Decision No 150
of 12 March 2020

on the exception of unconstitutionality of the provisions of Government Emergency Ordinance No 26/2020 amending and supplementing certain legislative acts concerning elections to the Senate and the Chamber of Deputies, as well as certain measures for the proper organisation and conduct of early parliamentary elections,

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Summary

I. As grounds for the exception of unconstitutionality, the Advocate of the People argued that Article 14 (1) (c^1) — (f) of Government Emergency Ordinance No 1/1999 allows the President of Romania to legislate in areas in respect of which the Basic Law requires the primary or delegated legislator to intervene, by amending organic laws and effectively restricting the exercise of human rights. Not even by exceptional legislative delegation, that is to say by emergency ordinances, the Government has the right to restrict the exercise of constitutional rights and freedoms. If the constituent legislator had taken the view that the President may legislate by decree during the state of emergency or the state of siege, it would have expressly provided for a type of legislative delegation, as it provided in the case of the other executive authority, i.e. the Government. In addition, Parliament is required, by Constitution, to operate throughout the declaration of the state of siege or of the state of emergency, being entitled to legislate in any field.

As regards the restriction on the exercise of certain rights referred to in Article 14 (d) of Government Emergency Ordinance No 1/1999, the Advocate of the People has argued that the constitutional provisions of Article 53 are categorical: the exercise of rights or freedoms may be restricted only by law. The role of the legislative power cannot be diverted by the possibility afforded to the President by the contested legislation to adopt, by the decree establishing the state of emergency or the state of siege, mandatory provisions concerning the specific manner in which the rights and constitutional freedoms are to be restricted. By the decree establishing the state of emergency, the President may, at most, arrange for the implementation of the law or to actually implement it, since the decree, as such, cannot have the characteristics of a law.

Similarly, by the provisions of Article 28 of Emergency Ordinance No 1/1999, as amended by Article I (1) of Government Emergency Ordinance No 34/2020, the Government did not provide for any administrative offence capable of being penalised, but merely regulated, in a general manner, that failure to comply with the provisions of Article 9 constitutes an administrative offence. Administrative offences are not defined by law, but by numerous administrative acts of law enforcement (government decisions, military ordinances, orders and other related regulatory acts) the regulatory object of which relates to different fields. The legislator must indicate clearly and unequivocally the material object of the administrative offences within the statutory rule or that material object must be capable of being readily identified by reference to another legislative measure of equal rank.

Therefore, Article 28 of Emergency Ordinance No 1/1999 lacks foreseeability and clarity. The contested rule imposes a general obligation to comply with certain rules, without incriminating a specific action, and lays down administrative penalties, without providing minimum objective criteria for the application thereof in a differentiated manner. It is clear that such a regulation does not set aside the subjective or discretionary elements that may arise

when the law enforcement officer interprets and applies the rules contained in military ordinances or other legislative acts. Thus, the contested legal text does not distinguish any administrative offence, whereas the amount of administrative fines has been considerably increased, which may give rise to penalties disproportionate to the gravity of the offence.

In the absence of a definition of the actions constituting administrative offences, the burden of proof is reversed, the matters referred to in the report on the offence committed being presumed to be genuine, and it is for the natural or legal person to prove the contrary. The insufficient description of the administrative offence does not enable the persons concerned to defend themselves effectively before the law enforcement officer, by putting them in a weaker position vis-à-vis the administrative body. That reversal of the burden of proof has no justification, even during the period of emergency, as it involves a risk of increase in the number of abuses, but also of possible tensions between citizens and the State authorities responsible for establishing administrative offences. Thus, the offender is placed in a much worse situation than he would have been faced in criminal proceedings, in clear breach of the fundamental guarantees of the right of defence.

As regards Government Emergency Ordinance No 34/2020, the Advocate of the People argued that it was unconstitutional, as it contravened the provisions of Article 115 (6) of the Constitution, which makes legislative delegation subject to compliance with the prohibition on affecting the constitutional rights and freedoms and the prohibition of the adoption of measures for the forced passage of goods into public property.

Taking into account the extremely evasive and general regulatory arrangements, in the absence of clear and concise determinations, the law enforcement agent will apply both the main administrative penalty consisting of the fine, the amount of which has increased considerably, and an additional administrative penalty of confiscation of goods intended, used or resulting from an administrative offence. It is therefore clear that the cumulative application of both penalties is such as to have an undue adverse effect on the offender's right to property.

