

THE LEGAL APPROACH TO THE STATE OF SIEGE FROM THE PERSPECTIVE OF THE CONDITIONS FOR APPLYING EXCEPTIONAL MEASURES

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Abstract: *The state of siege constitutes a category of exceptional measures with a distinct legal regime, which can be instituted by the head of state in situations of serious and imminent danger to the constitutional order or national security, such as wars, acts of aggression, armed insurrections or other events that seriously threaten the functioning of the rule of law. The application of the state of siege involves the temporary restriction of fundamental rights and freedoms, such as freedom of movement, the right to assembly, the inviolability of the home or freedom of the press. These exceptional measures must comply with strict conditions: legality, necessity, proportionality and non-discriminatory character. The aim is to quickly restore public order, without abusively affecting the rights of citizens. The responsibility for ensuring the exceptional measures imposed under the state of siege lies with the military authorities, and they, together with the subordinate military structures and the civilian authorities involved, have the obligation to act within the limits of the law, under the control of the judiciary. In addition, Romania, as a state party to the European Convention on Human Rights, must notify the Council of Europe of any derogation from international obligations, according to Article 15 of the Convention, thus ensuring a balance between security and respect for fundamental rights.*

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1. Conceptual determinations regarding the state of siege in the context of the application of exceptional and extraordinary measures

Since its emergence, the state has created and consolidated various forms of institutional mechanisms to defend its most important values, and the diversification of threats to it has led to a constant adaptation of the response that the state offers to the emergence of crisis situations.

State power constitutes a command center, which has the capacity to ensure the regulation of social relations [1]. The adoption and implementation of coherent legal regulations, which do not present gaps

or contradictions, is an essential condition for an adequate response to proliferated threats.

The concept of a state of siege includes a set of measures a set of measures that the state adopts in situations in which its fundamental values are threatened, a set that also includes other forms of state response, systematized according to the nature and extent of the threats. Although in the early stages of the modern state these measures had an exclusively military character [2], currently, the role of civil authorities in their management has increased considerably and the militarized factor intervenes when requested, only in

those situations whose resolution cannot be achieved through other instruments.

Romanian legislation provides in the content of several normative acts the categories: state of alert, state of emergency, state of siege, state of mobilization and state of war, whose legal content must be determined accordingly in order to apply them effectively.

It is worth highlighting the fact that the first two categories in the previous list involve the adoption of measures of a non-military nature. Thus, the state of alert constitutes “the response to an emergency situation of particular magnitude and intensity, determined by one or more types of risk, consisting of a set of temporary measures, proportional to the manifested or forecasted level of severity thereof and necessary for the prevention and elimination of imminent threats to life, health of persons, the environment, important material and cultural values or property” [3].

The increase in the degree of danger in circumstances that intensify or extend the threats created by emergency situations requires the transition to the next level of measures, represented by the state of emergency, understood as “the set of exceptional measures of a political, economic and public order nature applicable throughout the country or in some administrative-territorial units” [4].

If the level of threats seriously affects the fundamental values of the state guaranteed by the Constitution of Romania, a category of measures with a greater potential for force may be established that involves the action of the militarized factor. In this context, although it involves the adoption of exceptional measures similar to those adopted during the state of emergency, the military nature of the measures that will be applied confers another identity to the state that will be adopted, called a state of siege. Regulated by the same normative act as the state of emergency, the state of siege is “the set of exceptional measures of a political, military, economic, social and other nature applicable throughout the country or in

some administrative-territorial units, established to adapt the country's defense capacity to serious, current or imminent dangers that threaten the sovereignty, independence, unity or territorial integrity of the state.” [5]

The state of siege is also differentiated from the state of total or partial mobilization, as well as from the state of war, in the case of the latter the measures to be taken will have a different character, considered by the legislator as being of an exceptional nature. [6]

2. Constitutional foundations of the establishment of exceptional measures in the event of a state of siege

At the level of conventions concluded by European states, the possibility of establishing exceptional measures is provided for by a regime derogating from the generally applicable rules. Thus, the European Convention on Human Rights in art. 15 provides for the conditions for activating the derogation from the provisions of the Convention in the event that the signatory states are in special situations: “in case of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from the obligations provided for in this Convention, to the strict extent required by the situation and provided that such measures are not inconsistent with other obligations arising from international law” [7].

In case of application, the derogation does not imply the elimination of the other guarantees that the Convention establishes. The moment of activation of art. 15 of the mentioned international act takes into account the cumulative fulfillment of certain conditions:

- the existence of a state of war or other danger to public order that may constitute a threat to the life of the nation;
- the creation of an exception to the provisions of the Convention can be applied only when the situation requires it;

- the measures taken following the derogatory situation cannot contradict the provisions of international treaties that establish obligations for the state that decides to declare a state of emergency.

The same meaning in the wording is also contained in the provisions of the Charter of Fundamental Rights of the European Union which states that “any restriction on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. By observing the principle of proportionality, restrictions may be imposed only if they are necessary and only if they genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”[8].

For the special situations that may arise in the life of a state, the constituent legislator created the possibility of the necessary intervention to save essential elements of the state or to defend fundamental values.

