Shortcomings of lawmaking process in Romania. Their influence on the rule of law[1]

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Abstract

The study aims to analyze the main shortcomings that are found in lawmaking process in Romania. It will be structured in four sections, in which will be addressed, in succession, the requirements drawn from constitutional regulations in matters of lawmaking process in Romania, then the rules and principles drawn from the legislation of rules regarding the legislative technique. Further, reporting to the ideas expressed in the first two sections, there will be highlighted the worst shortcomings, by the content and consequences, and in the last part of the study will be revealed the negative effects they produce in the rule of law and, implicitly, on businesses environment. Also, there will be outlined several possible solutions and recommendations that should be considered in the future.

Keywords: *lawmaking, constitutional rules, legal principles, shortcomings, rule of law, effects, business environment, law, types of law, legislative technique*.

JEL Classification: K10

1. Constitutional rules in matters of regulation

The Romanian Constitution, revised[4] and republished[5] states the Parliament as being *the sole legislative authority of the country* [6]. This component of its statute complements the first one mentioned by the constitutional text, namely *the supreme representative body of the Romanian people*.

Both components must be explained by dialectics and their connection, one deriving from the other and supporting it, equally, the other.

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[4] The Romanian Constitution was revised by Law no.429 / 2003, published in the Official Journal of Romania, Part I, no. 758 of 29 October 2003/

[5] Republication was made in the Official Journal of Romania, Part I, no. 767 of 31 October 2003.

[6] By art. 61 that "*(1) Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country*".

In our view, relative to those expressed by the late professor Antonie Iorgovan[7], the quality of *single legislative authority of the country* of the Parliament generates the following main effects:

a) Parliament is, within the institutional framework established by the current fundamental law of the country, the only public authority under whose jurisdiction falls the adoption of legal acts called ***laws***, as they are covered by Article 73 of the Constitution, in relation to Articles 74 and 78 of it[8].

Law is, in our opinion, in the strict sense of the word, **the normative act adopted by the Parliament in the development of constitutional norms and principles enshrined therein, which regulates essential social relations for the organization and functioning of the state and the population communities' existence placed in its territorial limits;**

b) the second sentence, drawn from the alleged constitutional rules, aimes **their collating them with the rules on legislative delegation,** according to that the Government is authorized to adopt ordinances with the legal force of law called ***ordinances.*** They may have the legal force of **ordinary law**, respectively **simple ordinances**, or of both categories of law, organics and ordinaries, if we refer to **emergency ordinances;**

c) from the same corroboration follows the conclusion that the procedure for the adoption of legal acts with the force of law, that Government has, must be exercised in a way that not to affect the unique role of legislative body that Parliament has. We note so that the constituent legislator was extremely **careful** aiming, on the one hand, **to adapt to the current constitutionalism**, which in most states, gives powers to legislate also to the governments, by virtue of their role to achieve foreign and national policy of the country, but, *on the other hand* to keep the uniqueness in the field of regulation. In this regard, it provided that **the regulatory limits for simple ordinances are set by the enabling law** and are circumscribed **to the ordinary laws**. Regarding the emergency ordinances, for which is no longer necessary an enabling law, the doctrine stating that **their adoption is legitimized by empowering by constitutional status,** and in their case, **the Parliament retains the uniqueness and supremacy in matters of regulation**, given that **they are always subject to Parliament's approval, can not enter into force until they have been submitted to Parliament for approval**, and obviously having been published in the Official Journal, *sine qua-non* condition for the act to exist.

Moreover, the caution of the constituent has gone so far that, in 2003, finding that the slidings from the regime of the emergency ordinance as was enshrined in the first draft of the basic law, has consecrated in 2003 some **limitations,** respectively **restrictions** and **prohibitions** for Government to adopt this type of ordinances[9];

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[7] Antonie Iorgovan, *Tratat de drept administrativ*, vol I, 4th ed., Bucharest, 2005, pp. 406-417.
[8] Dana Apostol Tofan, *Drept administrativ*, vol. 1., 3rd ed. , Bucharest, 2015, p.28.
[9] It is about, according to Article 115 para. (6) about the fact that *"Emergency ordinances can not be adopted in the field of constitutional laws, or affect the status of state institutions, the rights,*

d) another conclusion which reveals to be a true axiom in matters of regulating in the current regulatory system is that **the rule regarding the legislation is the laws passed by Parliament,** and **the exception is to legislate through ordinances, simple or emergency.**

Specific to exceptions regime in law is that they are of *strictly and applied interpretation*[10]. This eliminates the possibility, now unfortunately a reality, to transform exceptions into rules and vice versa.

