

THE UNCONSTITUTIONALITY OF THE REGULATION OF CRIMES AND PENALTIES BY EMERGENCY ORDINANCES

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Abstract: *This survey proposes a theme that is exciting in a formula that is not proper to the countries with a rigid written constitution. It is noted, not infrequently, that the spirit and moreover the letter of the constitution is interpreted in the way the text of the fundamental act becomes permissive according to the will of that who interprets it for its own use or power. The authors ask themselves – where is the extent to which, in case of rigid constitutions one can provide an extensive interpretation?*

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Through the Constitution of 1991, revised in 2003¹, Romania adopted as an expression of the unique legal system with the Parliament as a source the constitutional law, the organic law and the ordinary law (article 73 paragraph 1).

For the Government to be able to exercise the general power of carrying out the internal and external policy of the country, according to its government program and to realize a general uniform management of public administration (article 102), the Constitution has established that it can issue orders (article 108).

As shown in the doctrine, "whereas the state of crisis is inevitable in any human community organized life, the idea of State of law requires that they find appropriate rules in the constitution text itself whenever they have a rigid character. Only so can be removed the objections of unconstitutionality raised by the practice of delegating to the benefit of the Government, of some Parliament powers"². The Institution of legislative delegation seeks to resolve certain issues of legislative policy by a special category of acts of the Government, called *ordinances*. Any judgment over the legislative delegation system must

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¹ Amended and supplemented by the Revision Law of the Constitution of Romania no. 429/2003, republished in the Official Journal no. 767 of October 31, 2003.

² See Ion Deleanu, "*Drept constituțional și instituții politice*" vol II, "Chemarea" Foundation Publishing House, Iași, 1992, p.202.

start from the idea that the power of the government to issue orders is a *delegated power* and not a proper power, because it should be remembered that in the article 61 paragraph 1 of the Romanian Constitution it is devoted, unlike other very rigid constitutions, that the Parliament is *the sole legislative authority of the country*³.

By *ordinance*⁴ we understand the document prepared and issued by the Government, in its capacity as an authority that “*ensures the carrying out of internal and external policy and exercise the general management of the public administration*” of the state and on the basis of *legislative delegation* conferred by the Constitution by article 108 and article 115. Government ordinances may be issued only within the limits set by constitutional provisions and “the overtaking of the limits of that delegation, established by the very text of the Constitution, represents an unacceptable interference in the legislative jurisdiction of Parliament, otherwise a violation of the principle regarding the separation of powers in State”⁵.

Orders shall be issued either on a special enabling law (they may be called enabling ordinances or simple) either under the constitutional text and only in extraordinary circumstances (called emergency ordinances) in order to establish by the power of organic or ordinary law, various social relationships.

Government may issue ordinances under a special enabling law adopted by the Parliament, within the limits and conditions established by it, in areas that are not covered by the organic law as well as emergency ordinances, in exceptional cases, whose regulation could not be postponed⁶ and which cannot intervene in certain areas specifically prohibited by the Constitution.

Government ordinances are unconstitutional since they violate the constitutional provisions regarding the ordinances, and the constitutional conditions can be divided into two categories: general (applicable to each type of governmental ordinance) and specific (reported in various types of ordinances).

The failure of these conditions entails the unconstitutionality of the respective ordinance. It should be noted that in case of failure to publish the ordinance in the Official Journal of Romania, the penalty prescribed by the Constitution is that of the inexistence of the act. Therefore, as advocated in the juridical literature, the inexistence of the act implies that the order is more than unconstitutional, that the ordinary courts and administrative courts should remove from the settlement of a process this pseudo-ordinance, via the exception of illegality, without waiting, in this respect, a Constitutional Court Decision⁷.

³ About legislative delegation, see the Plenum Decision of the Constitutional Court no. I of January 17, 1995 regarding mandatory decisions handed down in the constitutional review, published in the Official Journal no. 16 of January 26, 1995, in *Curtea Constituțională – Culegerea de decizii și hotărâri* - 1995, p. 665 and the following.

