

ROMANIA CONSTITUTIONAL COURT

Palatul Parlamentului
Calea 13 Septembrie nr. 2, Intrarea B1, Sectorul 5, 050725 Bucharest, Romania
Tel.: (+40-21) 414-2121 Fax: (+40-21) 315-9164

6 May 2020

PRESS RELEASE

I. On 6 May 2020, the Plenum of the Constitutional Court, as part of the *a priori* review, discussed:

A. The objections of unconstitutionality against the Law on repeal of certain provisions on service pensions and old-age allowances, as well as for regulating some measures in the area of occupational pensions, objections raised by the High Court of Cassation and Justice and the Advocate of the People;

During debates, the Constitutional Court, having examined the subject matter of those cases, ordered the joinder thereof.

Following deliberations, the Constitutional Court unanimously upheld the objections of unconstitutionality and found unconstitutional as a whole the Law on repeal of certain provisions on service pensions and old-age allowances, as well as for regulating some measures in the area of occupational pensions.

The Court held, in essence, that the impugned law was profoundly heterogeneous, referring to different professional statuses, as well as public offices, treated together in the light of the alleged intention of abolishing “special pensions”, without respecting the requirements imposed both in terms of the form specific to each area of regulation and the substance of the regulations. Thus, the procedure of adoption was conducted in breach of the order in which the Chambers

of the Parliament should have been referred as to the amendment of Law No 303/2004 on the status of judges and prosecutors, as well as against the constitutional obligation to debate the regulations on the rights of Deputies and Senators at the joint sitting of the two Chambers of Parliament, resulting in the violation of the provisions of Article 65 (2) (j) and Article 75 (1) with reference to Article 73 (3) (1) of the Constitution. Likewise, the adopted legislative act is not based on any documentation or substantiation, research or impact assessment, which is in breach of the constitutional provisions of Article 1 (3) and (5) which enshrine the rule of law, respect for the Constitution, its supremacy and laws. The Court finally found that the law was adopted in disregard of the general binding nature of the decisions of the Constitutional Court, as regulated by Article 147 (4) of the Constitution. In this respect, the Court held that according to the provisions of Article 147 (4) of the Constitution, its decisions are generally binding and effective only for the future, having the same effects for all public authorities and all individual subjects of law.

B. The objection of unconstitutionality against the Law on granting some facilities for taxpaying economic operators on the territory of Romania, an objection raised by 71 Deputies belonging to the Parliamentary Group of the National Liberal Party;

Following deliberations, the Constitutional Court unanimously upheld the objection of unconstitutionality and found unconstitutional as a whole the Law on granting some facilities to taxpaying economic operators on the territory of Romania.

The Court held, in essence, that the impugned law infringed upon the constitutional provisions of Article 61 (2), enshrining the principle of bicameralism, Article 111 (1) and Article 138 (5), concerning the obligation to inform the Parliament and the obligation to establish the source of funding for

budgetary expenditures, as well as of Article 1 (3) in relation to Article 1 (5) of the Constitution, enshrining the requirements of lawmaking in accordance with the rule of law and the principle of legal certainty.

C. The objection of unconstitutionality against the Law on suspension of loan repayments, objection raised by 72 Deputies belonging to the Parliamentary Group of the National Liberal Party;

Following deliberations, the Constitutional Court unanimously upheld the objection of unconstitutionality and found that the Law on suspension of loan repayments was unconstitutional, as a whole.

The Court found that the Law on suspension of loan repayments was such a to create situations of inconsistency and legislative instability contrary to the principle of legal certainty in its component regarding the clarity and foreseeability of the law, provided by Article 1 (5) of the Constitution, as it had the same regulatory purpose as Government Emergency Ordinance No 37/2020 on granting facilities for the loans granted by credit institutions and non-banking financial institutions to certain categories of debtors, published in the Official Gazette of the Romania, Part I, No 261 of 30 March 2020, the suspension for up to 9 months but not later than 31 December 2020 of the obligation to pay instalments, interests and fees related to the loans granted by creditors.

•

The legal effect of decisions establishing the unconstitutionality of the law as a whole is circumscribed to Article 147 (4) of the Basic Law and the case-law of the Court in this matter, so that the Parliament remains obliged to ascertain the legal cessation of the legislative process and, in the case of initiating a new legislative approach, to comply with those established by the Court's decision.

The decisions are final and generally binding and they shall be notified to the President of Romania, to the Presidents of the two Chambers of the Parliament and to the Prime Minister.

II. On the same day, the Plenum of the Constitutional Court, vested in accordance with Article 146 (c) of the Constitution of Romania, Article 11 (1) (A.c) and Article 27 of the Law No 47/1992 on the organisation and functioning of the Constitutional Court, discussed the referral of unconstitutionality against the provisions of Article I of the Senate's Decision No 16/2020 for the completion of the Senate Regulation, as well as the decision as a whole, a referral formulated by the Parliamentary Group of the National Liberal Party of the Senate.

