

Decision no. 381 of 8 June 2021

regarding the exception of unconstitutionality of the provisions of Article 5 (2) (d), of Article 13 (a), of Article 65 (h), of Article 66 (a), regarding the reference to Article 65 (h), and Article 67 (1) and (2) (b), (c) and (d) of Law no. 55/2020 on certain measures to prevent and combat the effects of the COVID-19 pandemic,

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Summary

I. As grounds for the exception of unconstitutionality, its authors considered that the provisions of Article 5 (2) (d), Article 65 (h) and Article 66 (a) of Law no. 55/2020 regarding certain measures to prevent and combat the effects of the COVID-19 pandemic do not describe any action or inaction of an antisocial nature that could represent the constitutive elements of an administrative offence. However, in order to observe the principle of legality, the legislator must clearly and unequivocally indicate their material object within the legal norm. Law no. 55/2020 does not refer to another law that clearly regulates certain administrative offence, but only mentions that they will be established by administrative acts. As a result of this legislative loophole, the ascertaining agent is put in the situation to assess, in a discretionary way, whether a certain conduct of a natural person is an administrative offence or not, not having at his disposal clear landmarks that could outline the administrative offence.

The authors of the exception claimed that the criticized provisions of the law are also contrary to the constitutional provisions of Article 23 (11), since, in the absence of defining the constitutive and legal content of the deeds that constitute administrative offences, the burden of proof is reversed, as the aspects retained in the citations are presumed to be real and thus it follows that the natural or legal person provides evidence to the contrary.

Also, the establishment of the obligation to wear a protective mask can only be achieved by law, and not by ministerial order, as it restricts the exercise of the right to free movement.

II. Examining the exception of unconstitutionality, the Court ruled that the normative acts with the power of law and the administrative acts with a normative character by which administrative offences are established and sanctioned must meet all the quality conditions of the norm: accessibility, clarity and predictability. The determination of the deeds, the commission of which constitute administrative offences, must be carried out in compliance with these requirements, and not left, arbitrarily, to the free discretion of the ascertaining agent.

Law no. 55/2020 enshrines a set of measures that, in the context of the COVID-19 pandemic, are considered capable of contributing to the prevention and combating of its effects, measures whose content is regulated at the level of the law, but whose concrete application is established by Government decisions, depending on the existence and incidence of certain risk factors.

The provisions of Article 5 (2) (d) expressly refer to quarantine and isolation measures and make a general reference to "measures to protect life and to limit the effects of the type of risk to the health of individuals", without naming them. Of course, considering the stated objective of the law, as well as the fact that the text does not refer to other normative acts, the Court assessed that it is about measures mentioned in Law no. 55/2020.

The authors of the exception argued that the criticized legal provisions are unconstitutional, as they do not specify the obligations whose violation constitutes an administrative offence. The Court assessed that the specification of these measures in the content of the legal texts subject to constitutionality review would have the consequence of

their application throughout the duration of the COVID-19 pandemic, without giving the authorities the opportunity to select the necessity and intensity of the intervention depending on the rapid and unpredictable evolution of this phenomenon. The regulation would thus acquire a rigid character, making a flexible application impossible, so as to effectively ensure the objective established by the legislator of preventing and combating the effects of the pandemic, but also the imperative to respect the proportional nature of the restriction of the exercise of some rights by reference to this objective and to the concrete data of reality. This could lead to the situation where the obligations imposed have the same scope, although the severity of the phenomenon has decreased, justifying the narrowing of this scope or even the non-application of the measures.

The general nature of the legal provisions analyzed, which require reference to secondary normative administrative acts in order to be applied, should not lead to the conclusion that the deeds that constitute contravention are established by the administrative bodies. Thus, the phrase "measures to protect life and to limit the effects of the type of risk on the health of individuals" contained in Law no. 55/2020 refers to measures enshrined in the law, as is also the measure of the obligation to wear a protective mask, expressly regulated in the content of Article 13 (a) of Law no. 55/2020.

Therefore, the Court established that individuals had the opportunity to know the content of the measures referred to in Article 5 (2) (d) and Article 65 (h) of Law no. 55/2020.

The analyzed provisions of Law no. 55/2020 make it possible to identify individual obligations whose violation constitutes an administrative offence and allow the ascertaining body and, in case of a legal challenge, the court, to assess the seriousness of the deed and the proportionality of the administrative sanction, considering the protected social values, namely the right to life and the right to health.

As for the criticism regarding the reversal of the burden of proof, the Court held that no rule in Law no. 55/2020 assigns absolute probative force to the citation establishing the administrative offence, and the procedure for challenging it, the remedies and the trial itself do not derogate from the general evidentiary regime.

The Court found that the criticisms of unconstitutionality regarding the violation of the right to free movement of persons cannot be upheld. Moreover, regarding the arguments of the authors of the exception regarding the regulation of the obligation to wear a protective mask through normative acts inferior to a law, the Court found that the joint order of the Minister of Health and the Minister of Internal Affairs is issued based on and in application of Article 13 (a) from Law no. 55/2020. Therefore, the order issued pursuant to Article 13 (a) of the law could not provide conditions related to the establishment of the obligation to wear the protective mask more restrictive than those established by this article, adding to the law, but, on the contrary, only more permissive ones.

III. For all these reasons, unanimously, the Court dismissed, as unfounded, the exception of unconstitutionality and found that the provisions of Article 5 (2) (d), of Article 13 (a), of Article 65 (h), of Article 66 (a), regarding the reference to Article 65 (h), and Article 67 (1) and (2) (b), (c) and (d) of Law no. 55/2020 regarding measures to prevent and combat the effects of the COVID-19 pandemic are constitutional in relation to the criticisms formulated.