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## Considerations on the Legal Regime Applicable to the Romanian Government Ordinances

Vasilica Negruț<sup>1</sup>

**Abstract:** In preparing the current article we have started from the facts established by the adoption by the Government Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Code of Criminal Procedure. The Romanian Constitution amended in 2003, in Article 115 par. (1), provides that the Government, the executive authority issues orders under a special law of habilitation, in areas that are not covered by the organic laws. Also, the Government may adopt emergency ordinances “only in exceptional cases, the regulation of which cannot be postponed, having the obligation to motivate the urgency in their content” (art. 115, par. (4) of the Constitution). Among the objectives of this work we have aimed to clarify some aspects referring: the specifics of government ordinances (simple and emergency ordinances); their legal effects; the legislative delegation; control of constitutionality. To this end, we have analyzed the acts that refer to this field, the doctrine and jurisprudence. Finally, after examining and empirical research, the paper details the general conclusions on the legal regime applicable to the ordinances of the Romanian Government.

**Keywords:** ordinances; emergency ordinances; legislative delegation, legal regime, constitutionality control

### 1. Context of Development

In the elaboration of this article we have started from the factual situation created by the Government's adoption of the Emergency Ordinance no. 13/2017 for amending and completing the Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Code of Criminal Procedure, abrogated shortly by the Emergency Ordinance no. 14/2017. The enactment of this normative act has generated countless interpretations of some legal institutions regulated by the amended normative acts, especially the job abuse (article 297 of the Criminal Code), but also street protests, considering that the adoption of an emergency ordinance for the modification of the two codes, since, by adopting it, only the harmonization with decisions passed prior to the adoption by the Constitutional Court of Romania was envisaged.

### 2. The Constitutional Regime of Ordinances and Emergency Ordinances

The matter is represented by art. 108 of the revised Constitution and article 115 devoted to legislative delegation.

According to the doctrine, the Constitution has opted for the term of *ordinance* in order to identify the normative act by which the Government carries out the *legislative delegation* (Apostol Tofan, 2014, p. 237), seen as a way of its participation in the exercise of legislative power. In our constitutional system,

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<sup>1</sup> Professor, PhD, Faculty of Law, Danubius University of Galati, Romania, Address: 3 Galati Blvd., Galati 800654, Romania, Tel.: +40372361102, Corresponding author: vasilicanegrut@univ-danubius.ro.

the Government does not have the right to primary regulate the social relations, and this right rests solely on the Parliament, the sole legislative authority.

Government Ordinances may be simple Ordinances, adopted on the basis of an enabling law and emergency ordinances, adopted in accordance with the provisions of art. 115 of the Constitution. The meaning of the *habilitation law* phrase is that of a provision established by law to empower the Government in order to issue ordinances (Iorgovan, 2005, p. 406). Although by its content the ordinance has legislative feature, it is an administrative act specific to the Government (Apostol Tofan, 2014, p. 237). And the legislative character is even more pronounced in the case of ordinances that are subject to Parliament's approval.

Ordinances only intervene in areas that are not subject to organic laws (article 115, para. (1) of the Constitution republished).

Although not expressly provided for in the Constitution, the Government's power to adopt ordinances is usually made during the parliamentary holiday.

The habilitation law obligatorily determines the scope and date until which ordinances can be issued. The Ordinances shall be subject to the approval of Parliament, according to the legislative procedure, until the fulfillment of the term of empowerment, if the habilitation law requires it. Therefore, the rule is that the ordinances are not subject to approval. However, if the law provides for the obligation of approval, non-observance of the term leads to termination of the effects of the ordinance (article 115, paragraph (3) of the Constitution republished).

The Parliament may, by law, approve or reject, amend or supplement Government Ordinances. According to art. 12, par. (1) of Law no. 24/2000 regarding the normative technical norms for the drafting of normative acts, republished, the ordinances issued by the Government on the basis of a special law of enforcement come into force 3 days after the date of its publication in the Official Monitor of Romania, Part I, or at a later date provided in their text.

In case the ordinance is approved in its original form, it will take effect from the date of its publication in the Official Monitor of Romania, Part I, or at a later date stipulated in the text of the Ordinance.

