

Uncertainty of the Misdemeanours' Legality Ascertained and Sanctioned during the COVID-19 State of Emergency in Romania

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ABSTRACT: In the context of the need to implement on the Romanian territory specific measures to prevent the epidemiological spread generated by the evolution of the global pandemic with Sars-Cov-2 virus, we drew attention through this study to the sanctioning instruments invested to apply them amidst civilian population. So, firstly we point out the lack of clarity and foresight of the sanctioning normative acts adopted as a matter of urgency by the Romanian Government as the exceptional legislator that can lead to errors in completing the reports of ascertaining and sanctioning petty offences, errors that are likely to cause mischiefs to individuals who came into contact with state agents during the emergency state. Secondly, we evidenciate the potential effects that the declaration of unconstitutionality for the legal provisions regarding the sanctioning regime of the deeds committed in connection with the declaration of the emergency state on the Romanian territory might have, respectively the potential expenses that the state will be required to pay to the citizens sanctioned for misdemeanors generated by the contestation in front of judiciary courts of the sanctioning reports, thus failing to achieve the preventive and repressive purpose of the measures initially generated.

KEYWORDS: emergency state, misdemeanor, unconstitutionality, legislative anachronism

Introduction

In relation to the measures adopted by Romanian authorities through establishing exceptional conditions in order to prevent the communitary spread of SARS-CoV-2 coronavirus infection, given that these measures were aimed at restricting the exercise of fundamental rights, through instruments that declaratively were considered to pursue a legitimate purpose, necessary and proportionate to the crisis situation (Paragraph (8) of Presidential Decree no. 195/2020 Preamble), we seek to highlight through this study, the difficulties reported in terms of contraventional law sanctioning framework operable during the state of emergency established in Romania.

For this, we will carry out an antithetical analysis between the coercive attribute of the state authority which through normative instruments creates a limiting environment of the citizens fundamental rights and freedoms exercise, arising from their justified restriction in relation to the primacy of guaranteeing a climate of security and safety for each of the Romanian citizens and the deficient means that the state authorities are committed to apply, this being the case of the contraventional law in the matter.

Evolution of the contraventional regulatory framework during the emergency state

Taking into account the sanctioning regime of the individual at the time of establishing the state of emergency on the Romanian territory (Article 1 of Presidential Decree no. 195/2020), we show that on 16.03.2020, according to the provisions of art. 28 of Government Emergency Ordinance no. 1/1999 regarding the state of siege and the state of emergency, corroborated with the provisions of art. 9 para. (1) of the same normative act, the individual's failure to respect the obligation established in GEO no. 1/1999, in the related normative acts, as well as in the military ordinances or orders, specific to the established state of emergency, constitutes a petty offence and is sanctioned with a fine from 100 to 5,000 lei, to these illicit deeds being applied the general framework regarding the legal regime of contraventions, constituting an aspect of interest the fact

that, according to art. 28 para. (1) of Government Ordinance no. 2/2001, the offender can pay, within maximum 15 days from the date of handing over or communicating the report, half of the minimum fine provided by the normative act (...).

Complementary to these provisions, we point out that in accordance with art. 4 para. (2) of the Presidential Decree no. 195/2020, to which, based on objective evaluation criteria, the Minister of Internal Affairs decides emergency measures by means of military ordinance, towards individuals, a series of prohibitions and obligations were gradually introduced, among which we mention: it is forbidden for isolated persons at home, quarantined or hospitalized, as a measure to prevent the spread of COVID-19, to leave the location where they were placed, without the approval of the competent authorities (Art. 8 para. (1) of Military Ordinance no. 1/2020 - initial form); between 22.00 and 6.00 o'clock, the movement of persons outside their home / household is allowed only for justified reasons (Art. 5 para. (1) of Military Ordinance no. 2/2020); the movement of all persons outside the home / household is prohibited, with some exceptions (Art. 1 of Military Ordinance no. 3/2020).

Moreover, taking into account the exceptionally unpredictable context targeting the general public' interest, the Romanian Government, in its capacity as an extraordinary legislative body (Art. 115 para. (4) of Romanian Constitution), adopts a normative act with repercussions in terms of misdemeanors, motivated by the need to establish preventive and coercive measures (Paragraph (6) of Government Emergency Ordinance no. 34/2020 Preamble) sufficient to direct the public to adopt responsible behavior in order to limit the epidemiological spread.

