

THEORETICAL AND PRACTICAL ASPECTS REGARDING THE CONSTITUTIONAL AND LEGAL REGIME OF GOVERNMENT EMERGENCY ORDINANCES AND THEIR RELATIONSHIP WITH GOOD GOVERNANCE AND DISCRETIONARY POWER

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Abstract

In a state governed by the rule of law in which democratic principles recognized, enshrined by the Constitution, are the basis for the organization and functioning of the public authorities and institutions in that state, the principle of separation and balance of power in the state cannot be ignored. According to this constitutional principle, governments are part of the executive branch and their main role is to implement the most important normative acts, the laws, adopted by parliaments. In order to achieve this role, generically identified, governments have constitutionally recognized the possibility of adopting legal acts, of a normative or individual nature, through which it is possible to them to organize the enforcement of laws or even to ensure their enforcement. Although, according to this above mentioned principle, we could not identify a "legislative power" recognized to governments, the reality has led even the constitutional legislator to recognize them the possibility of adopting legal acts with a legal force similar to that of laws to solve different special, exceptional, extraordinary, situations, even crisis.

The legislative delegation thus enshrined in the constitution, allowed governments to "legislate", to adopt primary normative acts by which, even only temporarily, to adopt measures that otherwise could not have been adopted except by law, by parliaments. Although, in principle, for the adoption of such normative acts with a legal force similar to the law, governments need the "permission" of parliaments expressed by adopting a law under the conditions established by the Constitution itself, however in some constitutional systems it is also recognized the possibility the issuance of such acts by governments, without the need to issue such a law in advance.

Taking into consideration that some governments, as well as ours, develop a "true passion" for the adoption of such acts, as emergency ordinances are in our constitutional system, by this article, we intend to analyze the possibility that by exercising a such attributions, usually and not of an extraordinary character, should be affected even by the Government the good governance that it has to ensure, thus exercising even a true discretionary power.

Keywords: ordinances, urgency, government, discretionary power, good governance.

1. Introduction

Legislation is one of the dimensions through which state power is realized and which, according to the principle of separation and balance of powers in the state and, implicitly, of the constitutional functions and attributions consecrated, belongs, in any democratic state, to the national parliament.

According to the constitutional provisions, as those from art. 74 para. (1) of the Romanian Constitution, the legislative initiatives - "starting material" in the legislative process - also come from the executives, more precisely from the Government. In fact, over time, the state practice¹ has shown that the vast majority of these legislative initiatives are formulated and submitted to the competent Chamber of Parliament by the Romanian Government.

Starting from the premise of good faith given that it is the public authority that, by virtue of its constitutional role, knows best the economic, social,

political reality, etc., as well as the concrete and specific needs of the field to be regulated, necessary premises for the configuration of a draft law, the Government will hope that that draft law will be adopted by the Romanian Parliament as conceived. However, even if the Government is supported by a substantial parliamentary majority, the democratic exercise includes the debate of such bills within the legislative authority, all the more so as the attribute of the legislation belongs, in law and in fact, to the Parliament. However, any parliamentary debate - both at the level of committees and in the plenary of the Chambers of Parliament - can have as a consequence the modification and / or completion of the draft law conceived by the Government. As there may be even differences between the Government's intention to legislate expressed in the draft law and the Parliament's will to legislate, embodied in the law adopted by it, the Government may be determined to seek to identify those constitutional ways to even deals with "legislation". However, such a mechanism, enshrined

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¹ See, in this regard, the public information on the website of Chamber of Deputies of Romanian Parliament, http://www.cdep.ro/pls/proiecte/upl_pck2015.home#, accessed on: 21.03.2022.

in the Constitution, can be considered the legislative delegation, and the instrument, also enshrined in the Constitution, by which this can be expressed is the ordinance.

But, the legislator is obliged, in our opinion, to ensure that such a power to issue normative acts with the legal force of a law will not consist in a transfer of legislative power from the Romanian Parliament to the Government, or will not involve even a "real takeover" of this legislative power by the Government, and Parliament just will only formally hold it. Therefore, it is mandatory that, by constitutional provisions, to be established instruments, mechanisms and procedures to limit the exercise of this power of Government or even to verify its exercise.

Constitutional configuration of such limitations, as well as control mechanisms and procedures for the exercise of legislative delegation, must be carried out in such a way that it cannot be exercised in a discretionary manner or jeopardized by good governance.

2. Emergency Ordinance of Government - expression of legislative delegation

The Romanian constitutional legislator, also in the initial version of the 1991 Constitution, by the provisions of art. 114, but also in the revised and republished version of it from 2003, especially by art. 115, has identified as normative acts by which to concretize the legislative delegation - the ordinance with its two forms: the ordinance issued on the basis of the enabling law (identified by doctrine² as a simple ordinance) and the emergency ordinance.

