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The Preconditions of Drafting a Legal Regulation

Abstract:

This paper systematically deals with the matter of nomotechnical rules of drafting legal regulations with special reference to essential preconditions of drafting legal regulations. The national sources of law are studied relating to the procedure of drafting legal regulations, which arise from the Rules of Procedure of the Croatian Parliament and what possibilities the prescribed and unique methodological-nomotechnical rules have. The emphasis is on determining the essential preconditions for the enaction and drafting of legal regulations, and on the advantages that contribute to a better drafting of legal regulations in the national system.

This is a very interesting topic since the so-called nomotechnical rules did not appear in scientific terms until the 19th century and are still evolving. The nomotechnical rules institute plays a very important role as a foundation of legal certainty.

Keywords:

nomotechnical rules; subjective and objective preconditions; the procedure of drafting a legal regulation

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Introduction

This paper defines the subjective and objective preconditions. For a proper and valid drafting of regulations, it is necessary to follow the precisely defined prescribed rules and the precisely defined procedure. The emphasis is on determining the essential preconditions for the enaction and drafting of legal regulations and on the advantages that contribute to a better drafting of legal regulations in the national system. This is a very interesting topic since the so-called nomotechnical rules did not appear in scientific terms until the 19th century and are still evolving. The nomotechnical rules institute plays a very important role as a foundation of legal certainty. In the legal sense, the development of nomotechnical rules results in the creation of increasing legal certainty and a legal state that has a need to ensure a proper drafting of legal regulations. The development of nomotechnics, as a new scientific branch imposes a significant accumulation of the legal expertise and at the same time the invested knowledge gives positive results. It is necessary to prevent harmful consequences that citizens may suffer within their scientific standardization. That is only possible by taking and fulfilling essential preconditions for drafting and enacting legal regulations. Researching the essential preconditions of drafting a legal regulation, we will determine how much they really contribute to legal security and the proper functioning of the rule of law.

The Methodology of Rules in Drafting Legal Regulations

The rules of drafting legal regulations through essential preconditions for drafting legal regulations are based on the comparative methodology of comparison of legal sources at a national level. The final consideration, with a focus on defining the role of nomotechnics in creating legal certainty, will be made through research and detailed study. Nomotechnical rules or nomotechnics, as a scientific discipline, developed much later and is still developing while striving for a more advanced system of rules for drafting legal regulations. Thus, with the comparative method of displaying the legal regulation of the matter of nomotechnical rules, the concrete conclusions related to the role of nomotechnics in creating legal certainty can be reached.

The Results and Discussion of Essential Preconditions for Drafting Legal Regulations

HISTORICAL OVERWIEV OF PRECONDITIONS OF DRAFTING A LEGAL REGULATION

Until the 15th century, the Parliament,drawing conclusions called acta, decreta or constitutiones, and in the 15th century, the conclusion was called articulus (article). Since the 16th century, this term has been used for more important conclusions, and in Croatian legal terminology it has synonym for law.

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Until the 16th century, parliamentary sessions were held exclusively by order or authorization of the king, and in case of danger of war and the need for urgent holding of the parliament, this right was given to the ban, provided that parliamentary conclusions became valid only from the day of the king's confirmation. Parliamentary conclusions, confirmed by the king, had the effects of law.

The first Rules of Procedure of the Croatian Parliament were adopted in 1861, which for the first time determined the internal structure and manner of work of the Parliament, and procedure for passing legal acts. In 1875, the Parliament passed new and shorter rules of procedure establishing permanent working committee, as well as provisions on voting (voting for or against was conducted so that the parliamentarians gets up or stays seated) and provisions that parliamentarians were not allowed to read speeches. [8]

From time immemorial, parliamentarians have been required to speak freely, without reading a speech written on paper, since such a speech is more convincing and has a stronger effect than reading a text. The provision banning the reading of speech was last regulated in the Rules of Procedure of the Croatian National Parliament from 1942., and since 1947. such a provision no longer exists in the Rules of Procedure. Although the provisions of the Rules of Procedure were changed in accordance with the spirit of the times, the Rules of Procedure of 1875. defined some provisions that are still valid today, such as provisions on roll-call voting, interpellation, reprimands for deputies who deviate from the topic, even then it provided for three readings of the bill, and a preliminary opinion of the working committee.