Therefore, considering the entry into force of art. I point 1 of GEO no. 34/2020 provisions in 3 days from the date of publication in the Romanian Official Journal (Art. III of GEO no. 34/2020), respectively on 03.04.2020 (Art. 12 para. (1) 2nd thesis of Law no. 24/2000) starting with this date, art. 28 of GEO no. 1/1999 is amended, establishing that non-compliance by individuals with the obligation established in GEO no. 1/1999, in the related normative acts, as well as in the military ordinances or orders, specific to the established state of emergency, constitutes a misdemeanor and is sanctioned with a fine from 2,000 to 20,000 lei.

However, it is a point of interest that the other provisions of GEO no. 34/2020, according to the norms of legislative technique, enters into force on the date of publication in the Official Journal, respectively on 31.03.2020 (Art. 12 para (2) of Law no. 24/2000).

In this regard, we note that according to the amendments made to the Emergency Ordinance no. 1/1999, through art. I points 3 and 4 of the amending normative act, the offender may pay, within maximum 15 days from the date of handing or communication of the report, half of the amount of the fine applied by the ascertaining agent (...), to the misdemeanors provided in art. 28 being applicable the provisions of GO no. 2/2001, only if it does not contradict the provisions of GEO no. 1/1999.

To the normative provisions previously seen, we point out three aspects likely to have raised difficulties and will continue to do so for legal practitioners, and last but not least, for ascertaining agents, even considering the declaration of unconstitutionality in integrum of the amending normative act, as we will detail below.

On the one hand, the normative act amending and supplementing GEO no. 1/1999 establishes derogatory lines from the general normative framework in contraventional law, stating a contradiction with the provisions of art. 4 para. (2) of GO no. 2/2001, according to which in urgent cases, the provisions of the normative acts establishing and sanctioning the contraventions enters into force within a period of not less than 10 days from the date of publication, the provisions of art. I point 1 of GEO no. 34/2020 entering into force in 3 days from the date of publication.

For this reason, insofar as it is found that in actual situations of maximum urgency, the term of 10 days provided in the general norm does not satisfy the concrete requirements of the competent public bodies in order to exercise the state authority, we consider the provisions of GO no. 2/2001 taken into account obsolete, and consequently, requiring their modification or even their repealing.

On the other hand, in view of the estranging from the preventive-educational nature of the misdemeanor' sanctioning, in disagreement with the general provisions in the matter, the amending provisions rule in the sense of the perpetrator's ability to pay half of the assessed fine's amount, and not half of the minimum fine provided by the normative act, as stated by art. 28 para. (1) of GO no. 2/2001, which together with the exponential increase of the sanctioning limits, rather emphasizes the repressive and punitive role of the sanction, with direct consequences in the perpetrator's wealth.

Last but not least, we point out the uncertainties with which the competent personnel to ascertain and sanction petty offences in the spectrum of those considered above were concretely faced. Thus, if until 31.03.2020 the provisions of GEO no. 1/1999 with the initial sanctioning limits (from 100 to 5,000 lei) could be applied, with the mention that the perpetrator could pay, within maximum 15 days from the report handing or communication date, half of the minimum fine provided by the normative act, in the time interval between 31.03.2020, inclusive - 02.04.2020, inclusive, the limits of the fines provided by GEO 1/1999 remain unchanged, but the amendment regarding the payment of half of fine' amount applied by the agent enters into force, and starting with 03.04.2020 (until the declaration as unconstitutional in its entirety of GEO no. 34/2020), operating both these provisions regarding the possibility of payment and the increase of the fines' amount (from 2,000 lei to 20,000 lei).

To these considerations, we can imagine the hypothesis according to which such erroneous completions of the sanctioning papers in the stated intervals, can lead to the annulment in front of judicial courts of such reports, with the consequence of patrimonial liability of the issuing units / ascertaining agents, considering the obvious prejudice created for the petty offender by the wrong entry of information's in the report' form, in case of inoperability / omission of applicability of the stipulations by which the unconstitutionality of the sanctioning provisions from GEO no. 1/1999 was stated.

