THE RESTRICTIVE CONSTITUTIONAL REGIME OF GOVERNMENT EMERGENCY ORDINANCES AS REFLECTED IN THE RECENT CASE-LAW OF THE CONSTITUTIONAL COURT OF ROMANIA

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ABSTRACT: *Avant la révision de la Constitution datant de 1991, le nombre élevé d'ordonnances d'urgence du Gouvernement (presque 200 par an!) peut s'expliquer par la réglementation lapidaire du domaine de la délégation législative, qui établissait un régime permissif, attractif pour l'Exécutif. Après la révision de la Constitution (qui a eu lieu en 2003), le nombre élevé (à peu près le même qu'avant) d'ordonnances d'urgence adoptées par le Gouvernement est plus difficile à expliquer et – surtout – très difficile à accepter, compte tenu des nouvelles dispositions constitutionnelles plus strictes en la matière de la délégation législative. La seule explication de cet abus est le besoin de l'Exécutif de légiférer de manière très rapide dans certains domaines à certaines périodes de l'année. Le Projet de loi sur la révision de la Constitution de la Roumanie (projet initié en 2011) ne prévoit pas de nouvelles dispositions normatives – sur la délégation législative – concernant le régime des ordonnances d'urgence ; par conséquent, à notre avis, l'analyse de la jurisprudence de la Cour Constitutionnelle en la matière pourrait révéler des idées susceptibles de se concrétiser dans des propositions* de lege ferenda *qui pourraient mener à l'enrichissmenet et à l'amélioration du projet ci-dessus.*

KEYWORDS: *the Constitution, emergency ordinances, the Constitutional Court of Romania, exceptions of unconstitutionality.*
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1. For an exact understanding of the topic to be developed in this presentation, we find it useful to start by presenting some brief statistics.
Before the revision of the Constitution, emergency ordinances were adopted as follows: ... in 2001 – 195, in 2002 – 209, in 2003 – 126, and *after the revision of the Basic Law*, the situation was the following: ...in 2008 – 230, in 2009 – 117, in 2010 – 133 and in 2011 – 126.

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If before the revision of the Constitution the high number of Government emergency ordinances can be explained (beyond the Executive's need to quickly enact in certain fields!) through the summary/lapidary regulation of legislative delegation[1], after that moment, the high number of emergency ordinances adopted by the Government is harder to explain and – especially – very difficult to accept considering the new and stricter constitutional provisions in terms of legislative delegation[2].

The Draft Law on the Revision of the Constitution of Romania (of 2011) does not include normative provisions – on legislative delegation – on the regime of emergency ordinances[3]; therefore, we consider that we can identify, from the analysis of the case-law of the Constitutional Court on the matter, ideas that could become *de lege ferenda* proposals that could enrich and improve the above-mentioned draft.

2**.** The Constitutional Court of Romania was referred to on many occasions –either directly by the Advocate of the People, or through exceptions of unconstitutionality – and it had to rule on the constitutionality of many emergency ordinances[4]. From its rich case-law referring to these normative acts, we shall choose and present several recently issued decisions, with the intention – clearly stated – to present the different ways to support – by referring to the above-presented provisions of the Basic Law – the constitutionality or unconstitutionality of Government emergency ordinances.

We hereby identify three types of situations in which the Constitutional Court ruled:

- emergency ordinances adopted in violation of the provisions of Article 115(4) or (6) of the Constitution
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- emergency ordinances that resumed, for immediate implementation, provisions from

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[1] Pursuant to the provisions of Article 114(4) of the non-revised Constitution "In exceptional circumstances, the Government can adopt emergency ordinances. They shall enter into force only after their submission for approval with the Parliament. If the Parliament is not in session, it shall be convened obligatorily".