Throughout history, the rules of procedure have generally followed changes in the state order, so in 1976. a three-chamber parliament was established. These Rules of Procedure were changed only in 1990. with the declaration of independence of the Republic of Croatia, when the Constitution established a two-chamber parliament consisting of the House of Representatives and the County House. Two separate rules of procedure of the House of Representatives and the County House, established in 1993., were valid until 2001., when a one-chamber parliament was introduced, and it was regulated by the Rules of Procedure of the Croatian Parliament. [7]

THE SUBJECTIVE PRECONDITIONS

The formal layout of a legal regulation is specially regulated and determined by the Uniform methodological-nomotechnical rules [2], which were passed much later in our legal system. When approaching the drafting of a legal regulation, it is necessary to develop a plan od normative activity and determie the existence of essential preconditions for the drafting of legal regulations. The subjective preconditions are the preconditions related to the editor. The editor is a person, who can accept the complex activities of legal standardization. The knowledge that is considered necessary for the drafting of legal regulations includes the following:

- general education

- socio-political system and legal system knowledge
- knowledge of the principles and tenets of drafting legal regulations (knowledge of nomotechnics)
- the ability of linguistic expression.

The general education implies that the drafting of legal regulations is complicated. Legal rules are addressing various areas of social life with their regulation, in which they deal with various relations between numerous subjects.

The editor must especially:

- know the constitutional matter
- know all branches of substantive law, especially the branches in whose area the legal order is enacted
- know the rules of the procedure of nature and especially those that are related to the process of drafting and enacting legal regulations (the hierarcy of legal regulations)
- know the rules of logic about terms, courts and conclusions
- know the legal practice
- know the legal literature
- know the legal terminology.

The understanding of the socio-political system and legal system means that the appropriate areas of social relations are regulated within this context. The content of the regulation must respect the principles of both the social and political system.

The understanding of the principles and the tenets of drafting legal regulations, i.e. the knowledge of nomotechnics, means that the editors must know them when drafting legal regulations. That applies to the drafting of every regulation.

The ability of linguistic expression implies that the thoughts of the person enacting the regulation are linguistically expressed through the drafting of a legal regulation.

The editor must make sure that the linguistic expressions:

- are clear
- match the content of the expressed thought
- are grammatically, linguistically and stylistically correct.

The authorized body must confirm that the proposal of an act is linguistically previewed and corrected [6].

THE OBJECTIVE PRECONDITIONS

The objective preconditions are the preconditions that must objectively exist when any legal regulation is enacted as a guarantee of a lawful and correct enactment.

The objective preconditions are:

- that the legislator is competent
- that a certain procedure had been carried out for the enactment of a legal regulation
- that the legal regulation has an adequate content
- that the legal regulation ensured a spatial and temporal action.

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The competence of the legislator of the legal regulation and the procedure for the enactment of the legal regulation

The competence is the right and the duty of a social entity by which certain social relations are regulated through a legal regulation. The legislator must have answers to the following two questions:

- is he generally competent to enact a certain regulation?
- what issues and how broadly can it affect the provisions of a legal regulation which he is allowed to pass? [1]

The Constitution contains the authority to pass acts. The government determines the internal structure of the ministry with regulations on the basis of the power from the Constitution of the Republic of Croatia [5]. The procedure for enacting a legal regulation is a set of prescribed actions that must be executed as formal legal preconditions. They must be carried out during the entire procedure, from the 1st phrase of submitting a proposal or the initiative for the enactment of a legal regulation, to the last stages. The last stages are:

- adoption
- promulgation
- publishing.

If an error occurs in the procedure of enacting a legal regulation, the formal legal validity of the legal regulation is called into question. In that way, the constitutionality, i.e. the legality, of the legal regulation is questioned. The Parliament of the Republic of Croatia passes acts on the basis of constitutional provisions. The procedure of passing an act in the Parliament of the Republic of Croatia takes place according to the phases that are determined by the Rules of Procedure of the Croatian Parliament[4] and they follow a logical order:

- institute proceedings
- the proposal of an act
- the submission and making of the proposal
- the consideration of the proposal of an act in working bodies
- the debate about the proposal of an act (the first reading)
- the final proposal of an act
- the debate about the final proposal of an act (the second reading)
- the third reading.