Unconstitutionality of sanctions applied during the state of emergency

Taking into account the lack of predictability of the sanctioning norms of GEO no. 1/1999, was raised an exception of unconstitutionality for the provisions of art. 28 of GEO no. 1/1999, as well as for GEO no. 34/2020 in its entirety, in its reasoning, the People's Advocate showing that (...) *in the case of misdemeanors, the legislator must clearly and unequivocally indicate their object in the very content of the legal norm or so it can be easily identified (...)*, having in view that the corroboration of art. 28 and art. 9 from GEO no. 1/1999 does not incriminate an actual deed and that there are no minimum objective criteria for the petty offenses sanctioning (People's Advocate 2020, 7-8).

At the same time, it is shown that the legislator has a positive obligation to regulate clear texts that provide exact legislative solutions, the sanctions applied imposing a proportional dosage to the deed gravity (People's Advocate 2020, 10), by way of improving the repressive and preventive nature of such sanctions (Romanian Constitutional Court 2018, para. 23), moreover, disruption mechanisms of individual rights by state bodies requiring sufficient accessibility, accuracy and predictability (ECHR 2020, para. 48).

Consequently, the constitutional forum admits the exception of unconstitutionality, establishing that the provisions of art. 28 of GEO no. 1/1999, as well as GEO no. 34/2020 as a whole are unconstitutional, noting that the provisions in question (...) *impose a general obligation to comply with an indefinite number of rules, difficult to identify, and establish sanctions without incriminating actual deeds*, ruling that inaccuracy of the normative text violates the fundamental rights to a fair trial and the right to defense (Romanian Constitutional Court 2020, para. 152-153).

Therefore, according to the provisions of art. 147 para. (1) of the Romanian Constitution, *the provisions found to be unconstitutional cease to have legal effect within 45 days after the publication of the decision* in the Official Journal, during this time, the provisions found to be unconstitutional being lawfully suspended. That was being started with 13.05.2020 the provisions

of art. 28 of GEO no. 1/1999, as well as those of GEO no. 34/2020 are lawfully suspended, and ceased its legal effects starting with 27.06.2020.

To the asserted findings, we point out that in relation to the constitutional context, although the declaration of unconstitutionality of the sanctioning provisions regarding the state of emergency took place on 06.05.2020 (Romanian Constitutional Court 2020, letter B), until the date of publication, respectively until 13.05.2020 they remained valid, the competent bodies to ascertain and apply sanctions facing an obsolete legislative instrument, but applicable in the mentioned period of time, not being justified the thesis according to which, in the considered interval of time, the ascertaining agents could have applied the initial fine limits provided in GEO no. 1/1999 (Ursuța 2020, 3rd footnote).

Also, given that on 15.05.2020 the state of emergency established on the Romanian territory ceases (Art. 1 of Presidential Decree no. 240/2020), but starting with 18.05.2020, is established the state of alert (Art. 1 of Government Decision no. 394/2020), the applicable contraventional regime being established by Law no. 55/2020, we note the legislative vacuum in contraventional law in the time period from the expiration date of the emergency state, until the state of alert establishment, being undeniable that in that frame of time the public bodies were widowed by the necessary tools to exercise the state authority in order to limit epidemiological spread.

In another train of thoughts, given that the 15-day time limit available to the offender to file a complaint against the sanctioning report (Art. 31 para. (1) of GO no. 2/2001) is a limitation period, which does not start to run during the state of emergency (Art. 62 of Presidential Decree no. 240/2020), it turns out that the fined individuals will have 15 days from the ceasing date of the emergency state in order to file a misdemeanor complaint, the sanctioning reports issued during the state of emergency not constituting enforceable executory titles during this period of time (Ursuța 2020).

However, the unconstitutionality imposition of the sanctioning provisions specific to the state of emergency opens the way to formulating court complaints against all the reports ascertaining and sanctioning misdemeanors issued regarding the non-compliance with measures imposed during that state, which can only complicate the justice system and creating the premises for citizens' distrust of public authorities.

Moreover, we point out that compared to the initial purpose of the sanctioning normative framework, to ensure an adequate preventive and coercive character in terms of contravention liability in case of non-compliance or immediate non-application of the established measures during the state of emergency (Para. 5 of GEO no. 34/2020 Preamble), the issuing authorities of the sanctioning reports meet all the conditions to be held to pay the court costs incurred by the legal proceedings specific to the misdemeanor complaint.