Other elements of the legal regime of laws, that are enshrined in the constitutional norms, are: **non- retroactivity**, except for more favourable criminal and contraventional laws; **the consecration of the rule regarding the entry into force, which is 3 days from the date of publication provided in the text of the law,** that must be mandatory **after the date of entry into force**. And finally, we invoke the requirement that **prior to the publication in the Official Journal**, **the law to be promulgated by the President of Romania**, which, like any head of state, benefits of certain **procedural instruments by which he can oppose to the promulgation, by appraising the constitutional contentious for unconstitutionality aspects, as a rule, or either by asking Parliament to reconsider the law, on grounds of undue political opportunity,** possibilities that he can exercise **once.**

In conclusion, we consider that in the current constitutional system, **the law** is the normative act that is **the rule in matters of regulation**, this being adopted by the Parliament with **simple** (ordinary laws), **absolute** (organic laws) or **qualified majority** (laws with particular regulating object specified by Constitution)[11].

If we analyze the characteristics of laws in terms of the adoption procedure in conjunction with the regulating domain, we are going to establish that **the organic laws and those adopted by qualified majority have in common the fact that may target exclusively areas provided in the Constitution, while the ordinary laws may concern any other matters which are not found among those listed in the Constitution.**

2. Requirements in the matter of legislating imposed by Law no. 24/2000 on legislative technique norms[12]

The purpose of the legislative technique is to ensure ***the systematization, uniformity and coordination of the laws, and also the content and appropriate legal form for each normative act***[13].

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freedoms and duties stipulated by the Constitution, the electoral rights, and can not aim measures of forcible transfer of public property ".

[10] According to the principle of law contained in the Latin adagio *exceptio est strictissimae interpretionis*.

[11] It's about laws ratifying treaties of accession to the European Union or NATO and any other treaties modifying treaties covers on them.

[12] Republished in the Official Journal of Romania, Part I, no. 260 of 21 April 2010.

[13] According to Article 2 para. (1) of the Law.

The legislative technique norms established by Law no. 24/2000 have the following characteristics:

a) aim any category of normative act, not only the laws adopted by the Parliament;

b) are mandatory for all categories of law subjects that have powers in adopting draft normative acts at central and local level. It is about **the Government, Members of Parliament, citizens who exercise their citizens' initiative, local government authorities** (local councils, county councils) and **other autonomous public authorities or subordinated, which, in addition to their specific activity, adopt such internal regulations** under which it is organized and operates.

For example, the Romanian Court of Accounts, whose constitutional[14] and legal[15] mission is to ensure the legality of public spending, operates under a Regulation for organizing and conducting specific activities (R.O.D.A.S.), that is published in the Official Journal of Romania, Part I[16].

Such a *regulation* has the legal force of a Government decision, *it enforces an organic law whose object of regulatory aims an autonomous authority*.

In the case of those categories of authorities is not applicable the principle that *laws are implemented by Government decisions*, as reflected in Article 108 para. (2) of the Constitution.

The autonomous character of the Court of Accounts, of Ombudsman or other similar authorities excludes the solution that Government regulates their way of organization and operation.

We appreciate that in matters of *regulation*, understood as activity of adopting normative acts, regardless their name and the subject that they emanate, we may identify:

a) **a lawmaking purpose**, which belongs to the Parliament and the Government, through legislative delegation or by enforcement of laws;

b) **a lawmaking mean of achieving competence**, belonging to other public authorities, that have other duties than to legislate, to adopt normative legal acts.

Returning to the question of legislative technique rules incidence, they apply to all public authorities that adopt normative acts. We must emphasize that the rules established by Law no. 24/2000 must be respected, first by the authorities that have other duties, as we stated previously[17].

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[14] Under Article 140 of the Constitution

[15] We consider the Law. 94/1992 on the organization and functioning of the Court of Accounts, republished in the Official Journal of Romania, Part I, no. 238 of 3 April 2014.

[16] The provision is found in Article 11 para. (2) and (3) of Law no. 94/1992.