[2] In the field of legislative delegation, the constitutional provisions of Article 115 set the following concerning emergency ordinances: "The Government can adopt emergency ordinances only in exceptional cases that call for regulation without delay, with the obligation to motivate the emergency within their contents" (paragraph 4).
"Emergency ordinances shall enter into force only after their tabling for debate in the emergency procedure within the Chamber competent to be referred to and after their publication in the Official Gazette of Romania. If not in session, the Chambers shall necessarily be convened within 5 days from the submission or, where appropriate, from the forwarding. If, within 30 days from the tabling date, the Chamber referred to does not decide on the ordinance, it shall be deemed approved and shall be sent to the other Chamber that will also rule through an emergency procedure. The emergency ordinance including norms of organic nature shall be approved with the majority set in Article 76(1)" (paragraph 5).
"Emergency ordinances cannot be adopted in the field of constitutional laws, nor may they affect the status of fundamental State institutions, the rights, freedoms and duties set forth in the Constitution, the electoral rights and cannot concern measures for the forcible transfer of assets into public property" (paragraph 6)

[3] For the content of the Draft Law on the Revision of the Constitution of Romania, as well as for the analysis of this legislative document, see Decision no. 799 of 17 June 2011, published in the Official Gazette of Romania no. 440 of 23 June 2011.

[4] For broader considerations on the topic, see Benke Karoly, "Jurisprudența Curții Constituționale a României în privința regimului constituțional al ordonanțelor de urgență" (*The case-law of the Constitutional Court of Romania concerning the constitutional regime of emergency ordinances*), in CONSTANTELE DREPTULUI. Culegere de studii, "In Honorem" Collection, "Universul Juridic" Publishing House, Bucharest, 2012, pp. 195-209.

laws adopted by Parliament (but subject to *a priori* constitutional review) in violation of the provisions of Article 115(4) and (6) of the Constitution.

3**.** As for the first category, the Constitutional Court has established, since 2005[5] that – pursuant to the provisions of Article 115(4) of the Constitution – the Government could adopt emergency ordinances if the following conditions were met cumulatively:

- the existence of an exceptional situation;
- that its regulation cannot be postponed;
- to motivate its emergency in the wording of the ordinance.

In its explanation, the Court held that the exceptional situations considered had to express a high degree of departure from the ordinary or the common, this being the only justification for the addition of the syntagm "that call for regulation without delay", which highlights the imperative of the regulation's emergency. The Court also stated that the emergency (that needs to follow an exceptional situation) could not be certified or motivated by the usefulness of the regulation. In another decision[6], the Court established that the emergency of the regulation could not be justified or determined by its opportunity, reason and/or usefulness.

However, the Constitutional Court rejected – as groundless – the exception of unconstitutionality of the provisions of Government Emergency Ordinances no. 27/2012 on certain cultural measures (exception raised directly by the Advocate of the People). In the rationale of the decision – when referring to the exceptional situation which the constitutional legitimacy of the adoption of an emergency ordinance depended on – the Court stated that "it is defined in relation to the necessity and emergency of regulating a situation that, due to its exceptional circumstances, requires the adoption of immediate solutions, in order to avoid serious damages to public interest"[7].

As for the limitation set forth in Article 115(6) of the Constitution, the Court held that the interdiction of adopting emergency ordinances in the field of constitutional laws was absolute and unconditional, while in the other fields referred to by the constitutional text emergency ordinances would not be adopted if they *affected*[8]**,** put another way, if they produced negative consequences on, the operating regime of the fundamental (State)[9] institutions that they concerned, but emergency ordinances with positive consequences – through the regulations included therein – in their respective fields could be adopted[10].

4. From the category of emergency ordinances adopted in simultaneous violation of the provisions of Articles 115(4) and (6) of the Constitution, we shall present a decision issued by the Constitutional Court concerning an exception of unconstitutionality of certain provisions of Government Emergency Ordinance no. 90/2010 amending and

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[5] See Decision no. 255 of 11 May 2005, published in the Official Gazette of Romania no. 511 of 16 June 2005.
[6] See Decision no. 109 of 9 February 2010, published in the Official Gazette of Romania no. 175 of 18 March 2010
[7] See Decision no. 737 of 31 July 2012, published in the Official Gazette of Romania no. 684 of 3 October 2012.
[8] About the meaning of the term "to affect", the Court ruled on several occasions, by stating that the above-mentioned verb could have the following meanings: "to suppress", "to cause a damage", "to harm", "to injure", "to violate", "to have negative consequences" (see: Decision no. 1189 of 6 November 2008, published in the Official Gazette of Romania no. 787 of 25 November 2008; Decision no. 82 of 15 January 2009, published in the Official Gazette of Romania no. 33 of 16 January 2009).
[9] See Decision no. 1008 of 7 July 2009, published in the Official Gazette of Romania no. 507 of 23 July 2009.
[10] See Decision no. 1189 of 6 November 2009 *cit. supra*.

supplementing Law no. 31/1990 on trading companies[11].