In the case of publication in the Official Monitor of Romania, Part I of the Law of Rejection of the Ordinance, it will no longer produce legal effects from the date of publication of the rejection law.

In the case where the ordinance was approved by law with modifications and additions, it will produce the effects established by the law of approval, from the date of its publication in the Official Monitor of Romania, Part I.

With regard to *emergency ordinances*, they are adopted in situations where Parliament is unable to meet for law-making (Ionescu, 2003, p. 190). Therefore, the emergency ordinances intervene in extraordinary situations, the regulation of which cannot be postponed (Constantinescu, Iorgovan, Muraru & Tănăsescu, 2004, p. 223) the government has the obligation to motivate the urgency in their content (article 115 (3) of the Constitution). As it results from art. 115, par. (5) of the Constitution, the final thesis, the Emergency Ordinance containing norms of the nature of organic law is approved by the majority provided for in article 76, par. (1), which means that emergency ordinances can also intervene in the field of organic laws (Vedinaş, 2017, p. 155). According to par. (6) of art. 115, the emergency ordinances cannot be adopted in the field of constitutional laws, they cannot affect the regime of the fundamental institutions of the state, the rights, the freedoms and the duties provided by the Constitution, the electoral rights and it cannot refer to measures of forced passage of goods in public property.

Unlike the simple ordinances, *all emergency ordinances are subject to the approval of the Parliament*, and only come into force after being submitted for debate in an emergency procedure to the competent Chamber to be notified after the publication in the Official Monitor of Romania. The Constitution also provides that if within 30 days of the filing, the Chamber concerned does not rule on the Ordinance, it shall be deemed adopted and shall be sent to the other Chamber, which shall also decide in an urgent procedure. The approval or rejection of the emergency ordinance is done by a law.

The doctrine states that both the habilitation law (in the case of ordinances) and the laws of approval or rejection of ordinances are *ordinary laws*, not mentioned in art. 73, par. (3) of the Constitution governing the areas reserved for organic laws.

### **3. The Constitutionality Control**

By adopting some individual emergency ordinances, the Government practice has created a new issue, although individual decisions, administrative acts that have been legally controlled by the administrative contentious court (Tofan, 2014, p. 246).

What is to be borne in mind is that ordinances cannot be censored through administrative litigation, as they are part of the category of acts adopted by the Government in relation to Parliament, acts exempt from the judicial control of administrative acts of public authorities, by way of administrative litigation, according to art. 126, par. (6) of the Constitution. However, the private individuals may request the administrative contentious instance to annul administrative acts issued on the basis of ordinances declared unconstitutional, according to art. 1, par. (7) in conjunction with art. 9 of the Administrative Contentious Law no. 554/2004.

The action promoted under art. 9, par. (5) of the Law no. 554/2004 may have as its object: granting compensation for the damages caused by Government Ordinances; the annulment of the administrative acts issued on their basis; require to a public authority to issue an administrative act or to carry out a particular administrative operation.

The plaintiff will not be able to request the court of administrative contentious to find the unconstitutionality of the ordinance or the provision in the Ordinance, so as its action will be dismissed as inadmissible, according to art. 9, par. (1) of Law no. 554/2004 (Trăilescu, 2017, pp. 9 et seq.).

Therefore, in order to promote an action in administrative contentious with the object established by art. 9, par. (5), it must be accompanied either by the Constitutional Court's Decision to declare the unconstitutionality or by the exception of the unconstitutionality of the ordinance or provision in the Ordinance.

As it can be seen, there are two situations: the order or provision in the Ordinance<sup>1</sup> was declared unconstitutional as a result of the admissibility of the unconstitutionality exception in another case; The Government Ordinance or a provision of the Ordinance was not declared unconstitutional, but the applicant claims that it contravenes some constitutional provisions.

In the first case (the declaration of unconstitutionality following an exception in another case), the action may be brought directly to the competent administrative court within a one-year limitation period,

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<sup>1</sup> By Decision no. 1960/2011 “*The High Court finds that the legislator provided that, assuming admittance of the exception to the unconstitutionality of the Ordinance in another case, the effects arise from the date of admittance of the exception and in similar cases, which have the same legal basis as those declared unconstitutional*” (<http://legeaz.net/spete-contentios-inalta-curte-iccj-2011/decizia-1960-2011>).

calculated from the date of publication of the Constitutional Court's decision in the Official Monitor of Romania, Part I.

