Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 10 (59) No. 1 - 2017

# SHORT CONSIDERATIONS REGARDING THE APPLICATION AND THE EFFECTS OF ART. 147 OF THE CONSTITUTION

**S.G. BARBU [1] A.M. CIOBANU [2] L.G. NIŢOIU[3]**

***Abstract:*** *The interpretation of Article 147 paragraph 1 of the Constitution holds some nuances which are revealed within some of the earlier decisions of the Constitutional Court, although in the Decision no. 64/February 9, 2017 they seem to not be taken into consideration in the same manner, respectively in the sense that under the aforementioned Article 147 paragraph 1, the Government can adjust for the criticism of unconstitutionality made by the Court only if its provisions demand it, while laws declared unconstitutional in whole or in part, especially in the a priori control, can be brought on the same line with the Constitution only by law as a legal act of the Parliament.*

***Key words:*** *Constitution, Constitutional Court (CCR), Ombudsman, principle of symmetry, ordinary rules, special derogatory rules.*

## 1. Introduction

Starting with the Decision of the Constitutional Court of Romania (CCR) no. 64/9.02.2017 regarding the unconstitutionality exception of the provisions of the Government Emergency Ordinance no. 13/2017 for the modification and completion of Law no. 286/2009 regarding the Criminal code and of Law no. 135/2010 regarding the Criminal procedure code, exception raised directly by the Ombudsman, we shall focus on a single theoretical aspect which can result from the content of art. 147 paragraph 1, first thesis of the Constitution.

As a general appreciation, we believe that the solution of the Constitutional Court pronounced in the aforementioned decision is correct, and the arguments of the Constitutional Court regarding the inadmissibility of the referral formulated by the Ombudsman, considering that in the meantime the Government Emergency Ordinance no. 13/2017 was repealed by Government Emergency Ordinance no. 14/2017, are correct and have a faultless logical fluency.

On the contrary, the dissenting opinion formulated in the cause by the two constitutional judges has no constitutional, jurisprudential or doctrinal support. The two authors of the dissenting opinions excessively force certain legal reasoning's in order to motivate the right of the Constitutional Court to control inclusively the constitutionality

[1] Transilvania University of Braşov, silbarg70@gmail.com.
[2] DLAF counselor, Government of Romania.
[3] Lawyer Braşov Bar, PhD student at the University of Bucharest, Law School.

of a repealed legal norm which does not produce legal effects, considering the principle of the ultra-activity of the law and the one of *mitior lex*.

## 2. Study Rationale

From this point of view, as long as the normative act with legal power is not into force, then the constitutionality control cannot be exercised, the active character of the normative act/legal norm being one of the admissibility conditions of the unconstitutionality exception as it is regulated at the constitutional level by art. 146 lett. d), respectively by art. 29 paragraph 1 – art. 32 of Law no. 47/1992 modified and republished.

*Per a contrario*, assuming that the normative act with legal power attacked by using the unconstitutionality exception, directly by the Ombudsman, is already repealed, as it was in the present situation at the moment of promoting the unconstitutionality exception by the Ombudsman, then, from the literal and logical interpretation of the provisions of art. 29-32 of Law no. 47/1992 modified and republished, undoubtedly results the conclusion that the referral of the Ombudsman is inadmissible, thus having to be rejected by the Court. (Muraru, et al., 2009, p. 129-131).

The fact that Government Emergency Ordinance no. 14/2017 for the repeal of Government Emergency Ordinance no. 13/2017, although it had entered into force, it has not yet been debated in Parliament in full accordance with the provisions of art. 115 paragraph 5, 7 and 8 of the Constitution, a fact which would confer on it an uncertainty status regarding its legal effects, cannot constitute *per se* an admissibility cause of the exception raised by the Ombudsman, because the legal admissibility condition regards, in this case, the notion of normative act entered into force, without any nuance or reserve of application of the text, so that, once more, the reasoning on this theme contained by the two dissenting opinions is excessive and erroneously substantiated.

