Conceptual Aspects of the Legislative Delegation within the Romanian Law and the Law of other States

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Abstract: The present paper represents a juridical and comparative study regarding the theoretical aspects of the legislative delegation, the dimensions of this concept, as provisioned by the Romanian constitutional provisions, of the Republic of Moldavia, and of other states. With regard to the concept of legislative delegation, it shapes a specific expressive form of relation between the Parliament and the Government as it is a living manifestation of the existent relations between the two major authorities of the state. The comparative analysis of this concept out of the perspective of several different legislations allowed the foundation of the collaborative and co-operative relation between the legislative and the executive authorities, as it is to be found under different forms of manifestation from one law to another.

Keywords: Constitution; legislative function; concept of legislative delegation; process of legislative delegation

1. Introduction

As the fundamental law of the state, the Romanian Constitution[2] not only contains norms regarding the organization of the state, but also rules regarding the legislative procedure of the state. In this way, article 73, line 1 of the Constitution provisions that the Parliament as "the unique legislative authority of the state" brings under regulation organic and ordinary constitutional laws.

The same as in Romania, although the constitutional norms of several states also provide that the Parliament is the depository of the sovereign authority of the people

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[2] The Romanian Constitution as it was modified and completed by Law of revision of the Romanian Contitution no. 429/2003, published in the Official Journal no. 767 of October, 31st 2003, was adopted on the 29th of October 2003.

AUDA, vol. 9, no. 2/2017, pp. 60-72

and the instrument by which the nation invest their representatives with the ability to legislate by means of the vote, there are cases when the Parliament cannot react timely and appropriately in order to control the new social relations.

In order to eliminate the disparity between the inertia of the legislative organ and the dynamic of the social life, under the constitutional norms, the parliaments of certain states transfer their empowerment to the subjects of the executive authority with the help of the **institution of the legislative delegation**, by assuring the operability of solving the stringent issues.

Although some authors regard this institution as a necessary mechanism meant to ensure the expediency in certain cases, the constitutional provision has not remained without critics, as it offered the possibility of being contested in front of the Constitutional Court in case of situations that did not request the exigency regarding the existence of some extraordinary situation, able to bring forth the adopting of an emergency ordinance. In this way, the organ that was appealed to considered that by "*the legislative delegation a limitation of the parliamentary monopoly in what regards the legislation… but which finds a unanimously accepted justification that originates in the principle of the separations and that of the co-operation among the auhtorities of the state*".[1]

By taking into consideration those exposed above, we can define the concept of legislative delegation in the following way: the legislative delegation represents, according to the constitutional provisions, the empowerment of the executive authority in bringing under regulation of the primary juridical relations that regard the sphere of competence of the Parliament when it comes to adopting normative acts having a juridical influence that is equal to that of the law, under the special law of abilitation (under certain circumstances, for a limited period of time) or in its absence.

[1] The decision of the Constitutional Court no. 1438/2010 regarding the rejection of the exception of no constitutional character of the provisions of the article 17, letter c) of the Law no. 78/2000 for the prevention, discovery, and the punishment of the acts of corruption, as well as of the provisions of the Emergency Ordinance of the Government no. 124/2005 regarding the modification and the completion of Law no. 78/2000 for the prevention, discovery, and the punishment of the acts of corruption, published in the Romanian Official Journal.
Enacted since January 7th 2011, and consulted at http://legislatie.just.ro/Public/DetaliiDocument/125090, site accessed in September 2017.

2. The Etymology and the Concept of Legislative Delegation

Both contextually and conceptually, the institution of legislative delegation is expressed in very different terms, from one state entity to another. We shall approach this concept in a comparative way, by referring to the Russian law, that of the Republic of Moldavia, and that of Romania, and by making reference to other European states, as well.

According to the doctrine, "the delegation (from the Latin delego, delegare=to attribute, ascribe) was known as to make certain mandates incumbent from their keeper of right (as the one who delegates somebody else) on the delegate or the person who receives these empowerments. Within the public law in Antiquity, the delegation did not have a consensual character, but it presupposed the mandatory adopting of a special law (*imperium lex curiata de jurisdiction*) that confirmed the act of delegation.