The principle *delegata potesta non delegatur* and, implicitly, its application oppose the idea of a second delegation of powers by the legislature to the executive, the first delegation - the original being the one that the people gave to their representatives, to draft laws on its behalf³.

Unfortunately, especially the reality of recent years has shown us that the institution of legislative

delegation is a necessity in special situations given the complexity of the parliamentary legislative procedure and the heavy way of working of the Romanian Parliament and its internal structures. Moreover, the CCR stated that the legislative delegation "is a limitation of the parliamentary monopoly on legislation, but finds a unanimously accepted justification that springs from the principle of separation and cooperation of powers in the state"⁴.

On the other hand, we must also keep in mind that it is almost impossible to predict all possible future situations that require legal regulation. This reality was also highlighted by John Locke who thus justified for the seventeenth century the need to recognize the possibility of the executive to adopt legal acts with the same legal force as the law adopted by Parliament⁵ because "[t]he executor of laws, having power in his hands by common law of nature, obtains the right to use it for the good of society in many cases where local laws do not give any guidance, until the legislature can meet to make [such laws]"⁶, therefore to exercise its own legislative powers. But, if for those times such predictability in identifying the need for regulation by law may sometimes not be possible, today the risk of lack of predictability is even higher.

However, such an impediment in the exercise of legislative power exclusively by Parliament cannot be invoked and used absolutely, unconditionally, to justify the constitutional configuration of the legislative delegation.

Therefore, all the more so, if we are to allow governments to participate in the exercise of their "legislative power"⁷ today, it is imperative that the constitutional provisions set out as clearly and conclusively as possible the legal framework, including the limits within which ordinances may be issued, on the one hand, and, on the other hand, the Romanian Parliament is obliged to use the constitutional mechanisms specific to its control to ensure that legislative delegation has not been exercised at its discretion by the Government.

Moreover, our doctrine underlined that once the role⁸ of the Parliament as "the sole legislative authority

² See, for example, I. Muraru, N.M. Vlădoiu, A. Muraru, S.G. Barbu, *Contencios constituțional (Constitutional litigation)*, Hamangiu Publishing House, Bucharest, 2009, p. 134.

³ See V. Duculescu, C. Călinoiu, G. Duculescu, *Constituția României comentată și adnotată (The Romanian Constitution commented and annotated)*, Lumina Lex Publishing House, Bucharest, 1997, p. 316, apud. I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles)*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2022, p. 911.

⁴ See point 27 of the Decision of the CCR no. 258/2015 regarding the exception of unconstitutionality of the provisions of art. 33 of Law no. 146/2002 regarding the legal regime of the county foundations for youth and of the municipality of Bucharest, published in the Official Gazette of Romania, Part I, no. 417 of 12.06.2015.

⁵ See, I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles)*, op. cit., 2022, p. 973.

⁶ J. Locke, *Al doilea tratat despre cărmuire. Scrisoare despre toleranță (Second Treatise of Government. A Letter Concerning Toleration)*, Nemira Publishing House, Bucharest, 1999, p. 154.

⁷ See I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles)*, op. cit., p. 911.

⁸ See I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles)*, op. cit., 2022, p. 911.

of the country” was enshrined constitutionally, according to art. 62 para. (1) of the Constitution, however, the constitutional recognition of legislative delegation “[m]ust be authorized by Parliament and can only be limited”⁹. Moreover, the Constitutional Court itself ruled, by its decisions, that “legislative delegation is an institution specific to constitutional law which involves the transfer of powers from Parliament to the Government under certain conditions provided by the enabling law or the Constitution”¹⁰.

In this article, we intend to analyze the issues mentioned in its title and abstract from the perspective of Government emergency ordinances given their constitutional regime and, implicitly, the Government's appetite for issuing them.

As pointed out in our doctrine, by the notion of ordinance, the Romanian Constitution “[d]etermines the legal act by which the Government exercises its legislative delegation which, being a power that the Parliament delegates to the Executive, implies the adoption of an investment law for this purpose”¹¹. But, in the case of emergency ordinances, such an enabling law is no longer necessary because their adoption is made directly on the basis of the constitutional provisions because “The Government receives the power to issue ordinances... through the direct application of art. 115 para. (4) of the Constitution”¹².

