



- The dissolution of an association by a simple administrative order as stipulated in Article 16 sentence 2 Nr.2 NGO Draft Law is only compatible with the constitution because this article explicitly provides the right to file a claim against this order with the court. Thus the necessary judicial review of such a strong measure is ensured.

### **c) Delegation of Too Much Rule Making Power<sup>28</sup>:**

Moreover the law might delegate too much rule making power to the administration. Concerning the principle of separation of power the main decisions must be made by the law. Rule making power can only be shifted to the executive by the legislative for those topics that do not need to be discussed by the lawmakers in a full process of lawmaking but which require the ability of a rapid and flexible response of the executive or which are so detailed that it would be simply too much to regulate all little technical details by the law.

In any case the constitution should be examined first if it explicitly requires a regulation by a “law” (like for example in Article 41 II CC: “The regime of the media shall be determined by law”). In this case any regulation just by a sub decree (Prakas or Anukret) would not be not sufficient. Furthermore all long term and far reaching decisions must be made in form of a law. The same rule applies if serious financial consequences for the national budget are at stake or if the regulation interferes with basic human rights.

#### Example:

- The regulation about colour and size of a license plate of a car can be left to a sub-decree because this is an less important technical detail the lawmakers do not have to bother with.
- But the scope of power of a commune council can not be simply left by the lawmaker to a government sub decree (Anukret) of the Ministry of Interior (as it is done by Article 47 Commune Council Law), because this undermines the self-rule and the basic rights of the communes.
- It also requires a law to determine under what conditions a license for firearms can be issued to civilians. It can not simply be left to a Prakas of the Ministry of Interior to describe these conditions as it was done in Article 11 sentence 4 Weapon Draft Law.

## **IV) Final Regulations:**

### **1) Unconstitutional or Disproportionate Penalties:**

To penalize a certain violation of the law can be unconstitutional when the prohibition itself already violates the Constitution because a certain behaviour must not be prohibited at all.

#### Example:

One of the early versions of the NGO Draft Law included an article that stipulated a punishment for not registering an association with the authorities. As it already violates the freedom of association to claim a mandatory registration it of course violates this freedom to punish the omission of such a registration.

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<sup>28</sup> For further details on this topic see: Patricia Baars, “Legislative Drafting”, page 38 and Konrad Adenauer Foundation, “Handbook on Law drafting and Legislation”, pages 27 – 32 and 57, 58



Besides this the penalty as such may be without concern but the intensity of the penalty could be too strong. It could for example violate the constitutional rights on due process to penalize **every** violation without any distinction according to the severeness of the violation.

Example:

A minimum imprisonment of five years for violations of the Weapons Law as foreseen in Article 20 of the Weapon Draft Law is disproportionate as this provision obviously does not consider the existence of any minor forms of violation.

## 2) Insufficient Timeframe and Transitional Provisions:

At the end of each law one finds provisions dealing with the question when this law shall enter into effect. If necessary there are also provisions that regulate how rights and duties shall be handled in pending administrative procedures regarding the fact that the new law will probably change all legal positions of the involved persons and authorities.

As far as the time frame is concerned it may be recommendable to have a so called “sun set clause”<sup>29</sup> which limits the period of the effectiveness of the new law. That means the law regulates that it will automatically expire at a certain date. Such a provision may be necessary to limit the effect of a law and to force the lawmaker to reconsider laws, especially when the lawmakers at present are not fully able to foresee the exact effect the law will have. This increases the democratic legitimacy of a law especially in cases when the situation is not durable or it is predictable that the starting point for the law may change in the future. It allows the lawmaker to make an experiment with limited effect. But it must be ensured that the time frame is not too narrow because otherwise the law can not fully develop its guiding and peace building function and would lose respect among the citizens.

Example:

A law that stipulates a period of only one year normally would provide a too narrow time frame because during this short period valid data for an evaluation of this law could hardly be obtained.

Concerning transitional provisions the lawmakers have to take care that legal positions already achieved during a pending administrative proceedings (like for example a right to property) are not suddenly cut off by a new law without any compensation. Furthermore it must be assured that there is a sufficient period of time left for persons who are affected by the new law to rearrange their dispositions and plans and adapt their business, professional or private affairs to the upcoming new regulation. For example it must be ensured that licenses do not expire from one day to another due to a sudden effectiveness of a new law. If such periods of adaptation were not granted the law would impose new restrictions that might violate the principle of proportionality.

Example:

- Article 390 sentence 1 Labor Code ensures that this code will be applicable to all individual work contracts from the date of its effectiveness on. But Article 390 sentence 2 Labor Code also guarantees that employees do not lose the benefits of their contract in

<sup>29</sup> For further details on such clauses see: Patricia Baars, “Legislative Drafting”, page 80.

See also: Konrad Adenauer Foundation, “Handbook on Drafting Law and on Legislation”, page 59