In the second situation, the administrative contentious court verifies whether the exception fulfills the conditions provided by art. 29, par. (1) of Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished, which states that it decides on “*the exceptions raised before the courts or commercial arbitration regarding the unconstitutionality of a law or ordinance or a provision of a law or of an ordinance in force, which is connected with the settlement of the case at any stage of the dispute and whatever is its subject matter*” and par. (3) of the same law, which states that the provisions found to be unconstitutional by an earlier decision of the Constitutional Court cannot be the subject of the objection of unconstitutionality “the provisions found as unconstitutional by an earlier decision of the Constitutional Court”.

If these conditions are found to be fulfilled, the Constitutional Court shall be notified by a reasoned decision and the case shall be suspended on the merits.

*After the pronouncement of the Constitutional Court, the administrative contentious instance shall put the case back to court and give notice, with the summons of the parties. If the order or provision of the order has been declared unconstitutional, the court shall settle the merits of the case; otherwise, the action is dismissed as inadmissible* (article 9, par. (3) of Law no 554/2004).

It should also be emphasized also that the decisions of the Constitutional Court do not apply retroactively, as it is evident from the provisions of art. 147, par. (4) of the revised Constitution, as well as those of art. 11, par. (3) of the Law no. 47/1992, according to which the decisions of the Constitutional Court have effects only for the future.

In this respect, the High Court of Cassation and Justice established, by Decision no. 19 of June 13, 2016<sup>1</sup>, that “*according to the provisions of art. 147, par. (4) of the Constitution, the decision of the Constitutional Court is generally binding both for public authorities and institutions and for individuals and only effects for the future and not for the past, the consequence of applying this principle being that it cannot be prejudiced to some rights definitively gained or legal situations already established*”.

In relation to the above-mentioned aspects, we agree with the views expressed in the doctrine that the assessment of the lawfulness of the contested administrative act is based on the *tempus regit actum*<sup>2</sup> principle, namely the government order in force at the time of the issue of the contested administrative act, whose constitutional deficiency still existed from the date of its adoption, not from the date of the publication of the Constitutional Court's decision (Trăilescu, 2017, p. 217). As a result, the administrative contentious instance will not be able to solve the case with which it was invested until after the Constitutional Court's decision on the constitutionality of the government ordinance underlying the issuing of the contested administrative act.

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<sup>1</sup> Decision no. 19 of 13 June 2016 regarding the examination of the appeal filed by the Iasi Court of Appeal - Labor and Social Security Litigation Division in File no. 7.521 / 99/2014, on giving a preliminary ruling on the following question of law: in interpreting and applying the provisions of art. 52 par. (2) of Law no. 53/2003 - Labor Code, republished, as subsequently amended and supplemented (Labor Code), in relation to the effects of the Constitutional Court Decision no. 279 of 23 April 2015 on the objection of unconstitutionality of the provisions of art. 52 par. (1) letter b) from the same law, the determination of the patrimonial liability of the employer (for the purposes of the text, equal compensation of salary and other rights) must be instituted from the date of the decision to suspend the labor relations, when the decision of the Constitutional Court was not published in the Official Monitor, or from the date of publication of the Constitutional Court's decision in the Official Monitor, published in the Official Monitor no. 1010 of December 15, 2016.

<sup>2</sup> The Act shall be adopted in accordance with the law in force at the time of its adoption.

#### 4. Conclusions

The Government Ordinances are presented as “the result of a collaboration between the legislative and the executive power”, borrowing from each trait through which it is individualized (Tofan, 2014, p. 241). We can talk about a normal, *constitutional regime of ordinances evoking the rule of empowerment and about an exceptional constitutional regime, the regime of emergency ordinances* (Iorgovan, 2005, p. 407).

In the Romanian legal system, the Government ordinances (simple or urgent) *can only be subject to constitutional control achieved by the Constitutional Court* under art. 2, par. (1)<sup>1</sup> of Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished, without being possible a direct control exercised by the administrative contentious court.

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<sup>1</sup> Art. 2, par. (1) provides: *The Constitutional Court ensures the constitutionality control of the laws, of the international treaties, the regulations of the Parliament and the ordinances of the Government.*