



ORIGINAL PAPER

Declaring the state of emergency in the Romanian constitutional system

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Abstract:

The Romanian Constitution includes the state of emergency as one of two extraordinary measures. Measures taken during a state of emergency invariably limit the exercise of certain rights and freedoms, which is why constitutional and legal provisions must be in place to ensure that this restriction is not abusive. The legal nature of the decree has been the subject of differing opinions in the doctrine.

Keywords: *state of emergency; restrictions on rights and liberties; decrees of the President.*

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The general normative framework for declaring a state of emergency

According to art. 93 of the Constitution, the President of Romania may decree, according to the law, the state of siege or state of emergency in the whole country or in some administrative-territorial units and must request the Parliament to approve the adopted measure, within 5 days from its adoption. If the Parliament is not in session, it shall be summoned by law no later than 48 hours after the state of siege or the state of emergency has been decreed and shall function throughout their duration.

The competence of the President thus presented (Muraru, Tănăsescu, 2008, 868-877) to decree the state of siege or the state of emergency, refers to exceptional situations that may occur internally, different from cases of external armed aggression. The normative content of the presidential competence is bivalent, being able to either decree the state of siege or the state of emergency. Also, the territorial geographical area in which it can produce legal effects can be the whole country or only in some administrative-territorial units.

Government Emergency Ordinance no. 1/1999 on the state of siege and the regime of state of emergency, approved by Law no. 453 on November 12004, regulates the situations that may lead to the exercise of presidential competence and defines the two states that can be established by the President.

According to art. 1, the state of siege and the state of emergency concern crisis situations that impose exceptional measures that are instituted in cases determined by serious dangers to the defense of the country and national security, constitutional democracy or to prevent, limit or eliminate the consequences of disasters.

The state of siege is a 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, which threaten the sovereignty, independence, unity or territorial integrity of the state. In the event of the state of siege, exceptional measures may apply throughout the country or in some administrative -territorial units.(Gîrleşteanu, 2012, 222)

The state of emergency represents the set of exceptional measures of a political, economic and public order nature applicable throughout the country or in some administrative-territorial units that are established in the following situations: a) the existence of current or imminent serious dangers to the national security or to the functioning of constitutional democracy; b) imminent occurrence or occurrence of calamities which make it necessary to prevent, limit or eliminate, as the case may be, the consequences of disasters. The state of siege can be established for a maximum period of 60 days, and the state of emergency for a maximum period of 30 days.

The exercise of the presidential competence to establish the state of siege or the state of emergency is achieved by issuing a decree. This decree must be countersigned by the Prime Minister and immediately published in the Official Gazette of Romania.

The decree establishing the state of siege or the state of emergency shall be brought to the attention of the population without delay by the mass media, together with the urgent implementing measures, which shall enter into force immediately. The decree shall be broadcast on radio and television stations, no later than two hours after signing, and shall be retransmitted repeatedly within the first 24 hours of the establishment of the state of siege or emergency.

The decree establishing the state of siege or the state of emergency must provide the following: a) the reasons that imposed the decree of the state; b) the area

where it is established; c) the period for which it is established; d) the fundamental rights and freedoms whose exercise is restricted, within the limits of the constitutional provisions and of art. 4 of this emergency ordinance; e) the military and civil authorities designated for the execution of the provisions of the decree and their competencies; f) other provisions, if deemed necessary.(Gîrleşteanu, 2012, 223)

Within a maximum of 5 days from the decree of the state of siege or the state of emergency, the President of Romania requests the Parliament to approve the adopted measure. In the situation when the Parliament does not approve the established state, the President of Romania is obliged to revoke the decree, the ordered measures ceasing their applicability.

During the state of siege or the state of emergency, the exercise of fundamental rights and freedoms may be restricted only to the extent that the situation requires it and in compliance with art. 53 of the Constitution. Also, during the state of siege and the state of emergency the following are prohibited: a) limitation of the right to life, except in cases where death is the result of legal acts of war; b) torture and inhuman or degrading treatment or punishment; c) conviction for unforeseen offenses as such, in accordance with national or international law; d) restricting free access to justice.

