CRITICAL ANALYSIS OF THE PROVISIONS OF THE EMERGENCY DECREE OF THE GOVERNMENT NO. 77/2013 AND EFFECTS OF ITS APPLICATION IN THE PUBLIC FUNCTION'S FIELD

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Abstract: *The article analyzes the normative content of the emergency decree issued by the Government of Romania, the deficiencies of argumentation relating to legislation and emergency aspects of unconstitutionality, as well as the effects on which this normative document it produces with regard to public office, as a general rule, and the dismissing of civil servants, in particular.*
Key words: *the emergency decree, unconstitutionality, public function, civil servant.*

1. Introduction.

The Constitution of Romania republished provides for the possibility of delegation laws made by the Parliament in favor of the Government, either for the regulation required during parliamentary recess, under the terms and within the limits of the enabling law, as is the case orders, either for regulations for the purpose of administering urgent cases, such as the case of emergency ordinances.

Rule imposed by the Constitution, by the article 61, paragraph (2), provides that the Parliament is the sole legislative authority of the state, in such a way that, the adjective of the Government to issue orders and emergency ordinances, constituting a situation of exception.

Categories of laws that fall within the sphere of competence of the Parliament are constitutional laws, organic laws and ordinary laws. For our analysis we are interested in order to be true in the first place, if the function is engulfed by category organic laws and, secondly, if the government has the ability to regulate, by emergency ordinances in organic laws.

In this regard, we have to mention that article 61, paragraph (1) of the Constitution of Romania establishes beyond doubt that *"Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the State. "*, and the article 73, paragraph (3) shall act as *"By the organic law shall regulate:*

a) *electoral system; organization and functioning of Permanent Electoral Authority;*
b) *organization, operation and financing of political parties;*
c) *status of Deputies and Senators, the establishment of compensation and other rights;*

d) organization and holding of a referendum;
e) organization of the Government and the Supreme Council for the defense of the country;
f) the regime of status of total or partial mobilization of the armed forces and the state of war;
g) the states of siege and emergency;
h) criminal offenses, penalties and their enforcement:
i) granting of amnesty or collective pardon;
j) the status of civil servants;
k) the administrative proceedings;
l) organization and functioning of the Superior Council of the Magistracy, the courts, the Public Ministry and the Court of Auditors;
m) the general legal status of property and inheritance;
n) general organization of education;
o) organization of the local public administration, of the territory, as well as general rules on local autonomy;
p) general rules covering labor relations, trade unions, employers' associations and social security;
r) the status of national minorities in Romania;
s) general rules of religious denominations;
t) other areas for which the Constitution provides the enactment of organic laws."

Seeing the provisions of the article 73, paragraph (3), point (j) we can have a first conclusion, namely that amendment and completion of civil servants can be achieved only by means of an organic law and only by the Parliament.

In respect of acts which the Government may adopt, the Constitution of Romania establishes in article 108, paragraph (1) that *"the Government shall adopt decisions and decrees"*, without making a distinction between simple ordinances and emergency. The Constitution provisions of paragraph (3) of article 108 shall specify, in explaining that *"Orders shall be issued under a special enabling law, within the limits and under the conditions of this"*. It should be observed that easily that the article 108 which is called "Acts of the Government" sets very clearly what acts may issue the Government of Romania and under what conditions. We admit, in accordance with the principle *ubi lex non distinguit, nec nos distinguere debemus*, that if not legislator made a distinction between the two categories of normative acts, when he took into account that the Government may adopt both types of decrees, but we consider that its adoption of the acts must be done in accordance with the article 73, paragraph (3), which restricts the Government intervention in the regulation of areas under express way in judicial regulation concerned.

Another constitutional institution which regulates some aspects of material competence in adoption of regulations is legislative delegation, in the text of the article 115 of the Constitution, according to which *"(1) The Parliament may adopt a special law enabling the Government to issue orders in fields outside the scope of organic laws."* Furthermore, in the second paragraph of the article 115, the Constitution stipulates that *"The enabling law shall determine, in the field and the date up to which orders can be issued."* Can be felt as well as in the case of the article 115, paragraph (1) legislator does not distinguish between simple ordinances and emergency, which means, as a consequence, that the prohibition to regulate in areas covered by organic laws apply to both categories of resumption.

