

JURIDICAL ASPECTS REGARDING THE EXCEPTIONAL MEASURES IMPOSED DURING THE STATE OF EMERGENCY

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Abstract: According to art. 20 of the Emergency Ordinance no. 1/1999 of the Romanian Government, the state of emergency imposes “non-military measures of public order and it is instituted in case of special threats to the national security or to the functioning of the constitutional democracy, as well as in the case of different disasters”. The requirement to implement economic, social or political measures in the case of the state of emergency is directly dependent on the progressive nature of the danger. During the state of emergency, the exercise of fundamental rights and freedoms may be restricted and important responsibilities of the public administration authorities are subordinated to the competence of the public order authorities, specified in the decree establishing the state of emergency. The spread of the SARS-CoV2 coronavirus, in the international context of the declaration of the pandemic by the World Health Organization, led to the adoption by the Decree of the President of Romania no. 195 of March 16, 2020 on the establishment of the state of emergency on the territory of Romania, which had important consequences in terms of restriction on the exercise of fundamental rights and freedoms.

Keywords: state of emergency, law, exceptional measures, human rights

1. The importance of regulating exceptional measures in the context of the SARS-CoV-2 coronavirus pandemic

The accelerated global spread of the SARS-CoV-2 coronavirus and the declaration of the pandemic by the World Health Organization on 11 March 2020 determined most of the affected states to adopt exceptional domestic measures, which have limited important rights and fundamental human freedoms.

The urgency and the scale of the measures have created an unprecedented national legislative context in most of the countries concerned and the legal instruments that have been used have varied from state to state, depending on the already existing regulations.

Thus, some states have activated regulations already adopted in the field of emergencies, which allowed them to impose the necessary measures without lengthy legislative debates, in this case the executive authority being the one that individualized and implemented the measures to limit the negative effects of the pandemic. Other states considered it necessary to generate new legal instruments, starting from the primary regulation through the legislative authority, instruments that although had the disadvantage of a longer stage of elaboration and adoption, had the advantage of being better adapted to the concrete situation.

Nevertheless, the concrete application of the measures stipulated in the normative

acts meant a strong and dramatic restriction of the exercise of individual rights and freedoms for the citizens of each state.

Both the state constitutions and the international human rights treaties contain regulations that allow state authorities to invoke special prerogatives that would normally be considered violations of freedom.

Thus, *The European Convention on Human Rights*, the most important international act for the protection of human rights at continental level, in art. 15, stipulates that “*in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law*” [1].

The interpretation of that article emphasizes the fact that the exceptional powers which the authorities have during the manifestation of the threat are permitted only to the extent strictly required by the requirements of the situation [2].

The European Commission for Democracy through Law, an advisory body of the Council of Europe, known as *Venice Commission*, argued that “*even in a state of public emergency the fundamental principle of the rule of law must prevail. The emergency measures and derogations, restrictions and suspensions of fundamental rights are acceptable only in case of a public emergency ...The rule of law further means that governmental agencies must operate within the framework of law, and their actions must be subject to review by independent courts. The legal security of individuals must be guaranteed*” [3].

Given the current situation, generated by the effects produced by the SARS-CoV-2 virus, the use of countermeasures by establishing the state of emergency procedure seemed the easiest way to regulate the new legal relationships.

However, as UN human rights experts warn, “*states should not abuse emergency measures to suppress human rights[...] While we recognize the severity of the current health crisis and acknowledge that the use of emergency powers is allowed by international law in response to significant threats, we urgently remind States that any emergency responses to the coronavirus must be proportionate, necessary and non-discriminatory*” [4].

2. The legislation applicable to the state of emergency in Romania

The foundation of the current legal regime of the state of emergency in Romania was established by the adoption of the Constitution of 1991. The text of art. 93, slightly amended in 2003, states that “*according to the law, the President of Romania shall establish the state of siege or the state of emergency in the whole country or in some administrative-territorial units, and asks the Parliament to approve of the adopted measure within at most 5 days after taking it*” [5].

The regulation of the state of emergency in 1999 by an act of the Government, The Government Emergency Ordinance no. 1/1999 on the regime of the state of siege and the state of emergency, provided our legal system with the normative act necessary for the establishment of the state of emergency, if the conditions require it, even if, at the time of the adoption, the constitutional provision that reserved this field only to organic laws was violated. This aspect of unconstitutionality was removed both by the interpretations of the Constitutional Court, and later by the approval of Ordinance no. 1/1999 by Law no. 453/2004.

According to the mentioned regulation, the state of emergency represents “the set of exceptional political, economic and public order measures applicable on the entire territory of the country or in some administrative-territorial units that are established in the following situations:

a) the existence of current or imminent serious dangers regarding national security or the functioning of constitutional democracy;

b) the imminence of the occurrence or the occurrence of calamities which make it necessary to prevent, limit or eliminate, as the case may be, the consequences of disasters” [6].

Ordinance no.1/1999 also regulates the legal regime of the state of siege, but, although the two states have a similar set of actions and procedures and a similar restrictive regime regarding fundamental rights, the substantial difference between the state of emergency and the state of siege is marked by the non-military, public order nature of the measures imposed by the state of emergency [7].

