

*Decision No 152  
of 6 May 2020*

*on the exception of unconstitutionality of the provisions of Article 9, Article 14 (c<sup>1</sup>)-(f) and of Article 28 of Government Emergency Ordinance No 1/1999 on the rules governing the state of siege and rules governing the state of emergency, and against the emergency ordinance, as a whole, as well as against Government Emergency Ordinance No 34/2020 amending and supplementing Government Emergency Ordinance No 1/1999 on the rules governing the state of siege and the rules governing the state of emergency, as a whole,*

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## **Summary**

**I. As grounds for the exception of unconstitutionality**, the Advocate of the People argued that the provisions of Government Emergency Ordinance No 21/2004 infringe Article 1 (4) and (5), Article 53 and Article 61 (1) of the Constitution, in that they allow that measures restricting the exercise of fundamental rights be ordered by administrative measures.

The delegated legislator also regulates the state of alert, but defines it poorly, in breach of Article 1 (5) of the Constitution, in its component relating to the foreseeability of the law. As it is not regulated in the Constitution, the state of alert requires a detailed establishment, at infra-constitutional level, of the cases in which it may be declared. The foreseeability of the legal framework governing the state of emergency constitutes not only the premiss of the lawfulness of the measures ordered, but also the guarantee of respect for fundamental rights and freedoms, the limitation of which may be made only by law and within the limits imposed by the provisions of Article 53 of the Constitution. In the absence of a clear and complete definition of the state of alert and of a procedure to ensure the legality of the measures ordered, there are no objective legal criteria for declaring it, since the legislator merely determines, in general terms, the conduct subsequent to its declaration.

The elliptical nature of the legislative act and the lack of rigour are unacceptable in an area as important as that of restriction on the exercise of constitutional rights and freedoms. The provisions of Government Emergency Ordinance No 21/2004 do not comply with the condition that the measure restricting the exercise of certain rights be provided for by law. Only a rule laid down with sufficient precision to enable individuals to regulate their conduct may be regarded as a law.

The issuing of administrative acts of an infralegal rank creates a state of legal uncertainty, since the imprecise primary legislation gives the administrative authorities an extremely wide margin of discretion and, at the same time, discretion as to the actions and measures that may be ordered. In addition, secondary regulatory acts usually have a high degree of instability and are frequently amended.

The Advocate of the People argued that the contested legislative act also did not comply with the condition of proportionality of the measure restricting the exercise of certain rights and freedoms, as it did not set a time limit until which the state of alert is to be maintained. Article 53 of the Constitution governs the exceptional nature of restrictions on the exercise of fundamental rights or freedoms, which also implies their temporary nature. In the absence of a time limit until which the state of alert may be ordered, and by laying down the possibility of extending it by means of an administrative act, a temporary restriction on the exercise of fundamental rights and freedoms becomes a permanent restriction on the exercise of those rights and freedoms.

The Advocate of the People took the view that the provisions of Government Emergency Ordinance No 21/2004 affect Parliament's status as the sole legislative authority. The Parliament and, by legislative delegation, under the terms of Article 115 of the Constitution, the Government have the power to adopt, amend and repeal rules of general application. Public authorities do not have such competence, their task being to ensure the implementation of the laws. The body which decides, with the agreement of the Prime Minister, on the state of alert at national level or at the level of several counties is the National Committee for Emergency Situations. In view of its purely administrative character, the delegation of legislative powers to this body, the purpose of which is to restrict the exercise of fundamental rights or freedoms, is clearly unconstitutional, since it infringes the principle of the separation of powers in the State, enshrined in Article 1 (4) of the Constitution.

**II. Having examined the exception of unconstitutionality**, the Court found that the state of alert is a measure taken during an existing or potential emergency situation and can only be ordered if the risk is imminent. The purpose of the measure is therefore primarily preventive.

The procedure for declaring a state of alert is established, pursuant to Article 4 (4) of Government Emergency Ordinance No 21/2004, by means of regulations, plans, programmes or operational documents approved by decisions, orders or provisions issued, in accordance with the regulations in force, by the National Emergency Management System. According to the provisions of Law No 554/2004 on administrative proceedings, these are administrative acts issued by administrative bodies for the purpose of organising the enforcement of the law or the actual enforcement of the law.

The Court found that it is sufficiently clear from the analysis of the legal framework governing the alert state regime what the alert state is and what the procedure for its declaration is. The Court therefore held that the provisions of Article 2 (f), in conjunction with those of Article 2 (a) and Article 4 of Government Emergency Ordinance No 21/2004, comply with the requirements of quality of the law relating to clarity and foreseeability. Many laws use more vague wording to avoid excessive rigidity and be able to adapt to changing circumstances.