If we leave aside the themes of referral admissibility that the Ombudsman had brought before the Court, we could draw the conclusion that a logical consequence could however exist, as it is correctly shown - in hypothetical terms and under the reserve of those previously exposed - in the dissenting opinion from the Decision of the Constitutional Court of Romania no. 64/2017 formulated by the constitutional judge Livia Stanciu.

Of course, that this discussion would be of actuality only in the situation in which the inadmissibility problem would not be raised, so only if this exception would justifiably be, from a legal point of view, rejected by the court of constitutional control.

As it was previously shown, as the Constitutional Court itself retained in the majority opinion, in the cause subject to analysis, this problem is not raised and the theory from the dissenting opinion cannot be applied to the cause, because the part of the Government Emergency Ordinance which is the object of the constitutionality control (the one regarding the criminal substantial law norms) has never entered into force, Government Emergency Ordinance no. 14/2017 producing repealing effects before the entry into force of the Government Emergency Ordinance no. 13/2017 in the norms of which unconstitutionality is cited.

As the Constitutional Court of Romania correctly stipulated in the motivation of its decision (the majority opinion), the eventual rejection of the Government Emergency Ordinance no. 14/2017 by the Parliament, when the attribution of the legislative consecrated by art. 115 paragraph 7 and 8 of the Constitution is exercised, entails the

incidence of other remedies provided by the fundamental law - the exercise of attributions by the head of the state regarding the promulgation of the laws (art. 77 of the Constitution), respectively the referral to the Constitutional Court by those who have this right according to art. 146 lett. a of the fundamental law.

Therefore, the verification of an eventual unconstitutionality of the law for the approval/rejection of the Government Emergency Ordinance, through which the first Government Emergency Ordinance is repealed, will be realized afterwards, when the respective law has acquired the legal framework expressly provided by the fundamental law in art. 115, which is an explicit legal basis for proceeding as it is shown in the dissenting opinion contained in the examined decision of the Constitutional Court of Romania .

From the entire decision, we shall extract and analyse, with a view to a more subtle examination of art. 147 paragraph 1 of the Constitution, a point of view expressed by the dissenting opinion of the constitutional judge Livia Stanciu, respectively that the legal reasoning regarding a variety of incidences of the principle of regulation symmetry, together with other legal interpretation rules, but all of them examined exclusively through the logic of the interpretation of art. 147 paragraph 1, first thesis.

The dissenting opinion thereby builds an interesting reasoning which we deem to be pertinent under the reserve of those aforementioned regarding the inadmissibility of the referral, so only as a theoretical approach of interpretation of some nuances from art. 147 paragraph 1, first thesis.

The author has correctly shown the fact that, regarding the argument referring to the compliance of the legislation with the decisions of the Constitutional Court, the majority opinion pronounced in the cause contradicts, by itself, the provisions of art. 147 paragraph 1 of the Constitution, as they were interpreted by the jurisprudence of the Constitutional Court, essentially the correct solution being the regulation by law, as legal act of the Parliament, of legal norms from another law which were declared unconstitutional by the court of constitutional control.

Therefore, the dissenting opinion mentions that, according to the provisions of art. 147 paragraph 1 of the Constitution, *„the provisions of the laws and ordinances which are into force, [...] established as being unconstitutional, cease their legal effects after 45 days from the publication of the decision of the Constitutional Court of Romania* ***if, in this interval, the Parliament or the Government, as the case may be, do not reconcile the unconstitutional provisions with the provisions of the Constitution****. During this term, the provisions established as being unconstitutional are suspended de jure*."

The author of the dissenting opinion specifies, correctly in our opinion, the fact that, referring to the level of the normative act through which this reconciliation is realized, there are to be recalled the considerations from the Decision of the Constitutional Court of Romania no. 415 of 14 April 2010, published in the Official Monitor of Romania, part I, no. 294 of 5 May 2010, which ruled that ***"the provisions of art. 147 para.1 of the constitution distinguish – regarding the obligation to reconcile the unconstitutional provisions with the provisions of the constitution – between the competence of the parliament, for the provisions of the laws, on one hand, and of the government, for the provisions of its ordinances, on the other hand".***

In the development of the reasoning, the author of the dissenting opinion brings into discussion several considerations from the decision of the Constitutional Court recalled in the previous paragraph, underscoring that the Constitutional Court of Romania had taken

into consideration the distinction between the acts of the Parliament and those of the Government with the same legal power – that of a law.