Even taking into account the acquiescence of the reports issuing bodies to the plaintiffs' claims, consisting in recognizing the nullity of the sanctioning paper and relieving the payment of the fine imposed, which could fall under the procedural-civil law institution of *Exemption of the defendant from payment* (Art. 454 of Code of civil procedure), according to the majority case law propensity, this may not be the case for misdemeanor complaint proceedings.

In this regard, we point out that, on the one hand, the reason for the exemption from costs lies in the applicant's *sanctioning* for acting untimely (Boroi *et al.* 2016, 1007), and on the other hand, the legal basis for awarding court costs is the procedural fault of the guilty party (Civil sentence no. 181/26.05.2020 of the Babadag Court).

Thus, the misdemeanor report being an administrative act, the provisions of art. 52 of the Constitution which state that the person injured in a right or in a legitimate interest, by a public authority, by an administrative act (...) is entitled to obtain (...) annulment of the act and reparation of the damage, leading to the conclusion that it is perfectly legal, but also moral, that the petitioner whose misdemeanor complaint was admitted should benefit from the reimbursement of the expenses he incurred in order to remove an injury resulting from an illegally concluded report (Civil sentence no. 2343/04.03.2020 of the Iași Court).

Furthermore, since the misdemeanor complaint is *an appeal against an administrative act, and not a claim of civil law* (Civil sentence no. 483/07.03.2017 of the Roman Court), the injured person by an ascertained petty offence report does not have the possibility to kindly remove the injury provoked, since the contravention report, once communicated, can no longer be revoked (Civil decision no. 197/02.06.2020 of the Covasna Tribunal), the offender having no other legal possibility than to bring an action before the court, the procedural fault of the sanctioning authority subsisting even in the situation where he was in good faith (Civil sentence no. 396/03.06.2020 of the Fetești Court), as is the case of law enforcement commissioned to apply sanctions during the state of emergency, without the possibility to discern on the constitutionality of the legal text they implement.

Therewith, it is promoted the inoperability of the exonerating provisions, whereas the advancement of a misdemeanor complaint represents the only procedural way available to the perpetrators in order to obtain the legality and validity verification of the reports, so that all the expenses incurred must be borne by the issuing unit of the sanctioning act, in the context of admitting the complaints, there being no other possibility by which the annulment of the act could be obtained (Civil decision no. 1630/17.10.2018 of the Cluj Tribunal).

In relation to the negative impact that could be inflicted to the justice system, but also on the state budget by solving the misdemeanor complaints regarding sanctioning acts issued within the state of emergency in relation to the provisions declared unconstitutional, in the manner previously analyzed, we welcome the legislative proposal (Romanian Senate 2020) aimed at repairing the prejudice caused to citizens sanctioned under these rules, *without the need to go to court* (Romanian Senate 2020, penultimate paragraph), a solution that the Government itself - solely author of normative acts declared unconstitutional - finds appropriate *in the idea of relieving the courts of a category of cases with a predictable end* (Romanian Government 2020, 2).

However, to the fact that from the view point expressed by the Legislative Council, is supported the thesis according to which (...) the annulment of the concluded reports cannot be achieved by law, (...) since the finding of nullity is within the competence of the court (Legislative Council 2020), we express our concern that the scenario outlined above regarding the blocking of the justice system and the obligation of the state to pay the court costs, even only in terms of the 20 lei judicial stamp tax (Art. 19 of GEO no. 80/2013), will come true precisely, recent judicial practice stating the requirement to pay the court costs for the issuing unit of the null sanctioning report in conditions of unconstitutionality, as we analyzed above (Civil sentence no. 1028/14.07.2020 of Mircurea Ciuc Court).

Conclusions

The legislator, be it primary or secondary, lacks coherence in the process of norming the sanctioning texts in the matter of exceptional situations, which most citizens end up facing with these days, leading to inadvertences for the entire repressive and preventive system on which the rule of law relies its responsibility to guide society towards salutary solutions.

From the deficient development in contraventional law of the events that governed the state of emergency established on the Romanian territory, and later, the state of alert, we can catch the disinterest that in the course of time the legislative entities granted to crisis situations in which all state authorities should be involved in an integrated system, this being also the case of the unclear, anachronistic and inflexible provisions of GEO no. 1/1999 on the state of siege and the state of emergency.

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