that, beyond the fact that a large part of the legislative work of the Parliament is devoted to the adoption of laws of approval of the ordinances and emergency ordinances of the Government, we are dealing with the unpredictability and inscrutability of the law, as either some of the ordinances have been approved by the Parliament with great delay, or some ordinances have been rejected by the Parliament, the stable and coherent regulatory framework providing the citizens with predictable and foreseeable juridical relations seems to be a distant goal.

2.3. GO and GEO, only disadvantages?

In this section of our approach, beyond the benefits related to the efficiency of the regulatory system on which we stopped relatively broadly, we also reveal other aspects that we found to be important in the context of the addressed topic. Thus, the simple ordinances, in contrast to the emergency ordinances, form a category less appealing as they are subject to stricter rules: they can be adopted only during the parliamentary recess and only in the fields clearly defined by the MPs. Compared to the draft laws (regardless of the procedure used to pass them by the Parliament - simple, emergency or by assumption of responsibility), the emergency ordinances have two major advantages (Nicolae, 2014). The first refers to the moment of application, which occurs immediately after issuance (in other words, until the GEO gets to be debated and possibly amended in the Parliament, it produces effects, sometimes irreversible). Then, we should not overlook the fact that depending on the interests of the majority, some emergency ordinances get to be debated by the Parliament only after a long period following their issue. The second major advantage of emergency ordinances refers to the possibility of appeal to the Constitutional Court. In contrast with the bills which prior to be sent for promulgation (i.e., before coming into force) can be appealed by senators and deputies to the Constitutional Court, the emergency ordinances have a completely different regime; they may be appealed to the Constitutional Court only by the Ombudsman following their approval by the Government. If we refer to the areas in which most of the amendments occurred (at the level of July 2014: 1. the Fiscal Code - 15 GEO and 4 GO, 2. the law on Healthcare Reform - 11 GEO, 3. the law of National Education - 7 GEO, 4. the Election Code - 5 GEO, 5. the Law on Public Procurement - 4 GEO), they are, firstly, the areas of taxation, health and education, i.e. those that require stability, predictability and an extensive public debate previously to the amendment of their provisions. Strictly, referring to the amendments made to the Fiscal Code, we show that by Government emergency ordinance, the Government has introduced, for instance, the payment of social

contributions from the income obtained from rental or agricultural, forestry and fish farming activities (GEO no.88/2013), the new excise duties on oil and the special construction tax - the so-called pole tax (GEO no. 102/2013) and established the tax relief of the reinvested profit (GEO no.19/2014). The Fiscal Code has been amended after May 2012 by 15 emergency ordinances and 4 simple ordinances (issued during the parliamentary recess). In total, almost 370 provisions have been recalled, amended or newly adopted (Nicolae, 2014), although within the Fiscal Code, there is a provision (article 4) stating that "the Code shall be amended and supplemented only by law, promoted, as a rule, 6 months before the date of the entry into force of such law".

3. CONCLUSIONS

The almost constant use of the Government emergency ordinances is not the most adequate means to the urgent adoption of certain efficient regulations. The philosophical thesis underpinning the rule of law, states that the power, in order to avoid becoming a totalitarian one, must be controlled by the power itself, by way of separation of powers. Focusing on the legislative procedure based on delegation / substitution (Legislative-Executive), which is usually used in emergency situations when the ordinary or extraordinary legislative procedure cannot be applied, we notice that it has experienced an appreciable practicability during the recent years. In the context of the debates on the revision of the Constitution it is argued that it is necessary to restrict the number of ordinances issued by the Government, since during the last two decades "the Parliament has become an annex of the Government and the legislating process was conducted by the Government rather than by the Parliament". Taking into consideration the fact that an emergency ordinance can be appealed to the Constitutional Court exclusively by the Ombudsman, we agree upon the fact that there should not be neglected, in the future, the solution consisting in the "ability of other institutional parties to make an appeal against an ordinance", which would lead to a decrease of the number of such normative acts. In addition, this would certainty lead to the settlement of a stable and coherent regulatory framework providing the citizens with predictable and foreseeable juridical relations.

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