Depending on the evolution of the dangerous situations, the President of Romania, with the approval of the Parliament, may extend the duration of the established state and may extend or narrow down its area of application. The end of the state of siege or emergency takes place on the date established in the decree of establishment or in the decree of extension. In case the dangerous situations are removed before the expiration of the established term, the end of the application of the exceptional measure is ordered by decree.

In relation to the above constitutional and legal provisions, we can ask ourselves: What is the legal nature of the decrees of the President? What does it mean that the President establishes, according to the law, the state of siege or emergency? What is the constitutional meaning of the phrase "establish, according to the law"? Does it refer to the fact that the President has only the power to declare a state of emergency or state of siege, under the subsequent control of a Parliament that enjoys only the power to approve the measure? Or does it refer to the fact that the President has the competence to implement the provisions of the law that establishes the legal regime of the state of siege or the state of emergency in Romania? Can the exercise of certain fundamental rights and freedoms be restricted by the President's decree?

What is the legal nature of the decrees of the President in exceptional situations?

Art. 1 of the Decree of the President of Romania no. 195/2020 on the establishment of the state of emergency on the territory of Romania, established for a period of 30 days the state of emergency, starting with the date of official publication, according to art. 8.

Subsequently, through art. 1 of the Decree of the President of Romania no. 240/2020 regarding the extension of the state of emergency on the Romanian territory, the state of emergency was maintained for a new period of 30 days, starting with the day following the fulfillment of the initial term of 30 days, according to art. 9.

Regarding both presidential decrees, it can be observed that art. 2 stipulates that during the state of emergency the exercise of the following rights and freedoms were restricted: a) free movement; b) the right to intimate, family and private life; c)

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inviolability of the domicile; d) the right to education; e) freedom of assembly; f) the right of private property; g) the right to strike; h) economic freedom.

Also, in chapters V and VII of annex no. 1 of the Decree no. 195/2020, respectively through chapters VII and XI of annex no. 1 of the Decree no. 240/2020, legislative measures were adopted, namely:

- it has been established that the limitation periods in civil matters do not expire or are suspended and that the relevant legislative provisions do not apply, as well as the fact that the limitation period for criminal liability is suspended;
- it has been established that the activity of judges of rights and freedoms and judges of the pre-trial chamber is not carried out except in an extremely small number of cases, empowering the governing boards of the High Court of Cassation and Justice and of the courts of appeal to determine these cases and the Superior Council of Magistracy to give guidance in the matter.
- special conditions and rules of procedure were established;
- the deadlines for responding to petitions and requests for information of public interest have doubled.

The question that arises is what is the legal nature of presidential decrees?

Three relevant directions of interpretation have been identified in relation to this situation.

In the first direction of interpretation, also assumed by the ombudsman through the exception of unconstitutionality formulated against the provisions of the O.U.G. no. 1 of 1999, more precisely article 9, article 14 let. C.1) - f), it is appreciated that the President of Romania does not have the competence to legislate in the areas for which the Fundamental Law requires the intervention of the primary legislator, such as restricting the exercise of certain fundamental rights or freedoms. To this end, it is stated that the role of the legislature cannot be diverted by the possibility offered to the President by the criticized legal provisions to enact, by the decree establishing the state of emergency or state of siege, imperative provisions regarding the restriction of constitutional rights and freedoms (The Constitutional Court of Romania, Decision no. 152, 6 May 2020)

In the second direction of interpretation, the President's decree by which the state of emergency is established or possibly extended is considered a normative decree that includes primary legal norms issued on the basis of a constitutional legislative delegation, through a law (Vida, 2012, 202-203). The fact that this decree is not subject to constitutional review is due to the completely and utterly exceptional nature of these regulations, which, however, remain under parliamentary control. In another opinion, which was expressed in the context of establishing the state of emergency, the President's decree falls within the expression -by law- used in Article 53 of the Constitution, so the provisions of ordinary or organic laws are suspended during the state of emergency and replaced with the rules established by the decree. In this interpretation, the decisive argument is considered that during the state of emergency the power to legislate is constitutionally delegated to the President, which means that the Parliament is competent to intervene in its exercise if it does so within those 5 days provided by the Constitution. The reason for the existence of this delegation is the urgent situation, and not the emptying of the legislative power or the legitimation of the President as a permanent legislator. (Dragoș, Simon, 2020, 5)