The author of the exception of unconstitutionality has criticized the emergency ordinance, among others, for having been adopted in breach of Article 115(4) of the Basic Law (as the Government did not prove and motivate the existence of an exceptional situation that would justify its emergency), as well as of Article 115(6) of the Constitution (as the legal provision subject to review affects the rights and freedoms – set forth by the Constitution – of the employees that cannot oppose the merger or division of the trading company.

The Constitutional Court rejected – as groundless – the exception of unconstitutionality by invoking rather opportunity-related grounds for justifying the exceptional situation and the regulation's emergency, and in what concerns the plea formulated in relation to the provisions of Article 115(6) of the Constitution, it did not rule.

We were the author of a dissenting opinion to the above-mentioned decision where we pointed out and held the following:

"The right of the employees to lodge, as any other company creditor, an appeal to the merger or division of the legal entity with which they signed individual employment agreements was set forth by the provisions of Article 243 of Law no. 31/1990 on trading companies. This right, granted by law by the supreme legislative forum, can be removed – symmetrically – through a law as well, and the Parliament has the power to amend a law that it adopted, even if the purpose of the last legislative measure was to discard a series of rights previously granted[12].

Nevertheless, in the situation analysed, the Government has intervened through Emergency Ordinance no. 90/2010, while the Parliament had already regulated – through a law – the possibility, for the employees, to exercise their right of opposition. This is likely to undermine the role of the Parliament (the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country, pursuant to Article 61(1) of the Constitution) having granted, by law, certain rights to the employees; but the provisions of Article 115(6) of the Basic Law do not allow such lawmaking through emergency ordinances[13].

The wording of Article 243 (supplemented by paragraph 9) was amended through Government Emergency Ordinance no. 90/2010 amending and supplementing Law no. 31/1990 on trading companies (published in the Official Gazette of Romania, Part I, no. 674 of 4 October 2010), in the sense that *the employees were excluded from the category of creditors that can oppose the merger or division of the company that hired them.*

Before this amendment, operated through the emergency ordinance, the provisions of Article 243(1) of the Law on trading companies stated that "The creditors of the companies participating in the merger or split shall be entitled to an appropriate protection of their interests. Any such creditor whose claim is previous to the date of publishing the merger or split project which is not due on the date of the publishing may oppose, under the terms of Article 62"[14].

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[11] See Decision no. 497 of 10 May 2012, published in the Official Gazette of Romania no. 511 of 24 July 2012.

[12] "*Ejus est tollere legem cujus est condere*" (The power having adopted a law can also repeal it).

[13] See, in relation to the fact that laws adopted by Parliament cannot be fought with Government emergency ordinances, Benke Karoly, *op. cit.*, pp. 203 – 206.

[14] Pursuant to Article 62 of Law no. 31/1990 on trading companies: "*(1) The appeal shall be made within 30*

The provisions of Article 62 of Law no. 31/1990 state that the appeal formulated shall be submitted to the court, which is solely competent to settle it. Therefore, it results from the above-mentioned text of law that the trade register office is just an intermediary receiving the appeal (lodged by a creditor) and forwards it to the court.

Therefore, as the court is the one ruling on this appeal, *discarding the employees' right to lodge an appeal against mergers or divisions has as a direct consequence the violation of their right of free access to the courts*, in order to defend their rights [...] and legitimate interests (pursuant to the provisions of Article 21(1) of the Constitution), right that *cannot be discarded through emergency ordinances*, because Article 115(6) of the Constitution clearly states that: *"Emergency ordinances cannot be adopted in the field of constitutional laws, nor may they affect the status of fundamental State institutions, the rights, freedoms and duties set forth in the Constitution, the electoral rights and cannot concern measures for the forcible transfer of assets into public property."* (subl.ns.).