Furthermore, the provisions of Article I (5) of Government Emergency Ordinance No 34/2020, inserting Article 33^1 in Government Emergency Ordinance No 1/1999, suspend the application of legal rules on transparency in decision-making and social dialogue in case of draft legislative measures laying down measures applicable during the state of siege or the state of emergency. Thus, the right to work and the social protection of employment and the right to information, enshrined in Article 53, are infringed by failure to comply with the requirement of proportionality in the temporary restriction on the exercise of rights.

II. Having examined the exception of unconstitutionality, the Court has held that, in terms of content, the decree of the President is an administrative measure of a legislative nature. Having regard to the legal nature of the measure, the Court held that he can only implement primary regulatory provisions ruling on the state of emergency, namely Emergency Ordinance No 1/1999. Given the it has lower legal force than the law, the decree of the President may not derogate from, replace or add to the law and may not therefore contain basic regulatory provisions.

Although the author of the exception criticises the provisions of Article 14 (c^1)-(f) of Government Emergency Ordinance No 1/1999, the Court noted that the author does not in any way give reasons for the unconstitutionality of the provisions of Article 14 (e) and (f). This criticism does not meet the condition laid down in Article 10 (2) of Law No 47/1992, according to which "Referral must be made in written and reasoned form".

As regards the complaint relating to Article 14 (d), the Court held that the restriction on the exercise of certain rights cannot be ordered by decree of the President. It is true that, when the Decree establishing the state of emergency was issued and when it was renewed, the President of Romania failed to rely on the provisions which constituted the legal basis for

taking measures to restrict fundamental rights. However, that does not mean that the President acted as a legislator able to decide on fundamental rights and freedoms of citizens.

The Court has also held that that Article 14 (c^1) does not empower the President to adopt rules having the status of law. However, the Court noted that the President ordered "first emergency measures"which were not provided for in Article 26 of Government Emergency Ordinance No 1/1999 and constituted derogations from the legislation in force when the state of emergency was declared. The President ordered, on the one hand, the suspension or non-application of legal provisions and, on the other hand, the amendment and completion of certain laws, his decisions having an impact on certain fundamental rights and freedoms (right to work, economic freedom, free access to justice, etc.).

If the constituent legislator had considered that the President, as an executive authority, may, by means of a decree, adopt legislative rules during the state of emergency or the state of siege, it would have expressly provided for that legislative delegation, as regulated by Article 115 in the case of the Government.Furthermore, Article 93 (2) of the Constitution provides that "if Parliament does not sit in a session, it shall be convened de jure within 48 hours of the institution of the state of siege or emergency, and shall function throughout this state". The reason for that provision is to create the possibility of legislative intervention as a matter of urgency. The constitutional rule constitutes a guarantee against any excess or abuse on the part of the executive public authorities. Parliament, as the highest representative body of the people, acts as a guarantor of the rights and freedoms of citizens.

However, the Court held that the manner in which the President exercised his constitutional powers, by exceeding the legal framework, was not the consequence of an unconstitutional flaw of the primary regulatory measure by virtue of and within the limits of which the public authority was entitled to act.

In authorising the declaration of the state of emergency, the Parliament of Romania was required to verify whether the constitutional and legal conditions with which the decree of the President had to comply were satisfied. However, the Parliament confined itself to authorising the measure.

As regards the infringement of Article 115 (6) of the Constitution, the Court has held that the legal rules governing the state of siege and the state of emergency, in the current constitutional framework, can be regulated only by a law, adopted in accordance with the provisions of Article 73 (3) (g) of the Constitution, i.e. as organic law. However, Emergency Government Ordinance No 1/1999 was adopted before the revision of the Constitution in 2003. At the time when the contested legislative measure was adopted, the constitutional rule did not require the Government not to affect by ordinance the regime of the fundamental institutions of the State or the rights and freedoms provided for by the Constitution. The Government emergency ordinance was therefore adopted in compliance with the constitutional framework in force at that date.

On the other hand, as regards Government Emergency Ordinance No 34/2020, the Court found that it had been adopted in breach of Article 115 (6) of the Constitution. The legislative measure alters the legal regime governing the state of siege and the state of emergency as regards liability for administrative offences in the event of failure to immediately comply with or apply the measures laid down in Government Emergency Ordinance No 1/1999.