The Court thereby expressly stopped, through the considerations of the same decision, the reconciliation of the provisions from Law no. 144/2007 regarding the establishment, the organization and the functioning of the National Integrity Agency by Government Emergency Ordinance, retaining that *"**the Government cannot adopt a Government Emergency Ordinance in order to reconcile the provisions of Law no. 144/2007 established as being unconstitutional with the provisions of the Constitution, but it can initiate a bill in accordance with those established through this decision".***

The author of the dissenting opinion also shows that the Constitutional Court of Romania had constantly ruled in its jurisprudence the fact that they have binding force, according to the provisions of art. 147 paragraph 4 of the Constitution, an interpretation which became indisputable in its jurisprudence. in an exemplary enumeration, we shall recall the most relevant solutions of the Constitutional Court of Romania (CCR) in this matter: the decision of the Constitutional Court of Romania Plenum no. 1/1995, the decision CCR no. 414/2010, the decision CCR no. 536/2011, the decision CCR no. 1039/2012, the decision CCR no. 102/2013, the decision CCR no. 163/2013, the decision CCR no. 196/2013, the decision CCR no. 449/2013 and the decision CCR no. 1/2014.

Also, through the decisions no. 415/2010 and no. 308/2012, the Constitutional Court ruled that the reconciliation of a ***law*** with a decision of the Constitutional Court must be realized all by a law adopted by the Parliament, *per a contrario* resulting that the venom of unconstitutionality cannot be regulated/removed by Government Emergency Ordinance , because some essential rules of legal interpretation would be violated, easily highlighting the principle of symmetry.

There are also other incidental rules of legal interpretation, essentially subsumed to the logical interpretation. The systematic interpretation of the constitutional provisions on the whole, centred on the succession and the importance of the norms contained by the fundamental law which are related to art. 147 paragraph 1, confer a certain mode of application on this constitutional text and allows for the construction of a reasoning in the sense of the recalled decisions of the Constitutional Court of Romania , respectively the symmetry which we have mentioned in the previous paragraph: in the case of the unconstitutionality of a law – in full or in part – the reconciliation of the unconstitutional provisions with the provisions of the Constitution can be realized all by law as a legal act of the Parliament.

This conclusion results from the corroborated analysis of the provisions of art. 61 – ***the Parliament is the supreme representative body of the Romanian people and the unique legislative authority of the country*** – with art. 73 paragraph 1 – ***the Parliament adopts constitutional laws, organic laws and ordinary laws*** – and with art. 115 paragraph 4 – ***the Government can adopt emergency ordinances only in extraordinary situations of which regulation cannot be postponed, having the obligation to motivate the emergency in their content.***

In other words, the rule is represented by the adoption of normative acts with legal power by the Parliament, by going through the parliamentary procedures established by the fundamental law and detailed by the regulations of the two Chambers, respectively the regulation of the common sessions of these.

The exception is represented by the legislative delegation under the two forms consecrated by art. 115, respectively the ordinances (so-called „simple") which are issued

by the Government on the basis of a special enabling law adopted by the Parliament (the hypothesis from art. 115 paragraph 1-3 and 8), respectively the emergency ordinances issued by the Government under the conditions regulated by art. 115 paragraph 4 to paragraph 8.

Considering the formulation from art. 147 paragraph 1, where the constituent opted to enumerate both the Parliament and the Government – ***as the case may be*** – as regulating authorities for the legal norms with legal power declared unconstitutional, we shall observe that the meaning of the terminology used in this constitutional text adds value to the principles of settlement, in terms of will of the constituent, of the Romanian regulatory framework, namely the observance of the distinction between the normative acts of the Parliament and those of the Government, as a delimitation of principle between rule and exceptions.

It is a known fact that in law the exceptions are subjected to strict and limitative interpretation. So the Government, legislating at the level of the legal power of the law, exceptionally realizes a transcendence towards the Parliament (towards its enactment attributions, more precisely), a share of attributions accepted in the fundamental law as legal fiction (respectively the limited role of Government as legislator), but as an exception, namely in certain situations which fully justify it.