The text of paragraph (4) of the article 115, which provides that *"The Government may adopt emergency ordinances only in extraordinary situations whose regulation may*

not be delayed, have an obligation to explain their measure." , it is part of the same institution which gives title of Article 115, namely *"Legislative delegation"*, in such a way that it can be concluded that the adoption of a decree shall be made by a delegation of competence by the Government, but it is no longer necessary to adopt a law of authorization. This is correctly considering that the Parliament cannot forecast exceptional situations, an emergency, that may appear, and requiring immediate action and implant. But, however, and in the case of these exceptional circumstances where it is appropriate to regulate emergency, by a decree, which is engulfed by the enabling law limits, the Constitution impose restrictions executive. Thus, the Government does not post-adopt service emergency ordinances *,,… in constitutional laws"* and *"may not affect the regime fundamental institutions of the state, the rights, freedoms and duties provided by the Constitution, electoral rights … ''.*

In the same direction, must be taken into consideration and that the condition that in the preamble of the emergency decree to be given for emergency, exceptional situation emerged, which requires a regulatory fast remedy, whose deferment would lead to irreparable damage.

2. Exposure criticism of unconstitutionality of Government Emergency Ordinance no. 77/2013 for the establishment of measures to ensure that local public administration functionality, in the number of posts and reducing expenditure to public institutions and officials under the ministry, under the authority or in coordinating Government or Ministries.

Referring to article 7 point C of the Government Emergency Ordinance no. 77/2013 require some observations, breaking constitutional text and the civil service law, namely:

a) On the basis of the text of article 73, paragraph (3) of the Constitution of Romania, which provides that " (3) *The law shall regulate:*
j) the status of civil servants;…" should be noted that the Government could not amend or supplement, under an emergency decree, Law No 188/1999, republished, with subsequent amendments and additions, where as article 115, paragraph(1) and article 6 of the Constitution of Romania provides that " The emergency ordinances ... May not affect the rights, freedoms and duties laid down in the Constitution, etc. ", such as, for example, the right to work.

Furthermore, if paragraph 1 of article 115 provides that the decrees issued by the Government, on the basis of a special enabling law adopted by the Parliament, it may regulate in areas which are covered by organic laws, all the more so the government may issue emergency ordinances in areas referred to in Article 73, paragraph 3, as they cannot be justified emergency.

Besides, analyzing the introduction to O. U. G. No 77/2013, where it is argued that need and emergency regulations in the prevention and removing public danger times of a major dysfunction of institutional type, close to the kitchen, which requires immediate action by the Government, it can be easily notice that, as regards the provisions of article 7, point C (to be completed by article 98 of Law no. 188/ 1999 upon the status of civil servants and does not change, as incorrect provided for in that article) is not justified at all emergency or exceptional condition.

They can't be reasoned, by laborious logical-legal, *"Emergency"* to cease the right ratios of service of some top civil servants, after 3 months from the date on which they will be subjected to mobility and past government inspectors. Issuing of an emergency such a rule (article 7, point (C), and in the contents of a emergency ordinances, can not be justified by invoking random and uncertain situations, in the future, because its merits

relate to an objective and immediately event (outer Government demands), namely an exceptional case.

In support of the above argument, we mention Constitutional Court Decision, No 1257/2009, relating to the objection of unconstitutionality of the law on the approval of the Emergency Decree of the Government no. 37/2009 on certain measures to improve the business of public administration. Constitutional Court decision concerns an emergency decree, which has as its object the regulatory the status of public function, namely the amendment and completion of Law no. 188/ 1999 upon the status of civil servants, which is the same as and the provisions of article 7 point C of O. U. G. No 77/2013.

By the judgment of the Constitutional Court will be established clearly that *"Through its Regulations, the Government Emergency Ordinance no. 37/2009 'affect' legal status of public servants driving from the scope of de-concentrated public services of the ministries and other components of central public administration of territorial administrative units as established by law no. 188/1999, republished, with subsequent amendments and additions, adopted by the Parliament in accordance with the provisions of article 73, paragraph (3), point (J) of the Basic law, according to which the status of civil servants shall be regulated by an organic law.*
In fact, through all your content rules, the Government has intervened in a field for which does not have jurisdiction material, breaking, so, the provisions of Article 115, paragraph (6) of the Constitution."

For the reasons set out above shall be distinguished very clearly concluded that the wording of article 7, point C of O. U. G. No 77/2013 is unconstitutional.

3. Critics concerning on the effects produced by O. U. G. No 77/2013 on the provisions Law no. 188/ 1999 upon the status of civil servants and other normative documents incidents.

With regard to matters relating to the legal institution of mobility, to which reference is made in the text of article 7 point C of O. U. G. 77/2013, we shall determine:

- Mobility represents, in accordance with article 87 of Law No 188/1999, a way for the amendment of the service report of decreed civil servant with regard to the place of employment and the way at work, within the same category of functions, which are listed in article 12 of Law no. 188/ 1999 upon the status of civil servants; it does not constitute, according to the law, in a means legal (premise) of termination of service relationships. If the legislator it would be desirable to regulate mobility as a prerequisite for legal institution of cessation of the right of the reports of the service, then it would have expressly provided that, and it would not be stipulated in the same article 87 that *"Mobility within the public servants service is achieved ... to improve the efficiency of authorities and public institutions or in the interests of civil servants, for career development in public office"*.