According to the constitutional provisions, “in terms of the material criterion for determining the concept, Government ordinances are limited both in content and in terms of applicability over time.”¹³. In the case of emergency ordinances, these limitations¹⁴ are identified even by the constitutional provisions of art. 115:

- identification of “extraordinary situations whose regulation does not suffer postponement” [art. 115 para. (4) of the Constitution],
- the fulfillment of two cumulative conditions in order to be able to enter into force, namely:

“submission for debate in the emergency procedure to the competent Chamber [of the Parliament, *s.n.*] to be notified” and “publication in the Official Gazette of Romania” [art. 115 para. (5) Thesis I of the Constitution],

- no adaptation of them in fields expressly mentioned in the constitutional text, namely: “constitutional laws, or affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, and cannot establish steps for transferring assets to public property forcibly” [art. 115 para. (6) of the Constitution].

Although these constitutional limitations exist, the constitutional legislature has regulated mechanisms by which can be verified the fulfilment of these limits by the Government. I mentioned such a first mechanism before, being, at the same time, one of the constitutional limitations in issuing emergency ordinances, and being represented by the parliamentary control that is exercised by the Parliament according to the provisions of art. 115 para. (5), (7) and (8) of the Constitution. Also, according to art. 146 letter d) of the Constitution, including emergency ordinances, the constitutional legislator not making any distinction from this point of view between these ordinances and the simple ones, may be subject to the constitutionality control exercised by the CCR. This type of control can be both substantially, in terms of regulation (intrinsic control) and formally, in compliance with the constitutional procedures for the adoption of the ordinance (extrinsic control)¹⁵, as was noted by the Constitutional Court. through its jurisprudence¹⁶. By the provisions of art. 126 para. (6) the second thesis of the Constitution corroborated with those of art. 9 of Law no. 554/2004 of the administrative contentious, with the subsequent amendments and completions, is also enshrined “a special legal mechanism for contesting their unconstitutionality [ordinances] within

⁹ A. Iorgovan, *Tratat de drept administrativ (Administrative Law Treaty)*, vol. I, 4th ed., All Beck Publishing House, Bucharest, 2005, p. 406.

¹⁰ See point 1) of the CCR Decision no. 1438/2010 regarding the exception of unconstitutionality of the provisions of art. 17 letter c) of Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption, as well as the provisions of the GEO no. 124/2005 regarding the amendment and completion of Law no. 78/2000 for the prevention, discovery and sanctioning of corruption, published in the Official Gazette of Romania, Part I, no. 16 from 07.01.2011.

¹¹ M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, *Constituția României revizuită. Comentarii și explicații (Revised Romanian Constitution. Comments and explanations)*, All Beck Publishing House, Bucharest, 2004, p. 223.

¹² I. Muraru, N.M. Vlădoiu, A. Muraru, S.G. Barbu, *op. cit.*, p. 133.

¹³ *Idem*, p. 134.

¹⁴ In this sense, see, for example, I. Muraru, N.M. Vlădoiu, A. Muraru, S.G. Barbu, *op. cit.*, pp. 134-135, or S.G. Barbu, A. Muraru, V. Bărbățeanu, *Elemente de contencios constituțional (Elements of constitutional litigation)*, C.H. Beck Publishing House, Bucharest, 2021, pp. 87-88, or, I. Muraru, E. S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles)*, *op. cit.*, 2022, pp. 985-990.

¹⁵ See V. Bărbățeanu, C.M. Krupenschi, *Aspecte din jurisprudența Curții Constituționale referitoare la controlul constituționalității extrinseci a legilor și ordonanțelor (Aspects of the jurisprudence of the Constitutional Court regarding the control of the extrinsic constitutionality of laws and ordinances)*, in Current landmarks in the jurisprudence of the Romanian Constitutional Court and perspectives of European justice, Sitech Publishing House, Craiova, 2012, p. 255.

¹⁶ Such a more recent example is represented by the Decision of the CCR no. 152/2020 regarding the exception of unconstitutionality of the provisions of art. 9, art. 14 letters c¹-f) and of art. 28 of the GEO no. 1/1999 on the state of siege and the state of emergency and the emergency ordinance, as a whole, as well as the GEO no. 34/2020 for the amendment and completion of the GEO no. 1/1999 on the state of siege and the state of emergency, as a whole, published in the Official Gazette of Romania, Part I, no. 387 din 13.05.2020.

the common law judicial procedures"¹⁷, being provided a special mechanism by which the CCR may be notified with exceptions of unconstitutionality (objections of unconstitutionality, *s.n.*) of an ordinance or provisions within one, by the administrative contentious courts which are competent to resolve the claims of injured persons by ordinances or, as the case may be, by provisions of ordinances declared unconstitutional.

But, as we mentioned before, state practice has shown that even the 2003 revision of the Constitution when substantial changes were made to the ordinance regime, especially the emergency regime, failed to curb the Government's "passion" for the latter type of ordinances. Although, as we have shown above, mechanisms have been created by which specific constitutional review, neither the Parliament, nor the CCR has succeeded in getting the Government to understand and accept that "the power of the Government to issue ordinances it is a delegated power and not its own power"¹⁸.