Finally, a last direction of interpretation starts from the aspect that the President's decree, through which the state of emergency is established, is an

administrative act, which has no legal force, because, according to article 61 par. (1) and Article 115 of the Basic Law, the authorities that have the power to legislate, ie the possibility to adopt primary regulatory acts, are the Government, which has only a delegated power, and the Parliament, which is the only legislative authority. If this was a normative act with the force of law, it would not make sense for it to be submitted to Parliament for approval, within a maximum of 5 days from the date of issue, because Parliament's decision is a legal act, which is inferior to the laws. (Măță, 2020, 90)

In my opinion, the last interpretation is the only correct one, because it corresponds to a thorough analysis of the legal nature of the President's decree, by reference to the provisions of Article 73 para. (3) lit. g) (through the organic laws the regime of the state of emergency and of the state of alert is regulated) and of article 93 par. (1) of the Basic Law (The President establishes, according to the legal provisions, the state of emergency or state of siege in some administrative-territorial units or in the whole country and requests the Parliament to approve the adopted measures, within 5 days from taking this measure). The constitutional provisions regarding the legislative delegation are of strict interpretation and this institution cannot be extended to other normative acts, even if they are issued in extraordinary situations.

A reading with a minimum level of training and good faith of the Constitution immediately shows that the decree of the President of Romania to establish a state of emergency or state of siege has no force of law, but is infra-legislative, so it is an administrative act. According to art. 61 para. (1) and art. 115 of the Constitution, the only constitutional authorities that can legislate, (ie) to adopt acts of primary regulation, immediately inferior to the Constitution, are the Parliament, as the sole legislative authority of the country, and the Government, which has a delegated legislative power.

The conclusion is valid both in normal times and in exceptional situations (any of the four exceptional states expressly and exhaustively listed in the Constitution: state of war, state of total or partial mobilization, state of siege and state of emergency). The existence of an exceptional situation does not in any way transform the President of Romania into a legislative body. On the contrary, during such states Parliament must function uninterruptedly, if its term ends it is extended, it cannot be dissolved, and the Government can adopt emergency ordinances.

If the decree of the President of Romania establishing the state of emergency or the state of siege had legal force equal to the law, it would be absurd that by art. 93 para. (1) of the Constitution to require the Parliament to approve the measure taken by decree, provided that the Parliament exercises this power by decision, which is a legal act inferior to the law. It would be devoid of any legal logic to constitutionally require that the measure established by the decree which would have the force of law be approved by an act with legal force inferior to the law.

It would also be absurd if we admitted that the decree of the President of Romania establishing or prolonging the state of emergency or siege would have legal force equal to the law, it could not be subject to legality control (which can only target sub-legislative acts), but exclusively to the constitutionality control. Or, as the Constitutional Court is a specialized jurisdiction, having the attributions expressly and limitingly enumerated in the Constitution and in organic laws, and among them is not found the control of the constitutionality of the decrees of the President of Romania, it means that such a decree by force of law, it would escape absolutely any validity check exercised by any jurisdiction. The President of Romania could decide at his discretion anything, without any judicial control (neither from the Constitutional Court, which does

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not have such a power, nor from the courts, which would not be possible in the event that the decree would have the force of law), so in fact the decree would be even super-constitutional (it can violate the Constitution without being able to be controlled and invalidated by any jurisdiction), which is contrary to the rule of law and democracy proclaimed by art. 1 ("The Romanian State") para. (3) of the Constitution.

If the President of Romania legislates during an exceptional situation, usurping the own power of the Parliament or the delegated power of the Government, he commits a deed of serious violation of the Constitution and a coup.