A proposal for the passing of an act is initiated to the Parliament Speaker. The right to propose acts has:

- every member of the Croatian Parliament
- deputy clubs
- the working bodies of the Parliament
- the Government of the Republic of Croatia.

Prior to the passing of the proposal of an act, the Parliament can order a preliminary debate to be held. It refers to the reasons which are important for the passing of an act and to the basic issues that need to be regulated by that act. After such a procedure is carried out, it is necessary to file a report on its results. The report is submitted to the proposer, who has an obligation to take into account the views, opinions and proposals given in that procedure when drafting the proposal of an act. It is necessary to specifically explain the

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opinions and the proposals that the act could not pass. The proposal of an act contains:

- the constitutional grounds for the passing of an act
- the assessment of the situation and fundamental issues that need to be regulated by the act and the consequences that will result from the passed act
- the assessment and sources of necessary funds for the implementation of the act
- the text of the proposal of an act, with its explanation
- the provision text of an existing act that is changed, i.e. supplemented, if an amendment or modification of the act is proposed
- the confirmation from an authorized body that the act proposal has been linguistically reviewed or corrected.

It is necessary to give an explanation of certain provisions that the act contains in the explanation of the proposal of an act. The Speaker of the Croatian Parliament receives a proposal of an act. He instructs the proposal to:

- the presidents of the working bodies
- all the deputies and the prime minister, when the Government is not the proposer.

The proposal of an act must be examined by the competent authorities in whose field of work the issues are regulated by the act. After considering the proposal, the working body determines the rapporteur. At the Parliament session, the rapporteur presents his views, opinions and remarks and explains the proposals of that body. The procedure of passing an act is implemented at the Croatian Parliament session. The first reading of an act is the 1st part in the procedure of the proposal of an act and it includes:

- the oral presentation of the proposer
- a general debate on the proposed act
- a debate of the details that include a discussion on the text of the proposed act
- a debate on the views of the working bodies that considered the proposal and
- making a conclusion on the necessity of passing the law.

If the main working body and the Legislation Committee give their written opinion, a proposal for the first reading of an act can be submitted at the session. The proposed act can be rejected by a conclusion. That is done after the debate, when the deputies assess that it is not necessary to pass the law. The proposed act that is rejected by the conclusion must be justified and submitted to the proposer, and only after 3 months can the procedure be repeated. If it is concluded that the proposed act is accepted after the discussion the views, proposals and opinions regarding the proposed act are determined and the proposer is instructed to prepare the final text of the law within 6 months of the acceptance of the act.

The final proposition of the act is submitted when the first reading of the act is completed with a conclusion. The conclusion is referring to the enactment of a certain law. It is important that it is submitted in the form in which the law is passed and it must contain a rationale. The rationale includes:

- the reasons why the law is passed
- the issues that are resolved by it

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- the explanation of the provisions of the proposed act
- the information about the financial resources required for the implementation of the law and about the way of securing these resources.

The Speaker of the Parliament must instruct the final proposal of the act to the presidents of the working bodies, to all the deputies and the Government, if it is not the proposer. The proposer is obliged to submit the final proposal of the act within 6 months from the date of its acceptance. If this is not done in that time period, the act enactment procedure will be considered suspended. The second reading of the act discusses the final proposal of the act and it includes:

- an introductory presentation by the proposer
- a debate on the views of the working bodies
- a debate about the proposed amendments
- deciding on the amendments
- the enactment of the law.

The third reading of the law is an exception in the law enactment procedure. It is implemented if it is decided by the Parliament or at the request of the proposer. Such a decision can be made if a larger number of amendments is tabled or when the amendments are of such a nature as to substantially change the content of the final act proposal. The proposal to amend the final act proposal is called an amendment. It must be submitted with a rationale. The right to submit amendments has every:

- deputy
- deputy club
- working body of the Parliament
- the Government.