Therefore, discarding the right to lodge an appeal against mergers or divisions, thus virtually closing the employees' free access to the courts, represents a violation of the constitutional right guaranteed by Article 21(1)."

5. Finally, from the category of emergency ordinances resuming or amending, for an immediate implementation, certain provisions of laws adopted by Parliament, that were subject to the *a priori* constitutional review, we shall choose – for a brief analysis – Government Emergency Ordinance no. 38/2012[15] and Government Emergency Ordinance no. 41/2012[16]. The obvious purpose of these emergency ordinances was to "save" and immediately implement the provisions of the laws that – "while being challenged before the Court" – were on the docket of the constitutional court. But considering the fact that, as for the respective emergency ordinances, the Advocate of the People did not lodge any exception of unconstitutionality[17], the Court could not to verify their constitutionality *ex officio*. Therefore, the Constitutional Court adjudicated on the above-mentioned emergency ordinances rather indirectly.

A. Thus, concerning Government Emergency Ordinance no. 38/2012, the Court ruled – first – through Decision no. 727 of 9 July 2012[18] on the referral of unconstitutionality of the Law amending Article 27(1) of Law no. 47/1992 on the Organisation and Operation of the Constitutional Court, stating that the legislative solution excluding Parliament resolutions affecting constitutional values and principles (that could be identified – with an identical normative content – in the emergency

days from the date when the decision of the associates or the amending document is published in the Official Gazette of Romania, Part IV, unless this law provides otherwise. It shall be submitted to the trade register office that it shall mention it in the register and then send it to the relevant Court to be discussed, within 3 days from the submission date. (2) The provisions of Article 133 regarding the suspension of activity shall apply accordingly. The appeal shall be discussed in the Court chamber with the summoning of the parties, and the provisions of Article 114 paragraph 5 of the Civil Code shall apply. (3) The Court decision is subject only to appeal."

[15]Government Emergency Ordinance no. 38/2012 amending Law no. 47/1992 on the Organization and Operation of the Constitutional Court.

[16] Government Emergency Ordinance no. 41/2012 included an (essential) amendment to the wording of the Law amending Article 10 of Law no. 3/2000 on the organization and holding of the referendum.

[17]The Advocate of the People can refer to the Constitutional Court – directly – through exceptions of unconstitutionality, pursuant to the provisions of Article 146d) of the Constitution.

[18] Decision no. 727 of 9 July 2012 was published in the Official Gazette of Romania no. 477 of 12 July 2012.

ordinance as well) from the constitutional review was unconstitutional because – considering the fact that the power to conduct the constitutional review of Parliament resolutions had been granted to the Constitutional Court through its organic law – it had received constitutional status according to the provisions of Article 146l) of the Constitution. It was mentioned in the above-mentioned decision that Government Emergency Ordinance no. 38/2012 amending Law no. 47/1992 on the Organisation and Operation of the Constitutional Court had the exact same normative content as Law amending Article 27(1) of Law no. 47/1992 (subject, as shown before, to the *a priori* constitutional review)[19].

Then, referred to with the objection of unconstitutionality of the provisions of the Law approving Government Emergency Ordinance no. 38/2012 amending Law no. 47/1992, the Court ruled – through Decision no. 738 of 19 September 2012[20], ascertaining that the above-mentioned emergency ordinance was in outrageous violation of the provisions of Article 115(6) of the Constitution, because – by amending the Constitutional Court's power referring to the constitutional review of Parliament resolutions – the legal status of constitutional review court had been affected[21]. The same decision underlined the fact that the Government's solution (to adopt – shortly before the constitutional court should have ruled upon the Law amending Article 27(1) of Law no. 47/1992 – an emergency ordinance fully resuming the normative content of the above-mentioned law) was also contrary to the provisions of Article 115(4) of the Constitution concerning the emergency of the regulation, by taking up for discussion – at the same time – the Government's unconstitutional and abusive behaviour towards the Constitutional Court.