3. Aspects of the imposition of exceptional measures during the state of emergency established in Romania by Decree no. 195/2020

The evolution of the epidemiological situation in Romania in the case of the spread of the SARS-CoV2 coronavirus, in the international context of the declaration of the *pandemic* by the World Health Organization, led to the adoption by the Supreme Council of National Defense of *Decision no. 30/2020 on the need to establish the state of emergency and the action plan for the establishment of the state of emergency*, followed by the *Decree of the President of Romania no. 195 of March 16, 2020 on the establishment of the state of emergency on the territory of Romania*.

The measures stipulated by the decree that establishes it have no precedent in the last decades of democratic regime in Romania. The legal basis of these measures is provided by art. 4 of the Emergency Ordinance no. 1/1999, which stipulates that, during the state of emergency, the exercise of fundamental rights and freedoms may be restricted to the extent required by the situation, with the application of the general regulation of the restriction of the exercise

of certain rights or freedoms as mentioned in art. 53 of the Romanian Constitution. The restriction of the exercise of certain rights and freedoms also takes into account the prohibitions formulated by art. 3 of Ordinance no. 1/1999:

“a) the limitation of the right to life, except in cases where death is the result of lawful acts of war;

b) torture and inhuman or degrading treatment or punishment;

c) conviction for offenses unforeseen as such, in accordance with national or international law;

d) restriction of the free access to justice.”

Thus, according to art. 2 of *Decree no. 195/2020*, “in order to prevent the spread of COVID-19 and to manage the consequences, related to the evolution of the epidemiological situation, during the state of emergency the exercise of the following rights is restricted [...]:

a) free movement;

b) right to intimate, family and private life;

c) inviolability of the domicile;

d) right to education;

e) freedom of assembly;

f) right to private property;

g) right to strike;

h) economic freedom” [8].

However, the restriction of these rights is proportional to the degree of fulfilment of certain criteria stipulated by the decree, which are related both to the intensity of the virus transmission or to the appearance of outbreaks in a certain space, as well as to the capacity of the public authorities to manage the new situations.

The main areas covered by the measures imposed by Decree no. 195/2020 focused on public order, the economic field, health, labour and social protection, justice, and foreign affairs.

Given the lack of clear signs of a possible slowdown in the evolution of the pandemic or capping of the number of cases, the state of emergency established for a period of 30 days was extended for another 30 days by the *Decree of the President of Romania no.*

240 of April 14, 2020 on the extension of the state of emergency on the territory of Romania [9].

For the application of the measures stipulated in the decree on establishment, according to the provisions of the Emergency Ordinance no. 1/1999, the authorities with the material and territorial competence of coordination and management of the state of emergency can issue *military ordinances*. As a normative act, the military ordinance is an act that meets both the conditions of a military act of command as well as those of an administrative act of authority [10], without following the exception stipulated in the Romanian Constitution at art.126 (6) on the impossibility of military command documents to be subject to control through administrative law.

The existence of military ordinances in case of a state of emergency declared at national level does not exclude the issuance of other normative acts by public authorities whose powers have not been transferred. Thus, by ordinances and decisions of the Government, by orders and instructions of the ministers and of other leaders of the specialized central bodies, various aspects regarding the application of the measures related to the state of emergency can be regulated.

Between March 16 and May 15 2020, in Romania, 12 military ordinances were adopted; these stipulated first of all the first emergency measures with gradual applicability, according to Decree no. 195/2020, but also situations that appeared during the state of emergency.

From the point of view of drafting and of applying the legislation during those 60 days in which the state of emergency was established on the entire territory of Romania, it was demonstrated that the effectiveness of the measures may not be the desired one without an active collaboration and participation of all the legislative and executive factors involved in this process, according to the competencies stipulated by law.

4. Conclusions

Inevitably, any crisis situation brings changes at the level of a society. The deeper the crisis, the more seriously the manner of governance; the cohesion between decision-makers and the society's ability to generate and to apply the necessary measures to mitigate and eliminate the factors that disrupt its development are tested.

The granting of wider prerogatives to the executive during the state of emergency ensures speed and continuity in the process of adopting of the administrative decision, which is necessary for effective crisis management. However, without a well-articulated control mechanism for the actions of the executive, the adopted measures can generate situations of violation of the fundamental rights and freedoms, of subordination of the public interest to the private one, of syncope in carrying out the planned measures.

In this sense, both the legislature, through the constitutional ways of control over the executive, and the judicial authority, by adopting unitary solutions for individual cases, are responsible for strengthening legality and for defending the values of the rule of law.

The situations of severe crisis, which can also manifest themselves through the establishment of a state of emergency, can endanger the existence of democracy in a state in various ways. One of the most important factors that can ensure the survival of democracy in times of crisis is the active participation of citizens in the process of adopting and implementing the necessary measures.

Initially theorized, this factor has acquired unprecedented practical aspects in the case of the global situation generated by the SARS-CoV-2 coronavirus. However, the path for activating such citizen participation must be traced in advance, not by creating new norms and rules, but by pro-democratic, civic exercise and dialogue.

These elements can be crucial for the future examination to which the global society

will be subjected, perhaps a tougher examination, in which the number and the quality of solutions will depend on what we

are aware of and achieve now, during the current crisis.

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