He who delegated had the right to control the accomplishment of the mandates he ascribed to the delegate. The keeper of the forwarded empowerments could not delegate another in one's turn further on, according to the rule that *delegatus non potest delegare.* (Bartoşec, 1989, pp. 147; 288, pp.16-21, pp. 32-33)

It is considered that the Government can adopt normative acts having a juridical power equal to that of the law only in the cases when this thing is expressly allowed by law. According to the official theory, such an authorization is considered to be the delegation of some legal mandates from the Parliament towards the Government, and therefore the normative acts of the Government are named here *delegate legislation.* (Arseni, Ivanov & Suholitco, 2003, p. 166)

According to the Russian Encyclopedic Dictionary[1], the delegate legislation represents the normative acts of the organs of the executive authority, usually of the Government, adopted according to some special delegation (empowerment) of the Parliament regarding issues within its area of competence, as they are emitted as a result of delegation, the normative acts gain the juridical authority of the law. The delegation of the Government (the head of the state) of the right to create laws is usually associated with the necessity of efficiently solving some issue.

Therefore, according to the Great Russian Encyclopedia the delegate legislation[2] represents the adopting of some of the mandates of the Parliament, of the normative

[1] At https://translate.yandex.ru/?utm_source=slovari, link accessed in September 2017.
[2] At http://www.bse.sci-lib.com/article022352.html, link accessed in September 2017.

acts having a juridical power equal to that of the law by the governments of the bourgeois countries. Unlike the common activity of the Government to bring laws under regulation, by legislative delegation the Parliament assigns its legal empowerments in the interest of the Government. The act of legislative delegation is emitted only for the issues within the exclusive competence of the Parliament.

From another point of view, the delegate legislation refers to "the normative acts that have a juridical power equal to that of the law, adopted by the Government by empowering by the Parliament within the process of delegation from the parliament to the Government of certain legislative attributions. The delegation of the legislative attributions can be done by adopting the appropriate law by the Parliament; the appropriate law regards the abilitation of the Government in order to be able to emit under delegation legislative acts on concrete issues during a determinate period of time".[1]

The old and contemporary Russian literature considers the process of redistributing the legislative authority as delegate legislation and names it as such, and the adopting by the Government of the normative acts having a juridical power similar to that of the law is called the delegate legislative creation on the basis of the delegation of some of its exclusive legislative mandates from the Parliament to the Government. (The Great Russian Encyclopedia, 1972, pp. 214; 303, 84; 289, 73)

In Professor Mişin A.A.'s opinion, the constitutional voluntary or involuntary bourgeois right cannot be an argument for the adopting of the laws by the Government because there is a huge number of terms that designate the legislative delegation: "It is enough to mention that the Western literature in order to refer to "legislative delegation" uses terms such as "governmental legislation", "subordinate legislation", "administrative legislation", "presidential legislation", "legislation of the executive authority", "edited right", "administrative right", and a series of other similar terms". (1972, p. 125)

Professor Iurie M. Tihomirov mentions that during the ex-Soviet period the delegation of the empowerments was not used, but they would proceed in their usual style of governing based on authoritarian administrative methods. The republican organs offered a series of empowerments to the regional, local and municipal organs, then the "inversed restitution" took place. (1995, p. 32) It is only natural as in the ex-Soviet Union the system based on the separation of the authorities did not exist

[1] http://www.gumer.info/bibliotek_ Buks/Pravo/Termins/term_2.php.

(meaning that the principle of the separation of the authorities was not desirable), respectively the adopting of a law regarding the delegation of the legislative mandates was not necessary at the time.

The juridical doctrine in our country defines the institution of the legislative delegation as being a "*transfer of legal attributions towards the authorities of the executive authority through an act of will of the Parliament or through constitutional means in extraordinary cases*". (Vida, 2006, p. 275)

The Explicative Dictionary of the Romanian Language (DEX) (1995, p. 273) mentions that "to delegate" means to "transfer the right to act as a representative to some other person or institution" or to "charge somebody for a limited period of time with the execution, surveillance, or the organizing of some work", and its etymology originated in French and Latin ("fr. déléguer, lat. delegare"). The delegation as a technical procedure for such a transfer is frequently used within the sphere of the administrative relations, inclusively as long as competition is involved; but competititon appears pretty rarely within the constitutional relations; and when it finally is applied, the fundamental rule of the delegation always remains the same: the necessity of an abilitation.