Following deliberations, the Constitutional Court, with a majority of votes, dismissed, as unfounded, the referral of unconstitutionality and found that the provisions of Article I of the Senate Decision No 16/2020 for supplementing the Senate Regulation, as well as the decision as a whole, were constitutional in relation to the criticisms formulated.

The decision is final and generally binding and it shall be notified to the Senate.

III. Furthermore, the Plenum of the Constitutional Court, vested in accordance with Article 146 (d) of the Constitution of Romania and Article 29 of Law No 47/1992 on the organisation and functioning of the Constitutional Court, debated:

A. The exception of unconstitutionality against the provisions of the Government Emergency Ordinance No 36/2020 amending and supplementing certain legislative acts, as well as for the adoption of measures during the state of emergency declared by Decree No 195/2020 declaring the state of emergency in Romania, exception raised directly by the Advocate of the People;

Following deliberations, the Constitutional Court unanimously dismissed, as unfounded, the exception of unconstitutionality and found that the provisions of Government Emergency Ordinance No 36/2020 amending and supplementing certain legislative acts, as well as for the adoption of measures during the state of

emergency declared by Decree No 195/2020 declaring the state of emergency in Romania were constitutional in relation to the criticisms formulated.

The Court could not accept the criticism of unconstitutionality regarding the absence of request of the Economic and Social Council's opinion in the procedure of adopting the Government Emergency Ordinance No 36/2020 because this regulatory act was issued in compliance with the provisions of Article I (5) of Government Emergency Ordinance No 34/2020, a text whereby, during the existence of the state of siege or state of emergency, a derogation from the legal regime of decision-making transparency and social dialogue is established and, at the time of adoption of the criticised regulatory act, this text enjoys the presumption of constitutionality.

The decision is final and generally binding and it shall be notified to the Advocate of the People.

B. The exception of unconstitutionality against the provisions of Article 9, Article 14 (c¹) – (f) and Article 28 of Government Emergency Ordinance No 1/1999 on the regime of the state of siege and of the state of emergency, as well as against Government Emergency Ordinance No 34/2020 amending and supplementing Government Emergency Ordinance No 1/1999 on the regime of the state of siege and of the state of emergency, as a whole.

Following the deliberations, the Constitutional Court unanimously decided:

1. It dismissed the exception of unconstitutionality and found that the provisions of Article 14 (c¹) – (f) of Government Emergency Ordinance No 1/1999 on the regime of the state of siege and of the state of emergency, as well as the emergency ordinance, as a whole, were constitutional in relation to the criticisms formulated.

2. It upheld the exception of unconstitutionality and found that the provisions of Article 28 of Government Emergency Ordinance No 1/1999 on the regime of the state of siege and of the state of emergency were unconstitutional.

3. It upheld the exception of unconstitutionality and found that Government Emergency Ordinance No 34/2020 amending and supplementing Government Emergency Ordinance No 1/1999 on the regime of the state of siege and of the state of emergency was unconstitutional, as a whole.

1. Following the analysis of the constitutional and legal regulatory framework, the Court found that, when establishing the state of emergency, State authorities exercised shared prerogatives: Parliament has the power to enact, by organic law, the state of emergency, while the President has the constitutional prerogative to declare the state of emergency and to enforce the legal provisions specific to the regime of the state of emergency, as established by the legislator. The organic law, by transposing Article 93 of the Constitution, gives the President the power to declare, by presidential decree, the state of emergency, which also implies taking concrete measures of immediate urgency and identifying the fundamental rights and freedoms whose exercise shall be restricted. *The presidential decree is nothing more than a regulatory administrative act, therefore an act of secondary legislation, which enforces an act of primary legislation.* The restriction of the exercise of certain rights is not achieved by presidential decree, the provisions of Article 14 (d) of Government Emergency Ordinance No 1/1999 representing the standard by which the primary legislator empowers the administrative authority (the President of Romania) to order the enforcement of the law, respectively of the provisions of Article 4 of the same regulatory act, which expressly provide for the possibility of restricting the exercise of fundamental rights. In this case, acting within the limits of his legal powers, the President has identified the rights and freedoms that were to be restricted.

However, the measures that the President deemed “of immediate urgency with direct applicability” (direct purchase of goods by public authorities, suspension from office of certain civil servants in management positions, postponing of the dates as of which the limitation periods start to run, suspension of the statutes of limitation, the full staying of the proceedings in civil and criminal cases, the interruption of the time limits for exercising legal remedies, etc.) are,

expressly or implicitly, derogations from the legislation in force at the time of declaring the state of emergency. The President ordered, on the one hand, the suspension or non-enforcement of certain legal provisions, or, on the other hand, the amendment and supplementing of certain laws, his orders having an impact on a series of fundamental rights and freedoms (right to work, economic freedom, free access to justice, etc.). The Court noted that the manner in which the President has exercised his legal power, by exceeding the legal framework, was not the consequence of any flaw of unconstitutionality of the regulatory act of primary legislation by virtue and within the limits of which the public authority was empowered to act. Thus, *since no provision of Government Emergency Ordinance No 1/1999 entitles the President to act beyond his constitutional prerogatives, the constitutional court may not sanction, within the constitutional review that it conducts under Article 146 (d) of the Constitution regarding the settlement of exceptions of unconstitutionality, the legal norms challenged by the author of the exception*. However, given the legal nature of the presidential decree as a regulatory administrative act subject to Parliament's approval, the Court found that the legislator had the obligation to submit it to parliamentary control, and, by the decision adopted, to sanction the *ultra vires* exercise of legal powers by the President of Romania, only such a decision being likely to be challenged before the Constitutional Court, under Article 146 (l) of the Constitution.