At the level of European states, we encounter different models of regulating states of exception, placed on a spectrum that starts from models that provide for a single form of response to crisis situations, regardless of the nature of the threat (Cyprus, Malta, Liechtenstein), and ends with models with a plurality of forms of regulating states of exception (Spain, Hungary) [9].

Close to the last category of regulations applicable to the states in question, the Romanian Constitution provides for the existence of a state of siege and a state of emergency.

In the chapter that regulates fundamental rights, freedoms and duties, the fundamental law establishes the possibility of limiting these rights in expressly provided situations. Thus, art. 53 states that “the exercise of certain rights or freedoms may be restricted only by law and only if it is required, as the case may be, for: the defense of national security, order, health or public morals, the rights and freedoms of citizens; the conduct of criminal proceedings; the prevention of the

consequences of a natural calamity, a disaster or a particularly serious incident” [10].

It should be emphasized that in these situations the aforementioned restrictions are made, according to the Constitution, only by the Romanian Parliament, by law. Furthermore, “the restriction may be ordered only if it is necessary in a democratic society; the measure must be proportionate to the situation which has given rise to it, be applied in a non-discriminatory manner and without prejudice to the existence of a right or freedom” [11].

Parliament has the opportunity to assess whether the measure it wishes to legislate is necessary in an open society, resulting from the will of its members. If the legislative authority considers that the measure is not necessary, Parliament is not entitled to adopt the restrictive measure in question [12].

3. Regulation of the state of siege in national legislation

In order to ensure the internal regulatory framework intended to facilitate the immediate taking of measures that are required in the event that the essential values of state life are threatened, each state establishes its own institutional architecture through which exceptional measures are established and applied.

Starting from the constitutional provisions regulating the procedure for establishing a state of siege, the adoption of the Emergency Ordinance of the Government of Romania No. 1/1999 represented a significant moment in the efforts of the Romanian state to ensure the basic regulation that would represent the normative premise of the response to different possibilities of crisis manifestation.

The presidential decree is the act that establishes the state of siege, and the period for which this normative act applies is a maximum of 60 days, after which it is necessary to extend it through the same category of normative act. The immediate publication in the Official Gazette of the

decree of the head of state ensures the speed of application of the measures, the legislative approval being subsequent to the publication.

The President of Romania may extend the duration of the state of siege if the reporting on the evolution of the dangerous situations requires this, being necessary, also in this situation, the approval of Parliament. The state of siege ends on the date established by the presidential decree establishing or extending the state of siege, but may also occur before this date if the dangerous situations have diminished or disappeared. Compliance with these prohibitions can be ensured by expressly regulating the rights and freedoms whose exercise is restricted in the specific situations in which the state of siege is established, otherwise these legal provisions, as well as the constitutional ones in the field of human rights, may become ineffective [13].

The powers and responsibilities assigned to the authorities and public institutions that have a role in managing the exceptional measures imposed by the decree establishing the state of siege have a wide area of coverage, differentiated according to the nature of the threats. The coordination of the measures imposed by the decree establishing the state of siege is carried out by the specialized body of the central public administration with national territorial competence in the field of defense.

During the state of siege, the authorities provided for by the legislator may issue military ordinances and orders, normative acts with a specific character to the exceptional measures established. Thus, in the event that a state of siege is established throughout the territory of the state, military ordinances will be issued by the persons designated by law.

Although not directly conditioned by the declaration of a state of mobilization, if measures for a state of siege are activated, military authorities must ensure that the military actions that the exceptional measures may generate have the necessary human and material resources.

The general legal framework regulating the state of siege also provides for those measures that may be ordered in the event of the establishment of a state of siege, among which the application of approved plans for the state of siege, prioritization of transport, communications, resources and infrastructure for the needs of the armed forces or the requisition of goods can be mentioned.

During the state of siege, depending on the specific operational situation, the Supreme Council for the Defense of the Country may decide that “the military units of the forces intended for defense shall be moved to higher levels of combat capability, according to the plans drawn up, including their replenishment with human and material resources, according to the organization for war”[14].

4. Conclusions

The state of siege is an exceptional legal regime established in conditions of major crisis, such as armed conflicts, serious social unrest or direct threats to national security. From a legal perspective, the application of this measure must respect the existing constitutional and legal framework, in particular the principles of the rule of law, proportionality and temporary nature. Thus, the state of siege should not be perceived as an arbitrary suspension of fundamental rights, but as a measure strictly necessary to restore order and protect the community. In this context, the role of the military factor becomes essential. Military authorities are called upon to intervene when civil authorities can no longer effectively manage the situation, contributing decisively to maintaining public order, protecting strategic objectives and ensuring the continuity of the vital functions of the state. At the same time, the involvement of the military must take place within the limits of the law, avoiding authoritarian slippages. The legal responsibility of military decision-makers who issue military orders during the state of siege implies respect for human rights even

in exceptional circumstances, in accordance with international and national norms.

Therefore, the effective resolution of the state of siege must combine the effectiveness of emergency measures with respect for democracy and legality. The

military plays a crucial role in the implementation of these measures, but must act transparently, responsibly and in coordination with other state institutions to ensure a rapid return to normality.

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