⁴ The ordinance means “*the normative act by which the government intervenes with legislation in the areas that make the object of law*” - see Tudor Drăganu, “*Drept constituțional și instituții politice. Tratat elementar*”, Lumina Lex Publishing House, 1998, p. 316. According to other more detailed definitions, ordinances are “*normative legal acts issued by the government, which regulates primarily certain social and economic relationships, or amend, supplement, repeal some legal rules, but only in “a field capable of regulation” by ordinary or organic law or in a “regulated field” by such a law and where there may act the force of ordinary and organic laws, except in areas exempted exclusively by the Constitution*” - see Lucian Chiriac, “*Controlul constituționalității ordonanțelor guvernului*”, Accent Publishing House, 2004, p. 54; “*the act by which the Government will achieve the legislative delegation ... is called (n.n.) ordinance, and for situations described in the article 114 paragraph 4 (now article 115 paragraph 4) emergency ordinance*” - see Ioan Muraru, Mihai Constantinescu, “*Ordonanța guvernamentală – doctrina și practică*”, Lumina Lex Publishing House, Bucharest, 2000, p. 67.

⁵ See Constitutional Court Decision no. 544 of June 28, 2006, published in the Official Journal no. 568 of July 30, 2006.

⁶ The Constitutional Court Decision no. 65 of June 20, 1995, published in the Official Journal no. 129 of June 28, 1995, referring to the exceptional case, which the constitutional legitimacy of the issue of an emergency order depends on, held that it is defined by reference to “*the necessity and urgency for a regulation of a situation that, due to its exceptional circumstances, requires immediate solutions, in order to avoid serious prejudice to the public interest*”.

⁷ See Tudor Drăganu, *op.cit.*, Vol II, p. 151, for the control of legality by the means of the exception of illegality, see Lucian Chiriac, “*Excepția de nelegalitate, mijloc de verificare a legalității unui act administrativ de către instanța de contencios administrativ*”, in the Journal “*Dreptul*” no. 11/2009, p. 91 and the following.

According to the article 115 paragraph 4-6 of the Constitution of Romania, the Romanian Government may, under a constitutional entitlement⁸ develop and issue *emergency orders*. They must meet, according to the article 108 of the fundamental act, both *general constitutional conditions* (they must be issued by the Government, be signed by the Prime Minister and countersigned by the Minister or Ministers who are bound for their execution; they must be published in the Official Journal under the penalty of inexistence) and certain *specific conditions of constitutionality*. Thus, the ordinances can be adopted only in *exceptional cases*⁹, *regulation of which can not be postponed*¹⁰, *the urgency must be motivated in the ordinance content*¹¹, *emergency ordinances cannot be adopted in the field of constitutional law, cannot affect the status of the fundamental state institutions*¹², *the rights, the freedoms and duties prescribed by the Constitution*¹³, *the electoral rights and cannot approve measures of forcible transfer of assets to public property*; emergency ordinances shall entry into force only after their submission to debate in an emergency procedure to the competent Parliamentary Chamber where there must be introduced *the publication* in the Official Journal of Romania.

According to the article 73 paragraph 3 letter h of the revised Constitution, crimes, punishments and the execution thereof shall be regulated by the organic law. However, by many emergency ordinances, in the legal Romanian system there were prescribed crimes and punishments or there were amended laws for that purpose.

The argument that crimes, punishments and the execution thereof are regulated only by organic law, since the entry into force of the Constitution the argument was subject to repeated attacks both in juridical literature but also in the regulatory- administrative practice.

Thus, from the beginning of the constitutionality control, the Constitutional Court held to be an interference of executive power through the ordinances issued under an enabling law, the regulation in the field conferred constitutionally to the sphere of regulation of the organic laws. Thus due to the Government Ordinance No. 25 of August 24, 1992 regarding the construction quality and the Ordinance nr. 27 of August 28, 1992

⁸ The adoption of emergency ordinances is more a matter of appreciation for a given situation; it is the expression of the power discretion enjoyed by the Government in its work - see Lucian Chiriac, *op.cit*, p. 72.