The amendment is directed to the Speaker of the Parliament until the end of the debate of the session of the Croatian Parliament on the final proposal of the act. The tabled amendments are submitted to the deputies by the Speaker of the Parliament. An amendment can become a part of the final law only if it is submitted within the deadline. It is being voted about separately in the following cases:

- if it was submitted by the proposer of the law
- if it was submitted by the main working body or by the Legislation Committee and agreed about with by the proposer of the law
- if it was submitted by a deputy or working body and agreed about with the proposer of the law.

If several mutually exclusive amendments to the same article of the final proposal of the law are accepted, the last amendment that is accepted by voting will be accepted.

The content of legal affairs and the effect of a legal regulation in space and time

It is necessary to give content to a legal regulation. This is achieved by covering the provisions of the area of social relations that fit the competence of their issuer. The content of that regulation must include all the essential and characteristic designations that are necessary for the total normative capture of the matter for whose normative regulation it is competent. In order for a legal regulation to be successfully regulated, it is

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necessary to include the matter in its content and present it in a logical order. The content must have a logical connection between the beginning, middle and end. A legal regulation must function in a certain space and time. That means that its provisions must be applied in a specific area. Its provisions oblige to all the subjects to which it applies if they are located in an area in which it has legal force. That is the so-called territorial validity of a legal regulation. Considering the width of the territory to which the provisions of the legal regulation apply, it is divided into a universal and a particular regulation. The regulation that is valid in the entire territory is called a universal regulation, and the regulation that is valid in a narrower territory is called a particular regulation.

A legal regulation becomes valid when it starts to have legal effect. It has a possibility of applying a sanction to those on that it applies. The issuer determines when the legal regulation will be valid. Five ways of a possible beginning of validity of a legal regulation:

- determining the beginning of validity by specifying the day, month and year when the legal regulation begins being valid (the so-called calendar mark of validity)
- determining the beginning of the validity of a legal regulation on the day of its publication
- determining the beginning of the validity of a legal regulation on the day of its adoption
- determining the beginning of the validity of a legal regulation after its publication
- determining the beginning of the validity of a legal regulation with the occurrence of a certain event.

Determining the beginning of the validity by specifying the day, month and year when the legal regulation begins being valid means that the issuer of the legal regulation specifies the day, month, year when the legal regulation starts being valid.

Determining the beginning of the validity of a legal regulation on the day of its publication means that the legal rule comes into force on the same day as it was published.

Determining the beginning of the validity of a legal regulation on the day of its adoption means that the regulation begins being valid on the same day when the regulation was adopted, most unfavourably from the point of view of the current legal rule it refers to.

Determining the beginning of the validity of a legal regulation after its publication means that the time interval between the publication and coming into force may be longer or shorter. That depends on the decision of the legislator. It is necessary to assess whether there is a need to leave a longer period to get to know the text of the legal regulation before it becomes obliging with its provisions.

Determining the beginning of the validity of a legal regulation with the occurrence of a certain event means that there is a possibility that the issuer is linking the regulation to the beginning of the temporal effect of the regulation, which he passes for the occurrence of a certain event, whose occurrence may be more or less certain. The coming into force of all parts of a legal regulation does not have to be simultaneous.

A legal regulation stops being valid when it ceases to be bound by its provisions.

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Possible ways to terminate legal regulations:

- the cessation of the validity of a legal regulation by passing a new regulation, which is determined so that the previous one expires (the derogation of regulations)
- the cessation of the validity of a legal regulation after a certain deadline
- the cessation of the validity of a legal regulation due to the cessation of the existence of the social relations that are regulated by it (the so-called extinction of regulations)
- the cessation of the validity of a legal regulation by objective repeal.

With the cessation of the validity of a legal regulation by passing a new regulation, which determinates that the previous one expires (the derogation of regulations), the ways of certain social relations are replaced with a new legal regulation, because social needs and relations change. Such a way of cessation of the validity of a legal regulation is called a direct derogation. In contrast to that, an indirect derogation is a situation in which a regulation regulates the same matter that has already been regulated by a previous regulation in a different way. It does not mean the cessation of the validity of the previous regulation.