Lastly, referred to with an exception of unconstitutionality of the provisions of Government Emergency Ordinance no. 38/2012, the Court – although it found that the respective regulation was contrary to the provisions of Article 115(6) of the Constitution (as it affected the status of a fundamental State institution) – rejected the exception, as inadmissible, as it was in breach of the provisions of Article 29(1)[22] and (3)[23] of Law no. 47/1992[24].

B**.** By adopting Emergency Ordinance no. 41/2012, the Government proved the same inelegant behaviour towards Parliament and the Constitutional Court. Indeed, while

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[19] For a more extensive approach of the topic, see G. Gîrleşteanu, "Consideraţii privind Decizia nr.783 of 26 septembrie 2012 referitoare la sesizarea de neconstituţionalitate a Hotărârii Parlamentului României nr.28/2012 privind desemnarea membrilor Consiliului de administraţie al Societăţii Române de Televiziune" (*Considerations about Decision no. 783 of 26 September 2012 on the referral of unconstitutionality of Parliament Resolution no. 28/2012 concerning the appointment of the members of the Board of Administration of the Romanian Television Corporation*), in „Pandectele Române" no. 11/2012, pp. 96-100.

[20] Decision no. 738 of 19 September 2012 was published in the Official Gazette of Romania no. 690 of 8 October 2012.

[21] In other words, the Government intervened in a field in which it had no substantive jurisdiction, in violation of the provisions of Article 115(6) of the Constitution.

[22] According to Article 29(1) of Law no. 47/1992 "The Constitutional Court shall decide upon the exceptions raised before the courts of law or courts of commercial arbitration referring to the unconstitutionality of laws and ordinances in force, or any provision thereof, where such is related to adjudication of the case (…)".

[23] In compliance with the provisions of Article 29(3) of Law no. 47/1992 "Legal provisions whose unconstitutionality has been found by prior decision of the Constitutional Court cannot form the object of an exception".

[24] See Decision no. 765 of 20 September 2012, published in the Official Gazette of Romania no. 784 of 21 November 2012.

the Law amending Article 10 of Law no. 3/2000 on the organization and holding of the referendum was with the Constitutional Court for an *a priori* constitutional review (law that was also found constitutional[25]), the Government adopted the above-mentioned emergency ordinance (with a partly different normative content from the law on the Court's docket), in violation of the provisions of Article 115(4) and (6) of the Constitution. The Court could not rule upon the constitutionality of this emergency ordinance (as adopted by the Government) either, as it was not referred to by the Advocate of the People. However, the Law approving Government Emergency Ordinance no. 41/2012 amending and supplementing Law no. 3/2000 on the organization and holding of the referendum was subject to constitutional review, and the Court found that the impugned normative provisions in this law were not contrary to constitutional provisions[26].

Finally, regarding Government Emergency Ordinance no. 41/2012, we have to mention that it was also subject to constitutional review and the Court rejected the exception of unconstitutionality lodged as having become inadmissible, because, after its referral with the settlement of the exception of unconstitutionality, Government Emergency Ordinance no. 41/2012 had been approved with amendments and supplements through Law no. 153/2012[27].

6**.** The brief analysis of the case-law of the Constitutional Court on the matter could lead us to the conclusion that the constitutional provisions of Article 115(4) and (6) are clear and exact enough for sketching the constitutional framework suiting the purpose for which they were introduced, because they – really – set the conditions and limits in which the Government can regulate through emergency ordinances. Thus, we could claim that, whenever these conditions and limits are ignored/violated, we are dealing with an abusive and unconstitutional behaviour of the Executive, which is sanctioned – many times – by the constitutional court. However, considering the easiness with which all post-revolutionary governments have ignored the constitutional provisions (by abusing fast regulation through emergency ordinances), we consider that the framers will have to find – at the next revision of the Basic Law – the solution for imposing on the Government a constitutional behaviour, through more serious restrictions of the adoption – by the Executive – of emergency ordinances.

[25] See Decision no. 731 of 10 July 2012, published in the Official Gazette of Romania no. 478 of 12 July 2012.
[26] See Decision no. 735 of 24 July 2012, published in the Official Gazette of Romania no. 510 of 24 July 2012.
[27] See Decision no. 764 of 20 September 2012, published in the Official Gazette of Romania no. 719 of 23 October 2012.