With regard to measures restricting the exercise of fundamental rights by administrative acts, the Court noted that Article 4 (1) expressly lists the measures which may be ordered by a decision declaring the state of alert. Next, the provisions of Article 4 (2) and (3) of the Emergency Ordinance further state that "all measures necessary to remove the state of force majeure may be ordered" and the measures "must be proportionate to the situations which have determined them and shall be applied in accordance with the conditions and limits laid down by law".

The Court found that the application of some of the measures could affect fundamental rights of citizens. Thus, evacuation from the area where the life or health of the individual, the environment, material and cultural values are threatened is a measure involving the removal of a person or group of persons from a place exposed to a danger. By the very way in which it is implemented, that measure is liable to affect a number of fundamental rights such as freedom of movement, personal, family and private life, inviolability of the home, right to work, right to private property or economic freedom. As regards the establishment of "obligations of citizens and economic operators with regard to participation in activities for the benefit of local communities", the Court held that it may concern another fundamental right, the right to work, in conjunction with the prohibition on forced labour, laid down in Article 42 of the Basic Law.

The Court held that the constitutional prohibitions laid down in Article 115 (6) not to adopt emergency ordinances which "affect" the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, were intended

to restrict the Government's power to legislate in these essential areas instead of Parliament, and not to completely deprive Parliament of the power to legislate in this area.

In legislating on the legal regime governing the state of alert, Government Emergency Ordinance No 21/2004 is the primary regulatory act ordering the actions and measures necessary to manage emergency situations, on the basis of which the entities with powers in the management of the emergency situation issue administrative acts of a legislative or individual nature implementing the primary rule. Given that the measures aimed at "a decision on eviction from the affected or partially affected area", namely "the obligations of citizens and economic operators as regards participation in activities for the benefit of local communities", may concern restrictions on the exercise of certain fundamental rights and freedoms, the Court found that the legislative act criticised falls within the scope of the prohibition laid down in Article 115 (6) of the Constitution.

In its case-law, the Court has held that, where the legislative text subject to review, by its contradictory wording, gives rise to different interpretations and only one of those interpretations is consistent with the Constitution, in order to ensure the primacy of the Basic Law, the Constitutional Court must intervene in order to rule out any possible interpretation of the law liable to disregard constitutional provisions. Similarly, the Court penalised the unconstitutionality of legal provisions in their interpretation by the public authorities responsible for their application (Decisions Nos 223 and 224 of 12 March 2012, published in the Official Gazette of Romania, Part I, No 256 of 18 April 2012).

The Constitutional Court therefore gave the contested provisions the interpretation which ensured their compliance with constitutional rules and found that the provisions of Article 4 of Government Emergency Ordinance No 21/2004 were constitutional only in so far as the actions and measures ordered during the state of alert did not seek to restrict the exercise of certain fundamental rights or freedoms.

In view of the legal nature of measures emanating from the structures empowered to manage emergencies, it is clear that those acts cannot affect fundamental rights and freedoms. As acts subsequent to the law, establishing specifically the measures to be taken in order to manage the emergency situation, they can only transpose the legal rules. The administrative act implementing the law cannot derogate from, replace or add to the law.

It is undeniable that legislation providing for the legal regime of crisis situations requiring exceptional measures to be taken requires a greater degree of generality than the legislation applicable during the normal period, precisely because the crisis situation is characterised by a deviation from normal. However, the generality of the primary rule cannot be mitigated by infralegal acts that would supplement the existing regulatory framework.

Therefore, with regard to the complaint concerning the possibility of imposing restrictive measures on fundamental rights by administrative acts, the Court held that actions and measures ordered during the state of alert, on the basis of the provisions of Government Emergency Ordinance No 21/2004, cannot relate to fundamental rights or freedoms. The Court also found that the delegated legislator cannot delegate in turn to an administrative authority something it does not itself have competence over. As the Court has consistently held, it follows from a combined reading of the constitutional rules contained in Articles 53 (1) and 115 (6) that the interference with/restriction of fundamental rights or freedoms can only be effected by law as a formal act of Parliament.

The Court held that, as long as Government Emergency Ordinance No 21/2004 complies with the above prohibition, it cannot be held that the legislative act complained of ignores the condition relating to the proportionality of the measure restricting the exercise of fundamental rights and freedoms, owing to the absence of a time-limit for which the state of alert is declared. In addition, with regard to the measures which may be ordered during the state of alert, Article 4 (3) of the Ordinance provides that they must be "proportionate to the

situations which determined them” and Article 4 (5) (b) stipulates that the decision declaring the state of alert shall include the “period of application”.

**III. For all these reasons,** the Court unanimously dismissed the exception of unconstitutionality and found that the provisions of Article 2 (f) of Government Emergency Ordinance No 21/2004 on the National Emergency Management System were constitutional in relation to the criticisms made. By a majority vote, the Court upheld the exception of unconstitutionality and found that the provisions of Article 4 of aforementioned Ordinance are constitutional in so far as the actions and measures ordered during the state of alert are not intended to restrict the exercise of certain fundamental rights or freedoms.