As regards the criticism expressed with regard to the legal nature of administrative penalties and their effects on the offender's assets, it appears that the regulation in this matter affects the right to property, enshrined in Article 44 of the Constitution, and the economic freedom provided for in Article 45 of the Constitution.

In addition, Article I (5) of Government Emergency Ordinance No 34/2020 provides that the legal rules relating to transparency in decision-making and social dialogue for the

duration of the state of siege and state of emergency are not to apply. That social dialogue is conducted by the Economic and Social Council, which is a constitutional body, and is expressly enshrined in Article 141 of the Basic Law. It is clear that the suspension of those rules affects the fundamental rights protected by them as well as the regime of a fundamental State institution, with the result that the emergency ordinance establishing such suspension runs counter to the prohibition laid down by Article 115 (6) of the Constitution.

As regards the complaints concerning the unclear regulation of actions constituting administrative offences, the Court has stated that Article 9 (1) of Government Emergency Ordinance No 1/1999 does not present any drafting deficiency in terms of clarity. The confusing, unclear and unforeseeable nature is apparent from a combined reading with Article 28 (1) of the ordinance, which establishes that failure to comply with the provisions of Article 9 (1) constitutes an administrative offence. The relevant offences and penalties must be clearly defined by law. It is necessary for the addressee of the rule to know from its very wording what acts, actions or omissions may give rise to administrative liability.

The provisions of Article 28 (1), read in conjunction with Article 9 (1), do not indicate clearly and unequivocally what acts, actions or omissions constitute administrative offences, nor do they enable for them to be easily identified, by reference to legislative acts related to the criminalisation text. Thus, Article 9 (1), which refers to "all measures laid down in the present emergency ordinance, in related legislative acts, as well as in military ordinances or orders, specific to the declared state", cannot be regarded as a reference rule. It is practically impossible to determine specifically in the primary legislative measure concerning the general regime of the state of emergency what measures may be taken in each individual case, since the measures taken by the authorities during the period of emergency concern different areas.

The legislator has thus adopted legal provisions which are incapable of achieving the objective for which they were introduced. The Court noted that the provision refers to Government Emergency Ordinance No 1/1999, but that that legislative measure, apart from the provisions of Article 28 (1), contains no other rule expressly governing an administrative offence. Related regulatory acts are not defined anywhere and cannot easily be identified by the addressees of the rule who, by reason of the general nature of the regulation, represent the whole population of the country.

The determination of the facts the commission of which constitutes administrative offences is arbitrarily left to the discretion of the law enforcement officer. Similarly, in the absence of clear representation of the constituent elements of the offence, the court does not have the guidance necessary for the application and interpretation of the law when dealing with the complaint against the report establishing the administrative offence and the related penalty.

Moreover, the contested legal provisions also fail to comply with the principle of proportionality. Not only do the provisions of Article 28 of Government Emergency Ordinance No 1/1999 not specifically provide for the actions giving rise to liability for administrative offences, but establish without distinction, for all such actions, irrespective of their nature or seriousness, the same main administrative penalty.

The Court therefore found that the provisions of Article 28 of the ordinance, characterised by a flawed legislative technique, do not meet the requirements of clarity, precision and foreseeability and are thus incompatible with the fundamental principle of compliance with Constitution, its primacy and the laws, laid down in Article 1(5) of the Constitution and the principle of proportionate restriction of fundamental rights and freedoms laid down in Article 53 (2) of the Constitution. Similarly, the imprecision of that legislative text also affects the constitutional guarantees which characterise the right to a fair trial, enshrined in Article 21 (3), including its aspect relating to the right of defence, a fundamental right laid down in Article 24.

As regards the complaint concerning the reversal of the burden of proof, the Court has held that no rule of the Emergency Ordinance No 1/1999 ascribes absolute probative force to the report establishing the administrative offence.

III. For all those reasons, the Court unanimously dismissed the exception of unconstitutionality and found constitutional, in relation the complaints made, the provisions of Article 14 (1) (c^1) to (f) of Government Emergency Ordinance No 1/1999 on the rules governing the state of siege and the rules governing the state of emergency, and against the emergency ordinance, as a whole. The Court unanimously upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 28 of the same ordinance. The Court unanimously upheld the exception of unconstitutionality and found unconstitutional, as a whole, Government Emergency Ordinance No 34/2020.