⁹ "By exceptional cases. ... we mean those situations that do not fall into the category of those considered specifically by the law" - see Constitutional Court Decision no. 65 of June 20, 1995, published in the Official Journal no. 129 of June 28, 1995.

¹⁰ The Court, referring to the exceptional case, which depended on the constitutional legitimacy of the adoption of emergency ordinances, has stated that it is defined in relation to the need and the urgency for a regulation of a situation which because of its exceptional circumstances, it calls for immediate solutions, in order to avoid serious prejudice to the public interest - see Decision no. 65 of June 20, 1995, published in the Official Journal no. 129 of June 28, 1995, "the Court stated that the essence of it - fortuitous case - is the objective character in the sense that its existence doesn't depend on the will of the Government which, under these circumstances, is forced to react promptly to protect a public interest by the means of emergency ordinances" - see Decision no. 83 of May 19, 1998, published in Official Journal no. 211 of June 8, 1998, see also Constitutional Court Decision no. 34 of February 17, 1998, published in the Official Gazette no. 88 of February 18, 1998, the Constitutional Court Decision no. 421 of May 9, 2007, published in the Official Journal no. 367 of May 30, 2007, the Constitutional Court Decision no. 258 of March 14, 2006, published in the Official Journal no. 341 of April 17, 2006.

¹¹ "The existence of the extraordinary situation whose regulation cannot be delayed is not motivated neither in the contents of the emergency ordinance, invoking only the urgency of regulation. The urgency of regulation does not amount to the existence of an extraordinary situation as operational rules can be achieved by the means of ordinary legislative procedure" - see Constitutional Court Decision no. 421 of May 9, 2007, published in the Official Journal no. 367 of May 30, 2007, "The inexistence or the unexplained urgency of regulating the extraordinary situations, such as to justify the adoption of a measure to eliminate the stability of the legal institution regulated, by the establishment of a period for the exercise of certain functions, it clearly constitutes a constitutional barrier in the way of adoption by the Government of an emergency ordinance for the purposes stated" - see Constitutional Court Decision no. 258 of March 14, 2006, published in the Official Journal no. 341 of April 17, 2006.

¹² See Constitutional Court Decision no. 544 of June 28, 2006, published in the Official Journal no. 568 of July 30, 2006.

¹³ See Constitutional Court Decision no. 95 of February 8, 2006, published in Official Journal no. 177 of February 23, 2006 - "the Constitutional Court finds that the provisions of the article 20 paragraph 5, second sentence of O.U.G. no. 154/2005, which establishes the possibility of revocation of the managing staff with beds by ministerial order, are unconstitutional, which are contrary to the provisions of the article 115 paragraph 6 of the article 1 paragraph. 3, 4 and 5 and the article 24 paragraph 1 of the Constitution of Romania ("The right to defense is guaranteed") ... (because - n.n) the organization and operation of the hospitals, including the appointment and dismissal of their governing bodies cannot be regulated only by law, in the narrow sense of that concept, and not by emergency ordinances".

regarding certain measures for the protection of national cultural heritage¹⁴ there have been incriminated acts as criminal acts and there were established penalties. This provision was found unconstitutional by the Constitutional Court.

This conduct, evidenced in the field of enabling ordinances was so emphasized at that time in the field of the emergency orders which in no case were allowed to intervene in the field reserved for regulation by organic law.

Once the changing optics of the Constitutional Court¹⁵, "it was accepted" the Emergency Ordinance intervention in the field of the organic law after the reviewing of the constitution with the limitations expressly set out in the article 115 paragraph 6.

Constitutional Court expressed the view regarding the exclusion from the legislative fund of setting taxes and duties by a supporting principle¹⁶ that by analogy is valid in the field of crimes and punishment, in the way that "the extent the constituent legislature wouldn't have devoted legislative delegation - institution of constitutional law through which the Government exercises certain attributions of the Parliament, which, naturally, are not located within its jurisdiction - it could be argued, with good reason, that the law represents the only legislative act by which the State establishes taxes and duties. But on terms of the existence of the delegated legislation system, the primary legislation assumed by the government doesn't escape from parliamentary scrutiny both in the initial phase of enabling but also in the following stage of the issued ordinance when the Parliament can either approve or reject it, or, if the law of enabling hasn't provided the requirement of submission for approval, it may amend or repeal by virtue of its status as a legislature.