Regarding the so-called simple ordinances, things are easier to explain because they are *a priori* managed by the Parliament, by adopting in advance the enabling law, so that the Parliament assumes the adoption of such a law for the adjustment of a law declared unconstitutional in full or in part.

The discussions get another nuance, a more complex one, when it comes to establishing if the Government can intervene by emergency ordinance in order to reconcile an unconstitutional law with the Constitution.

As we have previously mentioned, art. 115 paragraph 4 to paragraph 8 identifies the situations and requirements in which the Government can thus intervene for regulating from square one a certain normative and socio-economic segment, respectively to modify a pre-existent regulatory framework.

Another text which refers to the prerogative of the Government to intervene by simple or emergency ordinances is art. 147 paragraph 1 of the fundamental law. The only thing is – this last article has a completely different destination, as portfolio of regulation and, implicitly, of application – namely the special and derogatory situation in which the replacement of certain norms declared unconstitutional is necessary.

It is a known principle, the one of logical interpretation *specialia generalibus derogant*, and from this perspective, the entire art. 147 involves constitutional provisions with a special characteristic, derogatory from the other provisions of the fundamental law.

In other words, art. 115 Constitution constitutes the set of general norms which shape the constitutional framework for the limited role of legislator which may be exercised by the Government.

Besides that regulation framework, the Government may never exercise attributions of legislator, as it would violate the principle of separation of powers in the state and the rule of independent exercise of its own attributions excluded by the other powers.

The hypothesis from art. 147 paragraph 1 does not confer on the Parliament and the Government additional legislative attributions, but fixes a certain framework of regulatory intervention and, implicitly, of regulation, in principle through symmetry with pre-existent legal norms, with the explicit purpose customized in the text, respectively the

reconciliation of the unconstitutional provisions with the Constitution, outlining practically a context with the status of premise situation, nowise a new normative procedure.

Therefore, in strict terms of procedure, the conditions for the adoption of an emergency ordinance according to the hypothesis from art. 147 paragraph 1 obviously remain those regulated by art. 115 paragraph 4 and subsequent articles.

The special norm from art. 147 paragraph 1, using the terminology ***as the case may be***, explicitly divides the regulatory attributions of the Government from those of the Parliament, by relating to the legal nature of the normative act which was declared unconstitutional.

Art. 147 paragraph 1 thereby enables the Government to adopt simple ordinances if the Parliament previously adopts an enabling law, respectively to adopt emergency ordinances if the norms declared unconstitutional are contained by a previous emergency ordinance, pre-existent as such, namely having this special legal nature and derogatory from the common law, for the level of regulation of the law.

The Parliament has the right to intervene in absolutely any situation of those which are referred to by art. 147, because the Parliament is, according to art. 61 paragraph 1, the supreme representative body and the unique legislative authority of the country, being applicable the rule of interpretation **qui potest majus potest minus** - namely as long as the Constitution confers on the Legislative the attribution to delegate to the Executive the adoption of ordinances, respectively it shall approve or not its emergency ordinances *post factum/a posteriori*, as well as the general attribution of exercising control over the Government.

The Parliament thus remains – in the context of applying art. 147 paragraph 1 – with the main attribution of reconciling the unconstitutional provisions with the Constitution, for absolutely any situation which belongs to its logic of constitutional exclusive attributions, the control of constitutionality of the laws representing, in fact, the main attribution mirroring the one of the Constitutional Court.

Therefore, the exceptions cannot become defining and admissible beyond the provisions framework from the Constitution for these, namely art. 115.

In other words, seeing the phrase *as the case may be*, we undoubtedly obtain the idea that the Government can have a regulatory intervention taking into consideration the provisions of art. 147 paragraph 1 exclusively regarding the normative acts which the Executive itself had adopted, namely the Government Emergency Ordinance or the Government Ordinance (GO).

Regarding the Government Ordinance, we believe that, on the principle of symmetry, a preliminary expression of the Parliament through an enabling law is necessary in the situation regulated by art. 147 paragraph. 1.