The institution of the legislative delegation is regulated in Romania within article 115 of the Constitution. The same article 115 of the Constitution establishes two types of acts by which the executive has the competence to accomplish the legislative delegation, namely the common ordinances that can be only emitted under some abilitation law, and as a consequence of some legislative delegation given by the legislator, as provisioned in line (1) of the present article, and the emergency ordinances, as provisioned in line (4) when the legislative delegation is given by the Constitution itself.

3. Prerogatives of the Legislative Delegation

The legislative activity always requires for operability, profound knowledge of the everyday life, and the possibilities of the right, the respect for the generally human values and for the ethical and moral norms, the aptitude to use the means, the procedures, and the forms of the juridical regulation, abilities in the legislative technique etc.

According to Professors Muraru I. and Constantinescu M., the legislative delegation is interpreted by some sources as being an activity while some other authors

determine this institution by the totality of the acts of the executive authority, adopted under decree, and which have the authority of the law. (2000, pp. 5-7) We believe that both approaches can be considered, and this double interpretation gives birth to the two main notions of legislative delegation and respectively of delegated legislation.

In our opinion, for the Republic of Moldavia and Romania the expression "legislative delegation" is suitable as it is provisioned by the Constitutions of both states, and which reflects the significance that it has within the legislation of these states, as it represents the process of initializing and adopting of the acts of the legislative delegation, which as a whole mean, in their turn, the delegated legislation. (Balmus & Lungeanu, 2009, p. 10)

So we cannot admit as legislative delegation the cases when the delegation is assimilated to the legislative creation done by the subordinate organs on the basis of the empowerments given to them not only by the Parliament, but by other representative organs, as well. Within the title of legislative delegation we may enumerate the legislations of the states of the USA, the laws of the provinces of Canada, the supreme legislative organs of the subjects of the Russian Federation etc. (Hogg, 1997, p. 284) The Government, the president, and any other such organs or official persons can be subordinate organs.

It is undeniable that to legislate (emit laws) remains the main empowerment of the Parliament and the most important of the three main functions of the state. In the opinion of Professors Muraru I. and Tănăsescu S., "the legislative function means the editing of juridical norms that are mandatory for the executive, and in case of litigations also for the juridical authority. We shall notice yet that the law has two main meanings of which both are correctly and often used. One larger meaning as a normative juridical act and a narrow meaning as an act of the Parliament. In order to correctly understand the legislative function, we have to mention that we refer to the narrow meaning of the concept of law, meaning a normative juridical act of the Parliament. Within this meaning, the adopting of the laws belongs exclusively to the Parliament. As such, from this perspective, we have to also interpret article 61 (1) of the Romanian Constitution, according to which the Parliament is the only legislative authority of the country". (2011, pp. 451-452)

Apparently, we might say that the legislative function belongs exclusively to the Parliament; the more such as The Constitution of the Republic of Moldavia confirms this truth by the content of article 60 that affirms that the Parliament is the supreme

representative organ of the people of the Republic of Moldavia and the only legislative authority of the state. These attributions are fully part of the legislative authority and they are conferred to the head of the state (the promulgation of laws – article 93 of the Constitution; the right to legislative initiative – article 73 of the Constitution) and to the Government. (the legislative delegation) (Guceac, 2003, p. 45)

So, although the exercising of the legislative function belongs theoretically only to the Parliament, that carries it out by itself, in reality it delegates this function or only some of its aspects to the executive, to the voters (through referendum), or to the parliamentary commissions.

It is evident that the legislative function of the state "appears as a direct manifestation of the sovereignty of the people", accomplished by the Parliament. "The sole legislative authority of the country"[1] by editing general, impersonal, mandatory juridical norms that are susceptible to be sanctioned in case of their breaking by the authority of constraint that it was invested with. The difference between the legislative function and other functions of the state is demonstrated by the fact that the former has a primary character, and as a consequence the rules having a general character that are adopted by law express the will of the supreme representative organ, having a juridical authority superior to that of other normative juridical acts.