3. Good governance and the issuance of normative acts - expression of the legislative delegation

Does good governance imply an "extension" of the limits of the principle of separation and balance of power in the state by building a permissive constitutional framework for legislative delegation? Or, on the contrary, does it entail the constitutional regulation of this legal institution so that legislation delegated by the executive is adopted in special situations, clearly identified, but without jeopardizing the legislative function of the legislative authority of the Parliament?

In our opinion, obviously the second question is the one that should be answered in the affirmative way. Such an answer is all the more valid when we consider that good governance has as its premise a constitutional and legal framework built on the principles specific to a democracy, such as the separation and balance of power in the state, loyal interinstitutional cooperation,

the state legal certainty or the supremacy of the Constitution. However, these principles must also guide the constitutional legislator in configuring the legal framework for legislative delegation, as well as the "actors" who operate with it. But, when the constitutional regulation of a legal institution, as is the case of legislative delegation, is overtaken by the reality determined by the application of these provisions, by the state practice in the field, allowing even its discretionary and even abusive application, it is called into question the capability of state to ensure good governance.

Although, in the doctrine, there are also appreciations according to which today we can talk about a fashionable concept, even an "inflation of an idea"¹⁹, yet "clearly implicit in the general concept is the notion that good governance is a positive feature of political systems and that bad governance is a problem that countries need to overcome"²⁰. Indeed, good governance is a concept that we often hear in different contexts, viewed from different perspectives²¹ to meet the different needs of today's society²², but the governance of a state presupposes "[t]he use of political authority and exercise of control in a society to the management of its resources for social and economic development"²³. Among the different meanings of the concept of good governance, one of them identifies it with "[a] situation or event in which government follows a set of principles considered to be ideal. For example, the following in a policy statement of good governance: governments should make decisions based on principles of transparency, accountability, and responsiveness; a concern for efficiency and effectiveness; respect for the rule of law; and a commitment to creating a corruption free administration. This notion of "good governance" is normative and a matter of public policy"²⁴. In this regard, the former UN Secretary-General Kofi Annan said that "good governance is ensuring respect for human rights and the rule of law, strengthening

¹⁷ S.G. Barbu, A. Muraru, V. Bărbățeanu, *op. cit.*, p. 88.

¹⁸ See point 2) of the Decision of the CCR no. 1/1995 regarding the obligation of the decisions of the CCR pronounced within the constitutionality control, published in the Official Gazette of Romania, Part I, no. 16 of 26.01.1995.

¹⁹ See even the title of this article: M. Grindle, *Good Governance: The Inflation of an Idea*, in ID Working Paper Series 2010.202, Harvard University, Cambridge, MA, October 2010, available at: <https://dash.harvard.edu/bitstream/handle/1/37366227/202.pdf?sequence=1&isAllowed=y>, accessed on: 21.03.2022.

²⁰ M. Grindle, *op. cit.*, p. 2.

²¹ See, for example, T.G. Weiss, *Governance, Good Governance and Global Governance: Conceptual and Actual Challenges*, in *Third World Quarterly*, vol. 21, no. 5 (Oct., 2000), p. 796 and next, available at: <https://www.jstor.org/stable/3993619>, accessed on: 21.03.2022.

²² See, in this sens, the website of OECD regarding the different perspectives of governance and, implicitly, the ways to improve it in various fields, namely: <https://www.oecd.org/general/searchresults/?q=good%20governance&cx=012432601748511391518:xzeadub0b0a&cof=FORID:11&ie=UTF-8>, accessed on: 21.03.2022.

²³ OECD, *Participatory Development and Good Governance*, 1995, p. 14, available at: <https://www.oecd.org/dac/accountable-effective-institutions/31857685.pdf>, accessed on: 21.03.2022.

²⁴ P. Joyce, F. Maron, P.S. Reddy, *A Dangerous Virus: Introduction to IIAS Special Report*, in *Good Public Governance in a Global Pandemic – IIAS Public Governance Series*, vol. I, ed. I, p. 9, The International Institute of Administrative Sciences, Brussels, 2020, available at: <https://www.iias-iiisa.org/page/ebook>, accessed on: 21.03.2022.

democracy; promoting transparency and capacity in public administration”²⁵.

Analyzing the principles around which the concept of good governance is built and developed by any state or supranational organizational structure operating within democratic limits, we can see that some of them are constantly found, and the rule of law is both one of these principles, but also one that governs the identification of all the characteristics of this concept.

In our opinion, when a fundamental concept is centered or even developed by the fundamental principle of the rule of law which presupposes, inclusive, the observance of the principle of separation and balance of powers in the state, the constitutional legislator must be very careful, vigilant even with constitutional drawing of delicate legal institutions as it is legislative delegation.