In reality, according to art. 93 para. (1) of the Constitution, the President of Romania, by decree, only "establishes" the state of emergency, a measure which must then be "approved" by the Parliament. The text coexists perfectly logically with both art. 73 lin. (3) lit. g), according to which the legal regime of the state of emergency and that of the state of siege is regulated by organic law, as well as with art. 53 para. (1), which conditions the constitutional validity of the restriction of the exercise of fundamental rights and freedoms by its realization by law.

Restriction of the exercise of fundamental rights and freedoms by decrees establishing or prolonging the state of emergency or siege.

In my opinion, even if the decree is only an administrative act, so it has an infra-legislative legal force, the answer to the question of whether it can be used to decide to restrict the exercise of fundamental rights and freedoms can only be affirmative, without it signifying any contradiction with the previous statement, regarding the constitutional conditions of restricting the exercise of fundamental rights and freedoms, in case of a state of emergency or siege, only by organic law.

It is necessary to make only an absolutely necessary distinction between restricting the exercise of fundamental rights and freedoms at a general, abstract level, and the same measure with a concrete, determined character, respectively between directly applicable norms and empowerment norms.

The law has a general and impersonal character; it is not individual. Therefore, in principle, the law only establishes the legal framework for the restriction of the exercise of fundamental rights and freedoms, without actually deciding this in a particular case. Thus, the law establishes the conditions under which a person may be detained or his home may be searched or telephone calls may be intercepted (restrictions on individual liberty, inviolability of the domicile or secrecy of correspondence), but in particular, with respect to a certain determined person, the limitation is not decided by law, but by a judge, based on the law.

The law establishes the conditions under which an expropriation can be decided for reasons of public utility (limitation of the right to respect for property), but a concrete expropriation is decided by the administrative authorities, according to the law, and possible non-compliance with the law is analyzed by a court.

A limitation of a fundamental right or freedom can also be made by an administrative act which refers to a general category of addressees, ie by a legal norm (general, impersonal, repeatable) included in an administrative act, for example, a decision of a local authority to prohibit the movement of vehicles on a certain street, placing the appropriate traffic signs, which will be a restriction on the freedom of movement decided under the law.

Obviously, in rare cases, the law can directly limit a fundamental right or freedom to a generic category of persons, through a specific prohibition, without

necessarily needing an individual act (administrative or judicial) of concrete application. For example a law prohibiting the electoral rights of criminally convicted persons (limitation of electoral rights).

From this perspective, the only correct one in my opinion, the problem is simplified until it is solved. The Decree of the President of Romania, an infra-legislative act, establishes the state of emergency or siege, according to the Constitution and according to the special organic law. This organic law regulates the legal regime of the state of emergency or siege, including the possibility of restriction of the exercise of some fundamental rights or freedoms.

Obviously, the organic law on the state of emergency and state of siege contains general rules (including terms of restricting the exercise of constitutional rights and freedoms), so generally applicable in case of establishment the state of emergency or state of siege and duration. Even so, these rules do not apply directly and immediately in a given state of emergency or siege.

No extraordinary state is similar to another, even if legally speaking they fall into the same legal category (either a state of emergency or a state of siege). For example, the state of emergency can be established for social reasons (riots) or natural (earthquake, catastrophic floods, pandemic).

Not all and not to the same extent will the fundamental rights and freedoms that would require a restriction of their exercise will be affected in the event of a state of emergency declared for such different reasons. Depending on the extraordinary situation that needs to be resolved to return to normalcy, there will be different constitutional rights and freedoms that require the restriction of their exercise, and the level of restriction will also be different. Only in this way is the constitutional requirement of proportionality respected.

Thus, it would be illogical for the decree of the President of Romania only to establish a state of emergency or siege, and then absolutely all constitutional rights and freedoms which the organic law on the regime of state of emergency or state of siege allows the restriction of to be restricted. On the contrary, the decree establishing the state of emergency must provide concretely which fundamental rights and freedoms will be subject to the restriction and to what extent.

