

# ON THE UNCONSTITUTIONALITY OF THE EMERGENCY ORDINANCE REGARDING THE ADMINISTRATIVE CODE

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## **Abstract**

*Declaring the unconstitutionality of the Act regarding the Administrative Code of Romania was a good opportunity for the Government of Romania to resume the discussion on the bill for the Administrative Code. Unfortunately, the Government did not opt for the introduction of a bill regarding the Administrative Code, but has adopted an emergency ordinance, which raises many questions about the constitutionality of this normative act. This article aims at underlining the aspects of unconstitutionality of the Government Emergency Ordinance no. 57/2019 regarding the Administrative Code from the point of view of the way in which it was adopted.*

**Key-words:** *administrative code, unconstitutionality, Constitutional Court, emergency ordinance*

## **Preamble**

The need to systematize and codify the legislation is becoming more and more conspicuous as long as the positive law includes new regulations that extend the scope of the juridical acts in force. The Administrative Code represents an answer to such need felt by the society, but the way in which this normative act has been adopted and certain provisions in its content cast a shadow on its importance and significance. Indeed, adopting a legislative work of such complexity represents a legislative event, as underlined by a reputed doctrine expert [1], but it is important that this legislative step should observe the formal and substantive conditions in order to be validated for constitutionality. Or, in this chapter, the Administrative Code is rather defective and this is mainly because it was adopted through an emergency ordinance. Even if the Act voted by the Parliament regarding the Administrative Code of Romania has been declared unconstitutional as a whole, the legislative body had the possibility to introduce a new bill referring to the same topics and adopt an Act that can pass the test of constitutionality. The Act regarding The Administrative Code has been declared unconstitutional, through the Decision of the Constitutional Court no. 681/2018 [2], because the Parliament of Romania did not observe the procedure to adopt it. The

Constitutional Court has shown, in this case, that the principle of bicameralism has been violated, the parliamentary procedure to send back the Act has been violated and the endorsement has not been asked from the Economic and Social Council, the consultative specialty body of the Parliament and of the Government. According to the practice of the Constitutional Court, the moment the Constitutional Court finds that the procedure of adopting a law has been violated, they declare the normative act unconstitutional as a whole. Regarding this aspect, the constitutional litigation court shows, in the content of the aforementioned decision, the fact that "the situation determined by the finding that the law is unconstitutional as a whole [...] has a definitive effect with respect to that normative act, the consequence being the standstill of the legislative process in regard to that regulation" and invites the Parliament, in the case of introducing a new legislative process, to observe the indications comprised in the decision of admittance of the Constitutional Court referring to the vices of extrinsic unconstitutionality discovered. The film of events related to the Administrative Code shows us that the one who answered the invitation of the Constitutional Court was the Government, not the Parliament, who, unfortunately, made the same mistake, in the sense that they did not observe the procedure to adopt this important normative act. Moreover, as I have been pointing out, a Code is a complex legislative work, its construction must be contributed to by all persons interested in the issue of the administrative phenomenon, and its content must show a coherent vision, compatible with Romania's status of a member state of the European Union. Unless new legislative solutions are brought to the juridical order to improve the present institutional architecture, to increase the quality of the public service provided to the citizen and capitalize the opportunities offered by the status of member state of the European Union, it is useless to adopt a new regulation.

### **The Odyssey of adopting the Administrative Code through an emergency ordinance**

As it is well known, the legislative delegation gives the Government the possibility to intervene in the legislative plan, within certain limits and in compliance with certain conditions, the possibility being materialized in adopting ordinances, i.e. acts comprising

norms with power of law [3]. Through its specificity, the legislative delegation represents a complex institution [4]. By legislative delegation, The Government acquires a precise, limited legislative competence [5]. Using this possibility recognized by the Constitution, the Government of Romania has adopted the Administrative Code through an emergency ordinance. According to the Constitution, an emergency ordinance comes into force after being submitted to the Parliament and published in the Official Gazette. At the same time, the constitutional text, interpreted through the case law of the Constitutional Court, establishes three conditions that must be cumulatively met for the ordinance to be in accordance with the constitutional provisions, namely: that there should exist an extraordinary situation; that the regulation of this situation could not be postponed; that the emergency should be motivated in the content of the ordinance. The constitutional litigation court also shows that the emergency ordinance, as a normative act that allows the Government, under the control of the Parliament, to face an extraordinary situation, is justified through the necessity and emergency of regulating that situation which, because of its circumstances, imposes that immediate solutions be adopted in order to avoid a serious detriment to the public interest.

If the Government initially announced they adopted the Administrative Code through an emergency ordinance in the meeting of 25 June 2019, on the 3rd of July another Government meeting took place, where the executive discussed the normative act adopted in the meeting of 25 June, specifying that certain clarifications and small adjustments have been made, also generated by the recommendations comprised in the endorsement of the Legislative Council. But the emergency ordinance adopted in the Government meeting of 25 June was not published in the Official Gazette, therefore, under art. 108 paragr. 4 of the Constitution, not publishing the ordinance in the Official Gazette brings about its inexistence. Instead, in the Official Gazette of Romania, Part I, no. 555/ 5 July 2019, they published the Government Emergency Ordinance no. 57/2019 regarding the Administrative Code, adopted in the Government meeting of the 3rd of July 2019. Therefore, if we relate to the document issued in the Official Gazette, the Government adopted in the meeting of 3 July 2019 a new emergency ordinance regarding the Administrative Code, they did not make certain clarifications and small adjustments to the normative act adopted on the 25 of June, as stated by the