The notion of "legislative delegation" is interpreted in different ways and the issue of the acceptability of the delegation of the legislative empowerments is solved differently by different constitutions. According to the provisions of the Romanian Constitution, it can be noticed that the legislative delegation can become effective in three situations:

- the legislative delegation towards the Government by means of some law of abilitation;
- the constitutional legislative delegation on the basis of which the Government can proceed to primarily bring under regulation certain social relations, in extraordinary situations;
- the legislative delegation that works under the constitutional provisions in the favor of the head of the state, in cases of siege or in the state of emergency or when partially or general declaring the mobilization of the army, or in case of war.

[1] Article 61 of the Romanian Constitution.

According to Professors Muraru I. and Constantinescu M., “since the ordinance is a normative act, it is the result of some legislative delegation. We shall notice however that at least two aspects impose themselves: a) what is delegated is not the legislative function, but the mandates within the legislative field; b) a clear distinction between the legislative function of the Parliament and all its other functions, as they were previously identified, needs to be made. The distinction is not without big theoretical and practical implications. If more of the Parliament’s attributions are realized by adopting laws, it does not mean that their exercising can be delegated in all of the situations only because the legislative delegation is admitted. In other words, it is possible, in the case when the attribution cannot be delegated, that neither can the way of realization for the respective attribution by adopting some law be delegated”. (Muraru & Constantinescu, 2000, p. 45)

We endorse this interpretation according to which the legislative delegation is not an extension of the competence of the Government to emit ordinances by some law of abilitation, but, as Professor Vida I. also mentions, it represents a transfer of legal attributions within the restrictive conditions provisioned by the Constitution. (1999, pp. 133-134)

In the opinion of Professor Ion Deleanu the legislative delegation “means the empowerment for a limited period of time of another authority than the legislative one in order to exercise legislative prerogatives” (2006, p. 326), and Professor Ioan Vida considers with the same meaning that the legislative delegation represents a way of intervention of the executive authority for the regulation of certain social relations, determined by the appearance of certain circumstances when the legislative authority is in the impossibility of bringing under regulation in due time an issue brought forth for legislation.

The abilitation of the executive authority by the Parliament in order to legislate on its behalf is controversial and provokes string disputes within the contemporary writing or discussions regarding law, especially on the difficulties to establish the particularities of the ordinance.

Within the present context, we may identify several main particularities of the legislative delegation:

- the Parliament itself has to authorize another organ to emit laws on its behalf;
- this empowered organ has to belong to the executive sphere;

- different states introduce the institution of the legislative delegation within the constitutional field either by introducing the provisions regarding this within the constitution or by adopting the laws regarding the delegation of the legislative empowerments. Depending on the form of introducing the norms regarding the legislative delegation within the constitution and its utilizing in practice, we can distinguish the following groups of states where: the constitution includes norms regarding the legislative delegation and the institution is applied in practice (the majority of the European states, including Italy, Spain, France, Croatia, The Republic of Moldavia, Romania etc.); the institution is established by the constitution, but it is not practically applied; the constitution does not contain any norm regarding the legislative delegation, but it is largely used in practice (Sweden, Denmark, Belgium, Australia, Switzerland etc., the countries with unwritten constitutions); the institution does not exist in practice and the researches consider that the chances for its introduction within the constitution are significantly reduced (Bulgaria).

The level of concretization and precision of the provisions regarding the legislative delegation is different, but their existence represents an evidently significant particularity of the European constitutionalism. These constitutional provisions represent the basis of the legislative regulation of the activities of the subjects of the legislative delegation.

Therefore, line 1 of article 82 of the Spanish Constitution of 1978 provisions that Las Cortes Generales can delegate towards the Government certain empowerments regarding the adopting of the normative acts having a juridical authority that equals that of the law in different social domains, except those that refer to the fundamental rights and freedoms.

The Constitution of Holland enumerates the domains that have to be regulated by law and the domains that do not support legislative delegation. The legislative empowerments can be delegated for any other domains provided that by some law of abilitation the conditions to be respected by the Government, including the obligation to present to the Parliament as soon as possible a project of law for the approval of the act of legislative delegation, should be established.

The French Constitution puts an end to the wrong conception, widely spread, that the legislative delegation should somehow be no constitutional, in order to accomplish its program of governing; the executive authority can require the Parliament to give it the authority to emit ordinances for limited periods of time.

These ordinances are situated within the sphere of regulation of the laws and they are brought to regulation and adopted by being published, but they become null if a project of law for their confirmation is not firstly introduced to the Parliament if it asks this before the date established by the law of empowerment.