Moreover, in an *stricto sensu* interpretation, this claim is justified in the constitutional text of the article 23 of the Constitution revised, paragraph 12 according to which "no sentence can be established or applied only in accordance and pursuant to the law".

Critically reading the article 115 paragraph 6 of the Constitution we can state that the emergency ordinances as far as they establish crimes and punishments cannot be adopted among others in the field of rights, freedoms and duties set forth in the conditions, but expressly stated, in the matter of electoral rights (are they not fundamental rights?) and can not approve measures of forcible transfer of assets to public ownership (as guaranteeing property rights would be nothing but a fundamental right).

But the analysis of the constitutional texts, respectively article 115 paragraph 6 and 22 - art. 53 in Chapter II of the Constitution shows that the ordinances, in no case, once it affects the rights, freedoms and duties of the citizens, cannot include in their content crimes and punishments. Therefore, no matter how we look at the chapter of the Constitution regarding the fundamental rights and freedoms, any regulation of the crimes and punishments by emergency ordinances, affects the essence of those rights and freedoms, the way these emergency orders can only be unconstitutional.

The category of rights, freedoms and fundamental duties is so broad that it virtually covers every field, economic or social, of the legal relationships that are established in a society (eg. the right to private property, economic freedom, living standards, family, the right to a healthy environment, individual freedom, the right to life, physical and mental integrity, the right to intimate, family and private life, inviolability of the home and so on).

If we interpret the narrow concept of law as we believe that the constituent legislator wanted to do, we would have to settle on the argument based on which the offenses and

¹⁴ See Lucian Chiriac "Controlul constituționalității ordonanțelor Guvernului", Accent Publishing House, 2004, p.60.

¹⁵ See Constitutional Court Decision no. 34 of February 17, 1998, published in the Official Journal no. 88 of February 25, 1998, the Constitutional Court Decision no. 114 of July 20, 1999, published in the Official Journal no. 370 of August 3, 1999.

¹⁶ See Constitutional Court Decision no. 171 of November 2, 1999, published in the Official Journal no. 603 of December 9, 1999.

penalties can be regulated only by law and not by any other normative legal act inferior as a juridical force than the law. Moreover, we believe that this interpretation applies to all situations where in the fundamental act there is used the simple concept of “law”, and therefore the concept must be interpreted only in the narrow sense¹⁷. The more so when the Romanian Constitution says that “the exercise of certain rights or freedoms may be restricted only by law”, the interpretation means the narrow sense, because it is inconceivable that it might be admitted that such a limitation to be done by ordinance may it be of emergency by the executive authority.

Moreover, even the Constitutional Court in the Decision no. 87 of February 10, 2005¹⁸, acknowledges that “the regulation of crimes, punishment and the means of execution belong to the jurisdiction of Parliament”. The Constitution leaves, moreover, the legislator the *freedom to regulate this matter by organic laws*, depending on the need for social defense and taking into account all other principles enshrined in the fundamental law.

On the other hand it would be absurd to claim that an emergency ordinance that regulates in the prohibited areas by the article 115 paragraph 6, of the Constitution, adopted by the Government, contrary to these provisions, respectively through “the restriction of rights and freedoms”, which also the article 53 paragraph 1 prohibits, is unconstitutional.

Thus, in terms of the issues sustained in this article we consider that the will of the constituent legislator was from the first adoption of the Constitution of Romania in 1991 that crimes and punishments, their execution regime to be governed only by law, in a narrow interpretation, in order to avoid any alignment of the constitutional democracy established by the sovereign will of the people and manifested in December 1989 by the provisions of the Constitution from 1965, which defined and provided various possibilities of a dictatorial regime.

¹⁷ Contrary, see Constantine Mitrache, Cristian Mitrache, “*Drept penal român – Partea generală*”, Fifth Edition, Universul Juridic Publishing House, Bucharest, 2006, p. 62.

¹⁸ Published in the Official Journal. no. 202 of March 10, 2005.