We consider that such an approach is imperative in order not to infringe the principle of separation and balance of powers in the state, neither in terms of its content as it will be transposed by the rules of the fundamental law, nor of the way it will act in practice.

But, ensuring good governance is also conditioned by the way in which legal institutions, such as the legislative delegation, is constitutionally configured and operates, including through emergency ordinances. This allegation would be translated, in the case of legislative delegation by emergency ordinances, by the inclusion in the relevant constitutional text of its essential elements, such as: domain or domains, and / or situations, according to the constitutional legislator, in which it can be used; the period, if it is the case, during which a government may thus participate indirectly in the legislative process; the possibility or obligation, as the case may be, of subjecting emergency ordinances adopted to parliamentary, or constitutional, or judicial control; other limits that may condition the adoption of such acts of delegated legislation; procedural issues regarding the adoption of emergency orders, at the time of entry into force, as well as the types of controls to which these orders may be subject.

The enshrinement, even by the constitutional norms, of the above-mentioned elements will allow, implicitly, the identification of limits in which a real good governance can be ensured from this perspective so that the operating principles of a rule of law, such as

that of separation and balance of power in the state, namely that of loyal cooperation between public authorities, not to be adversely affected or even infringed.

On the other hand, we consider that the use of legislative delegation in a discretionary and even more in an abusive way, especially through emergency ordinances, is not a practice that can justify, in any way, ensuring good governance. We support such a statement by the fact that, in our opinion, good governance cannot be ensured by "replacing" Parliament in the exercise of the legislative function by the Government, by legislative delegation and, above all, by adopting emergency ordinances, precisely because the first-mentioned authority would have difficulty in carrying out such tasks with delay, including due to poor management and even a complex and rather heavy legislative procedure.

However, as we have already shown, there may be special situations that require the Government to adopt normative acts with the legal force of a law in an emergency, thus justifying the need for constitutional regulation of legislative delegation, including that by ordinances emergency.

4. Discretionary power and issuance of normative acts - emergency ordinances - expression of legislative delegation

By "discretionary power", according to the Explanatory Dictionary of the Romanian language²⁶, is meant that "prerogative recognized by law in some states to some state bodies to take action, without being restricted in their initiative", and sometimes this seems to be the acceptance on which the Government embraces when it adopts emergency ordinances.

We think that is more appropriate a very simple explanation according to which discretionary power "[r]efers to the possibility to "exercise free choice constrained only by legal limits"²⁷. Practically, we would consider the possibility of recognizing the Government of a right of appreciation in which to exercise its specific attributions of "delegated legislator" constrained by the observance of the absolute constitutional limits imposed²⁸, as well as by

²⁵ K. Annan, Secretary-General stresses need for political will to tackle Africa's problems, Press Release, 16 April 1998, available at: <https://www.un.org/press/en/1998/19980416.SC6502.html>, accessed on: 21.03.2022. For more detailed information on the principles that shape the concept of good governance, see, for example, the Council of Europe website: <https://www.coe.int/en/web/good-governance/12-principles>, accessed on: 21.03.2022.

²⁶ See, DEX online, the meaning of the word "discretionary", available at: <https://dexonline.ro/definitie/discre%C8%9Bionar>, accessed on: 21.03.2022.

²⁷ K. Davis, (1969). *Discretionary justice: A preliminary inquiry*. Baton Rouge, Lusianan State Universty Press, p. 4, quoted by A. Spire, *Discretionary Power as a Political Weapon Against Foreigners*, in *Etikk i praksis*. Nord J Appl Ethics (2020), 14(2), p. 90, available at: https://www.ntnu.no/ojs/index.php/etikk_i_praksis/article/view/3479/3576, accessed on: 21.03.2022.

²⁸ See regarding those type of limits, I. Muraru, E. S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles)*, op. cit., 2022, p. 988.

the obligation to appreciate and act²⁹ within the similarly established relative limits.

Thus, according to the provisions of art. 115 para. (4) of the Constitution, for the issuance of an emergency ordinance, the Government must identify the extraordinary situation whose regulation cannot be postponed, as well as the arguments justifying the qualification of that situation as such, but also the urgency that requires such regulation.

Given the content of the mentioned constitutional text, namely "The Government can only adopt emergency ordinances in exceptional cases (extraordinary situations, *s.n.*), the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents" means that it has the possibility to identify not only one, but two or more such extraordinary situations which lead him to adopt the same emergency ordinance. In such a situation it is necessary that those extraordinary situations: to be in correlation; to be identified and explained individually, but also to be explained the connection between them; and the urgency to be so motivated as to justify the adoption of the emergency ordinance for all extraordinary situations considered. Although such an interpretation might transpire from the above-mentioned constitutional provisions, we appreciate that we could, in fact, distinguish between simple, focused and justified on one dimension extraordinary situations, and complex extraordinary situations in which that situation could affect several dimensions at the level of society, such as politics, social, economic and medical, for example.