However, following the logic of the constitutional norms which provision the institution of legislative delegation / the Government ordinances, respectively analyzing the generic circumstances in which the legislative delegation can be granted by the Parliament (art. 115 paragraph 1), we reach the conclusion that, in the sense of art. 147 paragraph1 the legislative delegation is not appropriate. Therefore, the only truthful hypotheses remain the law as legal act of the Parliament and the emergency ordinance which is adopted by the Government.

As we have previously explained, the Government does not intervene in a new normative field, or in the standard hypothesis of exercising its exceptional attributions of

legislator, but it must adjust a legal norm declared unconstitutional and it cannot do this by overlooking the limitative criteria of art. 115 paragraph 4 and the subsequent articles.

Also, it cannot substitute the Parliament in its legislative attributions, the role of legislator of the Government being a very limited one and with a character of exception. In other words, it cannot adopt an emergency ordinance in order to modify a law which had been declared unconstitutional, because the express constitutional text – art. 147 paragraph 1 – binds, through the phrase *as the case may be* for the delimitation between the attributions framework of the Parliament and the exceptional attributions of the Government. The Government is thereby limited to intervene only in relation to its own acts which had been declared unconstitutional.

The constituent legislator thus opted for the intact preservation of the attributions of the Parliament regarding the reformation and the adaptation of the laws with a view to deeming unconstitutional certain norms from their subject matter.

## 3. Conclusions

In conclusion, subject to the considerations exposed in the first part of this short study, we stand by the dissenting opinion of the constitutional judge Livia Stanciu, but only in terms of the limits of the Government to intervene through emergency ordinance after a decision of the Constitutional Court.

This way, appealing to the emergency ordinance for reconciling Law no. 286/2009 regarding the Criminal code with the decisions of the Constitutional Court appears as a circumvention of the text of art. 147 para. 1 of the Constitution, in line with the interpretation offered by the Court and with the previously outlined observations, circumvention allegedly justified from the perspective of the passivity of the Parliament.

Besides, seeing the imperative provisions of art. 74 of the fundamental law, starting from the hypothesis of the „passivity" of the Parliament or simply *ex officio* and according to its subjective appreciation, the Government had the possibility or even the obligation to elaborate a bill (not an emergency ordinance) which, in the situation of a justified time crisis, could be adopted in the emergency procedure manner, or, in extremis, in the manner of assuming responsibility in the Parliament.

## References

Deaconu, Ş. (2013). *Drept constituţional* [Constitutional Law]. Bucureşti: CH Beck.

Deaconu, Ş. (2015). *Instituţii politice* [Political institutions]. Bucureşti: CH Beck.

Muraru, I., Tănăsescu E.S. (coord.) (2008). *Constituţia României. Comentariu pe articole* [Romanian Constitution.Comments on articles]. Bucureşti: Hamangiu.

Muraru, I., Vlădoiu, N.M., Muraru, A., Barbu, S.G. (2009). *Contencios constituţional*. [Contentious Constitutional]. Bucureşti: Hamangiu.

Muraru, I., Tănăsescu, E.S. (2013). *Drept constituţional şi instituţii politice* [Constitutional Law and political institutions], vol. I - II. Bucureşti: CH Beck.

Toader, T., Safta, M. (2015). *Constituţia României, decizii ale Curţii Constituţionale din România, hotărâri CEDO, hotărâri CJUE, legislaţie conexă* [Romanian Constitution, Constitutional Court of Romania decisions, CEDO decisions, CJUE decisions, related legislation ]. Bucureşti: Hamangiu.

*** Decision of the Constitutional Court of Romania (CCR) no. 64/9.02.2017, published in the Official Monitor no. 145 of 27th February 2017.
*** Decision of the Constitutional Court of Romania no. 415 of 14 April 2010, published in the Official Monitor no. 294 of 5 May 2010
*** Law no. 144/2007 regarding the establishment, the organization and the functioning of the National Integrity Agency, republished in the Official Monitor no. 843 of 8th December 2008.
*** Law no. 286/2009 regarding the Criminal Code, published in the Official Monitor no. 510 of 24th July 2009.