The cessation of the validity of a legal regulation after a certain deadline means that the regulation is passed with an unlimited duration. In case that the issuer has not extended its validity before the expiration, the legal regulation ceases to be valid.

The cessation of the validity of a legal regulation due to the cessation of the existence of the social relations that are regulated by it (the so-called extinction of regulations) means that there is no purpose or goal of the regulation, and thus of a legal rule. The regulation is not formally derogated, it is not contrary to another act. Such a regulation no longer applies.

The cessation of the validity of a legal regulation by objective repeal may occur as:

- an annulment
- an abolition.

The annulment (ex tunc action) means that the legal regulation is repealed, but from the moment of its coming into force all the legal consequences that arose from the application of that regulation are annulled.

The abolition (ex nunc action) means that the legal regulation is repealed. The application of the legal regulation is not possible in its cancellation, but all the legal consequences that have occurred up to the moment of its cancellation are not affected. The Constitutional Court of the Republic of Croatia is holding control for the constitutionality and legality of the legal regulation [3]. The Constitutional Court will annul a regulation:

- if it offends the fundamental freedoms and rights of man and citizens
- if it puts some individuals, groups or organizations unjustifiably in a more favourable position.

The Retroactive Effect of a Legal Regulation (The Retroactivity)

The retroactive effect of a legal regulation means that this regulation is applied to situations that

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arose and that existed before the regulation came into force. Such an action of a legal regulation creates legal uncertainty. In the Croatian law applies the Constitutional rule:

- according to which the law comes into force no earlier than the eight day from its publication, unless it is provided otherwise by the law for special personal issues
- according to which only certain provisions of the law can have a retroactive effect.

In case that the proposed act determinates that its individual provisions have a retroactive effect, the proposer of the law is in that case obliged to explain the reasons that require it. The Constitution stipulates that nobody can be punished for an act for which it was not established by law or international law, that it was a criminal offense before it was committed. Nobody can be pronounced a sentence that was not provided for by law. In case that the law imposes a milder sentence after an act is committed, the perpetrator is then sentenced to such a sentence. The court can request that the Supreme Court of the Republic of Croatia submits a request to the Constitutional Court to evaluate the constitutionality of the law. That is done in case that the court finds a law that is not in agreement with the Constitution. If the court finds in its proceeding that another regulation that should be applied is not agreeing with the Constitution, it will not apply that regulation, but it will notify the Supreme Court of the Republic of Croatia until the constitutional evaluation of the original regulation is completed.

Conclusion

The objective and subjective preconditions are necessary for the quality performance of the nomotechnical tasks. Through a historical review of the activities of the Parliament as a legislature the existence of certain preconditions was prescribed by the Rules of Procedure of the Parliament. With the development of the legal state, the preconditions of drafting a legal regulations developed in the nomotechnical sense as important. They must exist objectively. The subjective preconditions are a total of knowledge and skills that the editor must have. If the editor does not have the necessary knowledge, he cannot draft a legal regulation. Therefore, a legal regulation should be drafted by experts, who have the necessary knowledge. The procedure of passing a legal regulation is a set of prescribed actions that must be executed as formal legal preconditions. They must be carried out during the entire procedure, from the 1st phrase of submitting a proposal or the initiative for the enactment of a legal regulation, to the last stages. If an error occurs in the procedure of enacting a legal regulation, the formal legal validity of the legal regulation is called into question. A legal regulation becomes valid when it starts having legal effect. The issuer determines when the legal regulation will be valid. At a national level, the constitutional law envisages the possibility of assessing the constitutionality and legality of certain regulations or their individual provisions, and thus a legal protection in case of incorrect drafting of a legal regulation is secured. Through a

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system of developed nomotechnical rules that are significantly strengthened and that provide legal certainty that the rule of law will function properly, it also represents a form of legal protection. The compliance of nomotechnical rules gives equality to all and an easier and simpler application of legal regulations. The basis of regulated nomotechnical rules is the existence of subjective and objective preconditions of drafting a legal regulations, it clearly confirms that they contribute to legal security and the proper functioning of the rule of law.

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