The constitutional text does not offer other benchmarks for identifying a situation as an extraordinary one, only mentioning, through para. (6) in art. 115, the areas in which such emergency ordinances cannot be adopted even if an extraordinary situation could be identified and motivated by the Government, namely: "the field of constitutional laws, or affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, and cannot establish steps for transferring assets to public property forcibly".

Therefore, regarding the identification of the extraordinary situation that would justify the use of such a legislative delegation by emergency ordinances, we consider that the Government has a real discretionary power which does not justify any possible ignoring of other constitutional provisions that configure the legal regime of these ordinances, such as nor of the clarifications with which the CCR has come over time.

Thus, in one of its decisions³⁰, the Constitutional Court ruled that the Government must comply with three cumulative conditions for the adoption of an emergency ordinance: there must be an extraordinary situation, its regulation cannot be postponed and the urgency of the ordinance must be justified. And, among other aspects on which the Constitutional Court detailed explanations, through its decisions, we can mention some that we consider pertinent for outlining some limits in assessing a situation as extraordinary, including in trying at least to limit the discretionary tendencies of the Government in the interpretation and cataloging of certain situations.

Thus, we will be able to emphasize the relevance in the current constitutional context of some assessments that referred to the phrase used before the 2003 constitutional revision, namely the "exceptional case" to justify the issuance of an emergency ordinance, an assessment according to which "its essence is the objective character", "in the sense that its existence (of the extraordinary situation, *s.n.*) does not depend on the will of the Government which, in such circumstances, is forced to react promptly to defend a public interest by way of the emergency ordinance"³¹ which "requires adoption of immediate solution"³². The extraordinary situation identified by the Government must have "an objective character, in the sense that its existence does not depend on the will of the Government, which, in such circumstances, is forced to react promptly to defend a public interest through the emergency ordinance"³³.

The Constitutional Court also underline that "the extraordinary reasons that justified (and justifies even nowadays, *s.n.*) the issuance of the emergency ordinance must be assessed according to the time

²⁹ *Ibidem*.

³⁰ See CCR Decision no. 255/2005 regarding the notification of unconstitutionality of the Law for the approval of the GEO no. 100/2004 regarding the transfer of some forest lands from the public property of the state and from the administration of the National Forests Authority - Romsilva in the property of the Archdiocese of Suceava and Rădăuți, published in the Official Gazette of Romania, Part I, no. 511 of 16.06.2005.

³¹ See CCR Decision no. 65/1995 regarding the constitutionality of the Law for the approval of the GEO no. 1/1995 regarding the conditions for increasing the salaries in 1995 for autonomous companies and commercial companies with majority state capital, published in the Official Gazette of Romania, Part I, no. 129 of 28.06.1995.

³² *Ibidem*.

³³ See CCR Decision no. 83/1998 regarding the exception of unconstitutionality of the provisions of the GEO no. 22/1997 for the amendment and completion of the local public administration Law no. 69/1991, republished, published in the Official Gazette of Romania, Part I, no. 211 of 08.06.1998.

of issuance of the ordinance, and not according to the factors that occurred later"³⁴.

Also, recently the Constitutional Court emphasized that "the extraordinary situation expresses a high degree of deviation from the ordinary or common place and that it must be of an objective nature, without depending on the will of the Government, but not that it must represent, in itself, an element of novelty"³⁵.

Practically, through such assessments, through its jurisprudence the Constitutional Court also establishes limits of the right of appreciation of the Government in identifying situations as extraordinary to justify the need, even imperative, to adopt an emergency ordinance, thus trying to limit its discretionary power.

We consider that the approaches of the Constitutional Court when it ruled on the urgency of the extraordinary situation that determined the adoption of an emergency ordinance, are in the same sense as we mentioned above. Thus, the Court emphasized that this urgency "cannot be equated with the existence of the extraordinary situation"³⁶, but "is consequential to it"³⁷, and that "it cannot be accredited or motivated"³⁸ by its usefulness³⁹, "the opportunity or the reason for the regulation"⁴⁰.

On the other hand, we appreciate that this discretionary power of the Government was also felt in the assessment of the absolute or relative limits, as the case may be, mentioned by art. 115 of the Constitution at par. (6) and on which there is also consistent case law of the Constitutional Court. For example, and by its more recent decisions⁴¹, the Constitutional Court recalled that "it has consistently ruled [that] from the corroboration of the constitutional norms contained in art. 53 para. (1) and in art. 115 para. (6) it follows that the impairment / restriction of fundamental rights or freedoms can only be achieved by law, as a formal act of the Parliament"⁴². Aspects regarding the discretionary power of the Government in respecting these limits, as

well as on the decisions of the Constitutional Court in this regard, we will detail in subsequent articles.