2. The Court held that the legislation on petty offences, like criminal law, was subsidiary in nature, applying only when other legal means are not sufficient to protect certain social values. As such, the regulatory acts with the force of law and the administrative acts of a regulatory nature by which petty offences are established and sanctioned must meet all the requirements related to the quality of the norm: accessibility, clarity, accuracy and predictability. However, the Court finds that *the provisions of Article 28 (1), by the phrase "non-compliance with the provisions of Article 9 shall be considered petty offence", classify as petty offences any violation of the general obligation to observe and apply all the measures*

established by Government Emergency Ordinance No 1/1999, by the related regulatory acts, as well as by the military ordinances or orders, specific to the state of emergency declared, without expressly distinguishing between the acts, actions or omissions that may entail contraventional liability. Implicitly, the establishment of the conducts that represent petty offences is left, arbitrarily, to the free discretion of the law enforcement agent, as the criteria and conditions necessary for ascertaining and sanctioning such petty offences have not been established by the legislator. Moreover, in the absence of a clear representation of the elements that make up the petty offence, the judge himself does not have the necessary landmarks to apply and interpret the law when adjudicating upon the complaint filed against the report ascertaining and sanctioning the petty offence.

Furthermore, the provisions of Article 28 of Government Emergency Ordinance No 1/1999 establish, without making any difference, for all these conducts, regardless of their nature or seriousness, the same main contraventional sanction. With regard to the additional contraventional sanctions, although the law stipulates that they are imposed depending on the nature and seriousness of the action committed, as long as the respective action is not circumscribed, it is obvious that its nature or seriousness cannot be determined in order to establish, in a fair manner, the applicable additional sanction.

In conclusion, the Court found that the provisions of Article 28 of Government Emergency Ordinance No 1/1999, characterized by a faulty legislative technique, did not meet the requirements of clarity, accuracy and predictability and were, thus, incompatible with the fundamental principle of compliance with the Constitution, its supremacy and with the laws, provided for by Article 1 (5) of the Constitution, as well as with the principle of proportional restriction of the exercise of fundamental rights and freedoms, provided for by Article 53 (2) of the Constitution.

3. The regulatory act governing the legal regime of the state of siege and of the state of emergency aims at creating the legal framework of the exceptional measures

necessary for tackling this crisis situation, measures which, in themselves, affect rights and freedoms of the citizens. In other words, *the purpose of the law is precisely to represent the legal basis for restricting the exercise of certain fundamental rights or freedoms, in accordance with the constitutional imperative set in Article 53 (1), as well as the legal basis for the exceptional measures that may even concern powers of the fundamental institutions of the State.*

Noting that the regulatory act restricting/affecting fundamental rights and freedoms of the citizens or fundamental institutions of the State falls within the scope of the prohibition referred to by Article 115 (6) of the Constitution, the Court found that, under the current constitutional framework, such an act could only be a law, as a formal act of Parliament, adopted in compliance with the provisions of Article 73 (3) (g) of the Constitution, as an organic law.

Considering that Government Emergency Ordinance No 1/1999 was adopted under Article 114 (4) of the Romanian Constitution of 1991, i.e. prior to the revision of the Constitution by Law No 429/2003 (published in the Official Gazette of Romania, Part I, No 758 of 29 October 2003), which introduced Article 115 (6), the Court held that *Government Emergency Ordinance No 1/1999 was adopted in compliance with the constitutional framework in force at that time*, which did not limit the legislative prerogative of the Government in the sense of not affecting the regime of the fundamental institutions of the State or of the fundamental rights and freedoms.

On the other hand, with regard to ***Government Emergency Ordinance No 34/2020 amending and supplementing Government Emergency Ordinance No 1/1999***, the Court finds that it ***was adopted in violation of Article 115 (6) of the Constitution***, as its regulatory content was aimed at restricting the exercise of certain fundamental rights and freedoms (right to property, right to work and social protection, right to information, economic freedom).

The decision is final and generally binding and it shall be notified to the two Chambers of Parliament, the Government and the Advocate of the People.

•

The arguments retained as grounds for the solutions delivered by the Plenum of the Constitutional Court shall be presented within the decisions, which shall be published in the Official Gazette of Romania, Part I.

**Foreign Relations, Press and Protocol Unit
of the Constitutional Court**