[17] Article 3 para. (2) of Law no. 24/2000 provides, moreover, that: *"(2)The legislative technique norms apply properly, also to the development and adoption of draft orders, instructions and other normative acts issued by the heads of specialized central public administration and to the development and adoption of normative documents issued by local public administration authorities. "*

c) the need that the regulations adopted to start **from the present and future social desiderata, and also by the inadequacies of existing legislation.**

We understand therefore that the law must reflect certain social realities, to consecrate solutions consistent with these, to meet social needs of public interest provided and to create the path for the future ones, to harmonize the general interests with the private ones, keeping the former pre-emption.

d) compliance **with the requirements regarding the drafting of the normative acts,** meaning that they must have their own **prescriptive form** of legal norms.

The wording should be **clear, fluent and understandable**, without **syntactical difficulties and obscure passages or equivocal [18].**

All these drafting requirements are imposed in order not to prejudice legal style, precision and clarity of the provisions.

We stop here in order not to not extend too much this study and to be able to focus equally in its final part, on what constitutes the title and the message that we have proposed, trying to draw a signal alarm on the need to return to respect for how we regulate, how to legislate in broad sense of the term.

3. Shortcomings. Possible solutions

We start to identify them from the truth that it **is not possible to legislate inappropriately, but the legislated domain to work.**

For this to happen, it needs harmony between the two elements. When we say this we mean two things:

A. Respecting the principles and the competence for regulatory authorities.

This requires, in our view, the need that the normative acts to emanate from the competent authorities to adopt them and within the limits of those powers.

Specifically, this requires that Parliament to be and **to remain the sole legislative authority of the country, the Government to exercise the normative prerogatives within the limits set by the Constitution**, which means that the **adoption of ordinances, simples or emergencies or of laws in the way of engaging Government responsibility should be the unusual procedure of lawmaking.** The **typical one must be regulating through laws adopted by Parliament.**

During the last decades was revealed hardly acceptable forms of overturning such a report, some sanctioned by the Constitutional Court, others unfortunately validated by its decisions.

We do not intend to give examples, some of them are notoriously[19], just to mention them by drawing attention to the harmful effects they produce. We

[18] Rules are established by Article 8 of Law 24/2000

invoked, however, only the budgetary personnel remuneration, in which were adopted by the way of engaging Government responsibility, several normative acts[20], not adopted, because in the years 2015-2016 to give a lot of emergency ordinances that targeted only certain categories of personnel, promoting unclear solutions, ambiguous, which resulted in a matchlessly regulation, favoring certain categories of personnel, disfavouring others, creating deeply illegal and discriminatory situations and leaving outside regulation the personnel of the local public administration, whose salary level we think it is not only unsatisfactory but downright humiliating.

This disturbs the life of the authorities, of state and ours too, the beneficiaries of public services, given that it is an undeniable truth that **the performance is supported also by the way of paying the holders of public functions.**

B. Compliance with the requirements of form and substance of the adopting legislation process

In this respect, we sadly say that too often are abandoned the requirements imposed by Law no. 24/2000, the content of normative acts being heavy as drafting, difficult comprehensible, representing poor translations of some European regulations, which creates problems in their application. To this aspect is added the legislative instability that we can qualify, not infrequently "dizzy", which seriously affects the legal security in public life, in private life and in business environment.

In this way, the evolution of the state itself is affected and the implications extend "without big words" as said the great and late Professor Antonie Iorgovan, and also beyond national to the European level. Romania is a Member State of the European Union, it should be subject to national rules imposed by its institutions and principles derived from case law of the European institutions. Among these is included the **legal certainty** and the **predictability of normative acts** (*legal certainty*) that apply closely to the principles of legal expectations (*legal expectation*) of **rights** gained, of legal certainty, of objectivity in dealing with cases and of legality decisions[21].

With reference to the relationship between the national law of the Member States and the European one, we conclude by saying, in agreement with a distinguished and cherished new author, that it is about a *complex, integrative process,* in which the *"the states are organized to obey a different legal will of their*

[19] For example: O.U.G. no. 37/2009 on some measures to improve local public administration, the law for its approval being declared unconstitutional by Decision 1257/2009 published in the Official Journal of Romania, Part I, no. 758 of November 6, 2009.

[20] For example: Law no. 330/2009 regarding the unitary remuneration of personnel paid from public funds, published in the Official Journal of Romania, Part I, no. 762 of 9 November 2009.

[21] Ioan Lazăr, *Dreptul Uniunii Europene în domeniul concurenţei,* Universul Juridic, Bucharest, 2016, p. 148.

and to recognize the prevalence of the Community provision in relation with the national norm"[22].

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