On the other hand, considering the constitutional provisions of art. 115 para. (4) et seq., such a discretionary attitude of the Government in the adoption of emergency ordinances, we appreciate that it was also encouraged by the consecration of the possibility of their adoption in the field of organic laws, respecting the limits mentioned above. The field of organic laws, as it is identified primarily through the provisions of art. 73 para. (3) of the Constitution, but also by those referred to in letter t) of the same constitutional text, it is much more desirable to be regulated by the Government than that of ordinary laws due to the importance of the areas concerned. That is why we find it pertinent to say that the 2003 revision of the constitutional text on the majority required for the adoption of emergency ordinances issued under the Organic Law may equal to "an indirect invitation to the Government to adopt such ordinances"⁴³.

We appreciate that the Government benefited from such an "encouragement" even when, according to art. 12 para. (2) of Law no. 24/2000⁴⁴, republished, with subsequent amendments and completions, it was provided that "Government Emergency Ordinances shall enter into force on the date of publication in the Official Gazette of Romania, Part I, provided they are submitted to the competent Chamber before being notified, unless a later date is provided in them". But, such a provision that makes possible the entry into force of an emergency ordinance even a few months after its publication in the Official Gazette of Romania, even in our opinion, prejudices the purpose, the reason for which the legal regime of these emergency ordinances. Such a provision cancels or at least calls into question the urgency of the regulation, but also the impossibility of postponing the regulation and, implicitly, the use of parliamentary legislative procedures.

³⁴ See point 2 para. 8) of the CCR Decision no. 42/2014 regarding the exception of unconstitutionality of the provisions of art. 9 of the GEO no. 84/2012 regarding the establishment of the salaries of the personnel from the budgetary sector in 2013, the extension of some terms from normative acts, as well as some fiscal-budgetary measures and of the ordinance as a whole, republished, published in the Official Gazette of Romania, Part I, no. 210 of 25.03.2014.

³⁵ See point 53 of the CCR Decision no. 60/2020 regarding the exception of unconstitutionality of the provisions of the GEO no. 57/2019 on the Administrative Code, published in the Official Gazette of Romania, Part I, no. 369 of 08.05.2020.

³⁶ See point 53 of the CCR Decision no. 60/2020, *op. cit.*

³⁷ See point 57 of the CCR Decision no. 60/2020, *op. cit.*

³⁸ *Ibidem.*

³⁹ See CCR Decision no. 255/2005, *op. cit.*

⁴⁰ See point 57 of the CCR Decision no. 60/2020, *op. cit.*, as well as the CCR Decision no. 109/2010 regarding the exception of unconstitutionality of the provisions of the GEO no. 159/2008 regarding the amendment and completion of Law no. 51/1995 for the organization and exercise of the legal profession, published in the Official Gazette of Romania, Part I, no. 175 of 18.03.2010.

⁴¹ See, for example, CCR Decision no. 157/2020 regarding the exception of unconstitutionality of the provisions of art. 2 letter f) and of art. 4 of the GEO no. 21/2004 on the National Emergency Management System, published in the Official Gazette of Romania, Part I, no. 397 of 15.05.2020.

⁴² Point 89 of the CCR Decision no. 109/2010, *op. cit.*

⁴³ I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles)*, *op. cit.*, 2022, p. 987.

⁴⁴ Law no. 24/2000 regarding the norms of legislative technique for the elaboration of normative acts, republished, with the subsequent modifications and completions. The republishing was published in the Official Gazette of Romania, Part I, no. 260 from 21.04.2010.

5. Conclusions

Although in order to eliminate an area in which the Government's discretionary power is felt, it would seem simpler to repeal the constitutional provisions on legislative delegation, especially those on emergency ordinances, we should be aware that "the non-delegation doctrine is almost a complete failure"⁴⁵, and "it has not prevented the delegation of legislative power"⁴⁶. Moreover, such an attitude did nothing but to fail "[t]o provide needed protection against unnecessary and uncontrolled discretionary power"⁴⁷, which is why the concern of the constitutional legislator must involve the development of some " [s]tandards, principles, and rules to confine discretionary power"⁴⁸.

In this regard, in a future revision of the Constitution, such amendments could be considered, as mentioned in the doctrine⁴⁹:

- "setting precise deadlines for both Chambers (of the Parliament, *s.n.*)... in which the ordinance is actually approved or rejected, under the sanction of caducity"⁵⁰. Regarding to this proposal, we would just add that the deadlines should be expressly mentioned in the constitutional provisions and should not be longer than 10 days in order for the Parliament to respect the purpose and reason for which emergency ordinances can be adopted, being able to quickly appreciate the opportunity of the identified extraordinary situation, not only the legality.