In this way, the decree of the President of Romania establishing the state of emergency or the state of siege decides which fundamental rights and freedoms will be restricted in their exercise and within what limits, but in strict compliance with the organic law on the state of emergency and state of siege.

In other words, regarding the restriction of the exercise of fundamental rights and freedoms, in principle the organic law on the state of emergency and the state of siege does not contain rules of immediate application, in the sense that those rules do not become immediately applicable by the mere institution of a state of emergency or a state of siege. If that were the case, by the mere entry into force of the decree establishing the state of emergency or state of siege, absolutely all the rights and freedoms indicated in the organic law on the state of emergency and state of siege would be restricted.

In order to be able to adapt the reaction to concrete needs, so to respect the constitutional principle of proportionality, the vast majority of the rules in the organic law of the state of emergency and siege on restricting the exercise of constitutional rights and freedoms are not directly and immediately applicable, but are conditioned of the decision regarding their applicability, contained in the decree of the President of Romania establishing the state of emergency or siege.

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On the other hand, obviously, the decree will not be able to provide the restriction of the exercise of fundamental rights or freedoms for which the organic law in question does not contain such a possibility, nor restrictions more severe or in other forms than those allowed by the respective organic law, because in this case the President of Romania would become a legislator, he would regulate by decree the regime of state of emergency or state of siege and thus usurp the power of Parliament.

The Decree of the President of Romania establishing the state of emergency or siege establishes, within the limits of the organic law on the regime of emergency and state of siege, the list of fundamental rights and freedoms whose exercise may be restricted, as well as the forms and limits of the restriction.

In favor of this direction of interpretation, the Constitutional Court also recently expressed its opinion in the content of Decision no. 152/2020 regarding the rejection of the exception of unconstitutionality formulated by the People's Advocate against some provisions of the Government Emergency Ordinance no. 1/1999.

The Constitutional Court stressed that, "in issuing the decree, the President acts as a state body, in public power, to satisfy a legitimate public interest", so that the legal nature of normative administrative act of the decree establishing the state of urgency is unequivocally established: "by the administrative act of law enforcement, the President only identifies those first emergency measures, provided by law, which are adapted to the concrete situation that generated the exceptional situation, as well as those fundamental rights and freedoms whose exercise is to be restricted during the state of emergency. Given the inferior legal force of the act, the President's decree cannot derogate, substitute or add to the law, so it cannot contain rules of primary regulation. "

Conclusions

The global health crisis triggered by the spread of the SARS-CoV-2 coronavirus has forced most states to introduce certain exceptional measures. Romania joined this general current, establishing, for the first time in over 20 years, the legal regime of the state of emergency. The establishment and prolongation of this state, by decrees of the President of Romania, triggered in the Romanian society a wide debate regarding the constitutionality and legality of the adopted measures. The lawyers had to analyze the content and legal effects of some legal acts not existing so far in the Romanian legal order, such as the presidential decree establishing the state of emergency, the Parliament's decision approving this decree, military ordinances and orders issued in the state of emergency. The existence of an exceptional situation and the adoption of a specific measure cannot justify the exclusion of certain forms of control because the state of crisis must not be equivalent to the absence of legality.

Public opinion may call for severe measures in response to an exceptional situation, and governments may respond to such requests by resorting to drastic and far-reaching measures. However, peace and security are best defended by the rule of law, even in times of crisis. It is a good lesson to remember that at no time in history has too much justice and respect for individual rights and freedoms been detrimental to national and international peace, security and prosperity. In times of crisis, a sustained effort by all actors in society, including judges, prosecutors and lawyers, to maintain the highest possible standards of human rights protection is not only more difficult but also more necessary than ever to contribute to restoring order in which human rights and fundamental freedoms can be made available to all people again.

In conclusion, in my opinion, it is perfectly constitutional to restrict the exercise of fundamental rights and freedoms by the decree of the President of Romania establishing a state of emergency or siege, but this measure should target only those constitutional rights and freedoms that can be restricted under the organic law on the state of emergency and the state of siege and only within the limits allowed by it.

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