Therefore, reasons for apply the mobility are *efficient activity of mobility authorities of public institutions* or *times for career development in public office.* But, one cannot talk about work more effectively and, as far as possible, of their career development, if the high civil servant is subject to mobility to be thrown out over 3 months.

- This judicial regulation (article 7 point C of O. U. G. No 77/2013) is illegal and the fact that without prejudice to the principle of stability in the exercise public office, principle provided for by article 3 of Law No 188/1999, republished, with subsequent amendments and additions, the status of civil servants;

- Is illegal unilateral conversion and without the express consent of high civil servant of a report of service for an indefinite period in a report of the service for a fixed period, whereas, in accordance with article 4, paragraph 2 of the Law no. 188/ 1999 upon republished, with subsequent amendments and additions, the status of civil servants *"Exercise service relationships is carried out for an indefinite period"*.

The text of the article 7 point C of the Government decree(OUG) 77/2013 does nothing but to turn, by means of mobility, a report of the service for an indefinite period, on the basis of a contest (also claimed in those conditions), in a report of the service concluded for a specified period of 3 months.

Improper attitude they also expect it hopefully, well established in that similar international doctrine as *abuse of discretion* or *abuse of authority*[1], amending legal report of the Labor Code, which is detrimental to rights and legitimate interests of civil servant is with certainty generators of any dispute in administrative court, but, with a view to manner of making it up, a problem if it do not take shape and a penal liability, in relation to the concrete items to realize the abuse [2].

- It is clear that Law no. 188/ 1999 upon republished, with subsequent amendments and additions, the status of civil servants, is an organic law, but, at the same time, it has a special character by reference to the law frame from the world of work, which is Labor Code. In this respect, the rule of the status of civil servants applies in particular to those contained in Labor Code. But, when the Status of civil servants does not contain certain rules applicable to a situation, then it shall apply the provisions of the Law No 53/2003, in accordance with the article 117 of Law no. 188/ 1999 upon republished, with subsequent amendments and additions, the Status of civil servants, under which *"The provisions of this law shall be supplemented by the provisions of the work legislation as well as with the rules of civil law, administrative or criminal proceedings, as the case may be, in so far as they do not contrary of specific legislation of public office."*

With respect to the amendment of the service report, which is in fact a legal relationship of labor law, which shall be exercised on the basis of the appointing administrative act, it should be pointed out that the Law on the Status of civil servants is not available with regard to which components of the statement of service may be changed unilaterally by the employer, only indirectly, through mobility, namely place at work, and the function within the category senior civil servants. For this reason, legal rules applicable to such situations are those contained in the article 41 and the article 42 of the Labor Code, even if it relates to individual employment contracts, but it is still a legal relationship of labor code, which is based on an administrative act (decision employer). In this context, corroborating the article 41 and the article 42 of the Labor Code with the effects of mobility of Law no. 188/ 1999 upon the Status of civil servants, we come to the conclusion that the ratio of service of high civil servant can be changed unilaterally by the employer only in respect of function (the type of work) and the place of employment, being excluded report changing the length of the service.

These aspects of disregarded the normative documents have multiplier effect, which shall become effective until the scope of the control examination of legality, carried out by the court of administrative court, so that we can identify that public servants suffers from both a material injury, as well as moral damages, emotional, reported to indirect effects produced on the family [3].

4. Conclusions.

From the analysis realized on the Government's Emergency decree No 77/2013, as well as the effects of which it produces, in particular on the provisions on Law No 188/1999, we can be concluded that:

a) The provisions of the article 7 point C of the emergency decree referred to are unconstitutional, whereas, on the one hand the Government does not have jurisdiction to intervene material such a decree in a field, which shall be regulated by an organic law, and on the other hand there is no justification for the emergency status change civil servants;

b) By normative provisions criticized bring serious multi-touch principles established by framework legislation in the field of employment relationships and domain specific legislation public office, especially the principles of stability and career in public office;

c) Finally O. U. G. No 77/2013 violates constitutional provisions concerning the right to work, as well as European provisions in matters [4].

References

[1]. See M.O. Curelar, Romanian-English Juridical dictionary, Academica BrâncuşI Publishing House, Târgu-Jiu, 2011, p.4;

[2]. See E. G. Simionescu, The stages of intentional crimes. Theoretical and practical aspects, Annals of the „Constantin Brâncuşi" University of Târgu Jiu, Juridical Sciences Series, Issue 4/2012

[3]. See A.G. Gavrilescu, *Parental rights and obligations*, Juridical universe Publishing House, Bucharest, 2011, p.49-66

[4]. See L M. Trocan. *The political, legal and economical aspects of the process of Romania's integration into the European Union*, COFOLA 2009: the Conference Proceedings, 1. edition. Brno : Masaryk University, 2009, ISBN 978-80-210-4821-8