- the prohibition of the adoption of emergency ordinances in the field of organic law, taking into consideration the three types of laws that can be adopted by the Romanian Parliament, according to art. 73 of the Constitution. Indeed, such a constitutional amendment could lead to a low interest on the part of the Government in "legislation by emergency ordinances". But, there is a risk of the occurrence of an extraordinary situation and the regulation of which can not be delayed, and its urgency may be justified, but the regulation cannot be adopted because it falls within the scope of organic laws. In this context, we consider that

it could be provided that emergency ordinances do not modify, supplement, repeal codes or provisions thereof.

- In view of the above, we also consider that it would be necessary to include an express provision of the date of entry into force of the emergency ordinances, which must respond to the reason for which this type of ordinance was constitutionally regulated. Thus, the ordinary legislator would no longer be offer the possibility to regulate the entry into force of the emergency ordinance at a date subsequent to its publication in the Official Gazette of Romania, a date provided even in its content, a date as far as possible from the date of publication in the Official Gazette of Romania cannot support the need to adopt the emergency ordinance, the urgency and extraordinary nature of the situation which led to its adoption. In this context, we consider justified, opportune and pertinent the proposal of the CCR that the date of entry into force of the emergency ordinances will be provided by the Constitution itself and be the very day following its publication in the Official Gazette of Romania⁵¹.

- maintaining the obligation to submit all emergency ordinances, without exception, to the approval of the Parliament⁵² which, in its capacity as legislative authority, will maintain "the power to censor the GEO, both in terms of legality and opportunity"⁵³. Moreover, the CCR emphasized that the Parliament has not only the power to reject the emergency ordinance by law if it considers it unconstitutional, but even the obligation⁵⁴, the legislation by the Parliament not being an unconditional and unlimited power that could allow the unconstitutionality of an emergency ordinance to be ignored.

The CCR has ruled that the first " [m]eaning of the concept of the rule of law is the observance of the rules of positive law, in force for a certain period of time, which expressly or implicitly regulate powers, prerogatives, attributions, obligations or duties of state institutions / authorities "⁵⁵. Therefore, "[t]he loyalty of state institutions / authorities must always be

⁴⁵ K.C. Davis, *A new approach to delegation*, in *The University Chicago Law Review*, vol. 36:713, 1969, p. 713, available at: <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3620&context=uchrev>, accessed on: 21.03.2022.

⁴⁶ *Ibidem*.

⁴⁷ *Ibidem*.

⁴⁸ K.C. Davis, *op. cit.*, p. 733.

⁴⁹ I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles)*, *op. cit.*, 2022, pp. 976 and next.

⁵⁰ *Idem*, p. 976.

⁵¹ See point 340 of the CCR Decision no. 80/2014 on the legislative proposal on the revision of the Romanian Constitution, published in the Official Gazette of Romania, Part I, no. 246 of 07.04.2014.

⁵² See, I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles)*, *op. cit.*, 2022, p. 981.

⁵³ *Ibidem*.

⁵⁴ See point 89 of the CCR Decision no. 240/2020 regarding the objection of unconstitutionality of the Law for the approval of the GEO no. 44/2020 regarding the extension of the mandates of the local public administration authorities included in the period 2016-2020, some measures for the organization of the local elections from 2020, as well as the modification of the GEO no. 57/2019 on the Administrative Code, as well as the GEO no. 44/2020, published in the Official Gazette of Romania, Part I, no. 504 of 12.06.2020.

⁵⁵ See point 106 of the CCR Decision no. 611/2017 on the requests for settlement of legal disputes of a constitutional nature between the Romanian Parliament, on the one hand, and the Public Ministry - the Prosecutor's Office attached to the HCCJ, on the other hand, requests made by Senate and Chamber presidents Deputies, published in the Official Gazette of Romania, Part I, no. 877 from 07.11.2017.

manifested towards constitutional principles and values, while inter-institutional relations must be governed by dialogue, balance and mutual respect."⁵⁶. Consequently, when dialogue, balance and mutual respect between state authorities, such as the Government and Parliament, including in the exercise of the powers specific to the legislative delegation, is vitiated by the discretionary exercise of those powers by one of them, usually by the Government, and not be able to ensure good governance, it is the duty of the

constitutional legislator to intervene to make the necessary changes to correct such conduct. Until the moment of the constitutional review, however, it is the duty of the Parliament and the Constitutional Court, within the limits of their powers, to sanction any discretionary action of the Government in adopting emergency ordinances by misinterpreting and misapplying the relevant constitutional provisions, or even their infringement.

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