Government in public. It is also interesting that the agenda of the Government meeting of the 3rd of July 2019 did not include the adoption of this emergency ordinance. Moreover, those so-called “clarifications and small adjustments” [6] announced by the Government are, in fact, new legislative solutions that required compliance with the legislative technique rules. For instance, admitting the right of the local public authorities to decide through a council decision the use of minorities’ language also in cases where the said minority does not reach 20% in that town/ city represents an exception from the constitutional and legal rule, with deep implications on the administrative practice at the local level and on the fundamentals of the Romanian state. With respect to the importance of complying with the legislative technique norms in the legislative process, the Constitutional Court shows [7] that “observing the provisions of the Act no. 24/ 2000 regarding the norms of legislative technique for the elaboration of normative acts represents a genuine criterion of constitutionality”.

Synthesizing, the film of events would be the following: on the 25th of June the Government adopts a text of the ordinance, together with a substantiation note and approvals from ministries and other entities (the Legislative Council, the Economic and Social Council), the documents being valid for the text of the said ordinance, the ordinance is not published in the Official Gazette, and on the 3rd of July, without being on the agenda of the meeting of the Government of Romania, the text of the ordinance adopted in the Government meeting of 25 June is called back into question; new legislative solutions are included and a new normative act is adopted, being the only one that is published in the Official Gazette.

### **Why is adopting the Administrative Code through an emergency ordinance unconstitutional?**

The regulation through emergency ordinance of a vital area of society, the area of public administration, represents defiance of the Parliament and of the case law of the Constitutional Court and disregards the doctrinarian opinions that insist on the need to adopt the Administrative Code by law. At the same time, through its approach, the Government did not take into account the previous experiences in the state practice either, which showed that the normative acts of a certain importance, adopted pursuant

to legislative delegation without a serious debate and where political interests prevailed have been declared unconstitutional. It's not by coincidence that the doctrine shows the fact that "in the state practice, issuing emergency ordinances has often turned from a constitutional exception into a common rule" ignoring any kind of constitutional barrier.

What results from overseeing the way of adopting the Administrative Code by the Government, related to the constitutional provisions?

1. The Emergency ordinance adopted by the Government on 25 June 2019, related to art. 108 paragr. 4 of the Constitution, does not exist, because it has not been published in the Official Gazette;
2. As long as this act does not exist, the Government had nothing to amend or clarify. Despite this, the Official Gazette no. 555 of 5 July 2019 publishes the Emergency ordinance no. 57 of 3 July 2019, i.e. an act of the 3rd of July meeting, where the Government announced that they only made a few adjustments and clarifications to the text of the ordinance adopted on 25 June;
3. According to the norms of legislative technique, an emergency ordinance must be accompanied by a substantiation note to justify the emergency, approvals from ministries and other approvals stipulated by the law. Or, these documents have been valid for the variant or the ordinance adopted on 25 June, not for the text adopted on 3 July and published in the Official Gazette. Likewise, if some adjustments have been made to the bill, further to the suggestions and observations made by the approving bodies, the initial motivation must be reconsidered accordingly [8], which did not happen.
4. The variant of Administrative Code published in the Official Gazette comprises new legislative solutions, which were not present in the initial variant of the ordinance adopted on 25 June and which required remaking the presentation and motivation instruments, which must accompany the normative act.
5. Failure of an emergency ordinance to come into force immediately is a contradiction in terms [9], because, the situation they regulate being an extraordinary one, its coming into force cannot be postponed.
6. If on 25 June the emergency could not be justified, it is even more unlikely to justify the adoption of the Administrative Code through an emergency ordinance on the 3rd of

July. The mere mention of emergency in the preamble to the ordinance, as a constitutional basis of regulation, through an emergency ordinance, would be, in accordance to the doctrine [10], rather a figure of speech than an approach meeting a constitutional requirement. As shown by the Constitutional Court numberless times in its case law [11], the emergency need not be claimed, it must be real, fully motivated and must justify the intervention of the Government in the legislative plan. The fact that, initially, they adopted a normative act that was not published in the Official Gazette and in a few days they adopted a new normative act with amended and completed content as compared to the initial form and which was published in the Official Gazette in order to produce legal effects, indicates the inexistence of emergency and of the extraordinary situation. Or, the intervention of the Government in the legislative plan through the emergency ordinance is required when an extraordinary situation occurs, whose regulation cannot be postponed, the Executive having the obligation of motivating the emergency of adopting this normative act.

## **Conclusions**

All the presented aspects lead to the conclusion that the adoption of the Administrative Code through an emergency ordinance is unconstitutional. In such situation, it is the duty of the People's Advocate to notify the Constitutional Court with an unconstitutionality exception, and, if this does not happen, the ordinance must be adopted by law and then that law must be challenged in front of the Constitutional Court. We believe that, during the constitutionality check, the Constitutional Court shall discover the unconstitutionality of the Emergency Ordinance regarding the Administrative Code, because, as we have seen, through the way in which it was adopted, this normative act comes into contradiction with the constitutional provisions. There is also the variant of the Government abrogating the Emergency Ordinance no. 57/2019, since it entails suspicions of unconstitutionality, and introducing a new bill that the Parliament should debate on and present an Act that meets all the substantive and formal conditions in order to be validated from the constitutionality point of view by the Constitutional Court. Romania needs the codification of legislation in the area of public

administration, but such endeavour must be made within the limits and conditions established by the Constitution.

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