The constitutions of Denmark, Belgium and Norway do not contain concrete provisions regarding the delegation of the legislative empowerment, but it appeared within the public practice with the purpose of re-establishing the economy, that was destroyed during the war, as soon as possible. So by the law of 09.04.1940 the Storting of Norway delegated the entire legislative authority to the Government until the next legislation: "the Storting empowers the Government until the moment when the Government and the head of the Storting will agree on a convocation of the Storting for an ordinary session in order to protect the interests of the state, adopt decisions, and give empowerments on behalf of the Storting and the Government that can be necessary in order to ensure the security and the future of the country". (Isaev, 2001, p. 25)

In this way, the Constitution of Denmark stipulates that the king is entitled in case of extraordinary situations, when the Parliament cannot reunite, to adopt temporary laws provided that these laws should not interfere with the constitutional provisions and that they should be given to the Parliament immediately, as soon as it gathers for their approval or avoidance.

In Switzerland, the legislative delegation is not justified by constitutional provisions, but although the federal Constitution of the Swiss confederation does not expressly refer to the legislative delegation of authority, it is considered to be legitimate under situations of emergency and necessity; if the legislative delegation is executed by law, the latter can be submitted to referendum for public approval.

In Belgium it is possible, under exceptional situations, to promulgate a series of laws known as "special powers" or "exceptional powers" by which the head of the state is conferred the right to emit measures that normally enter within the sphere of the legislative authority. Although the Belgian Constitution does not expressly provision anything regarding this issue, yet article 33 of the Constitution stipulates that the authority is exercised as the Constitution establishes, and the fact that by this kind of laws of empowerment both the objective of the legislative delegation and the durability and its validity are determined. The already mentioned norm infers the general forbiddance to delegate empowerments, but one being obliged to admit that, regarding the legislative empowerments, this forbiddance is not practically

respected. F. Perin mentions the bizarre character of the delegation of empowerments in Belgium from the point of view of the conformity of the constitution, yet he accepts that it is unavoidable. (Perin, 1967, p. 270)

The Romanian Constitution admits that the Government can adopt emergency ordinances under exceptional circumstances, and they are brought under regulation only after the Parliament has approved them. Anyway, by the law of abilitation the parliament strictly establishes the conditions under which the Government can be given legislative prerogatives. In this case, in the absence of a pre-established systematic legislative domain, Professor Ion Deleanu considers that within our system the legislative delegation is justified only in two circumstances (2006): a) if the domain for which the delegation was approved is expressly governed by the law; b) if a regulation by law has already been brought within the respective domain of delegation.

So, only certain prerogatives can be transferred to the executive authority, for a limited period of time and under the strictly defined control of the Parliament. This transfer, under its formal aspect, can be hidden behind some constitutional or legislative competence given to the Government in order to emit ordinances. But in reality the Parliament has its own legislative competence, the right to control the legislative delegation, and it can primarily bring under regulation any type of social relation.

4. Conclusions

By taking into consideration the nature of the economic, social, and political problems that have to be solved, the parliaments of many countries admit that sometimes they are unable to accomplish their legislative function as it was initially conceived. The generalization of the constitutions of the world states demonstrates that the structure of the institution of legislative delegation is composed of different norms that make up its different elements: provisions regarding subjects, scopes, conditions, forms and methods of delegation, the exercise of control.

We can speak of legislative delegation only if the executive authority is empowered to emit acts that have a juridical power that equals that of the law from the sphere of competency of the Parliament by constitution and by some special law of abilitation of the Parliament or in its absence.

Only apparently, the interference of the executive authority within the legislative domain is an institutional substitution that departs from the rational arguments of a political system based on the principle of separation and the harmony of the three authorities of the state, as well as on a written constitution that provisions that the Parliament is the only legislative authority.

In fact, the interference of the Government within the legislative domain by means of ordinances is nothing else but a substitution of attributions between the Parliament and the Government, the latter taking the place of the former, under certain circumstances and for a limited period of time, under the strict parliamentary control.

The legislative delegation does not depart from the principle that forbids the delegation within the public law either, as only the under delegation is forbidden. So the temporary and conditioned transfer of certain legislative attributions towards the executive authority is a way for the collaboration of the three authorities of the state which, historically speaking proved to be beneficial as long as its use did not turn into abuse.

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