

Exceptional Measures Regarding the Powers of the President

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Abstract: *The presidential institution in the Romanian constitutional system has an important role in ensuring the guarantor of the. The President of Romania is part of the executive power and meets the essential prerogatives of this power. As a model for organizing the executive power, the Romanian constitution establishes the bicephalic model. According to this dualist model recipe, executive power is distributed evenly between the head of state and the Government.*

In this article we will try to establish the legitimacy of the President of Romania to undertake exceptional measures. As such, the competence of the president also extends to exceptional measures in exceptional cases. Establishing exceptional competences in the president's duties ensures him a somewhat superior position in the executive's dualistic complex.

Keywords: *Legitimation of the President, rights and freedoms, state of emergency, state of calamity.*

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The legitimacy of the President to exercise exceptional measures

The exercise of measures such as exceptional ones by the President are provided in art. 93 because the President is the guarantor of the unity and territorial integrity of the country, of national independence and is obliged to ensure local politics.

The annotation of art. 93 of the constitution, the content of this text gives the President decisive rights that he is obliged to exercise only under the conditions established in the legislative framework prescribed by the Parliament and under its control. Other powers or exceptional attributions cannot be exercised by the President of Romania pursuant to art. 93. In these senses, we must distinguish between the terminology that refers to “enumerated attributions” and “implied prerogatives”(C. Ionescu,2014). We must understand that through his position, the President acts in extraordinary circumstances defined as such in the laws voted by Parliament.

A deepening of art. 93 of the Romanian Constitution shows that the Constituent Assembly limited itself to establishing exceptional measures that the President is obliged to undertake and characterized them as such.

The nature of these measures and implicitly their consequences for public authorities and citizens are a clear indication for the Parliament to assess in what situation they can be resorted to and what is the regime that governs them.

Art. 73 para. (2) letter g) of the Romanian Constitution mentions in this that the state of siege and emergency is established by the Parliament through an organic law. In this sense, the Parliament prevents any possibility of any person occupying the position of President to resort to exceptional measures or to other measures that they would consider as such in an excess of power.

The legislator established a legal framework to implement these exceptional measures through the Government’s Emergency Ordinance no. 1 of January 21, 1999 approved with substantial amendments and additions by Law no. 453 of November 15, 2004. Provisions in this regard are also contained in Law no. 45 of July 1, 1994 – National Defence Law of Romania, Law no. 415 of July, 2002 regarding the organization and operation of the Supreme Council of Defence of the Country, Government Emergency Ordinance no. 21 of April 15, 2004 regarding the National Emergency Management System. As can be seen, the legislator allows the President to apply measures for exceptional situations only under art. 93 of the Constitution, being an express attribution thereof.

Although the President has the capacity of head of state, it is fully legitimate to resort to exceptional measures, his decision is not discretionary. In the situation where, although he has all the data regarding the evolution of a phenomenon that requires the application of exceptional measures, the President, in his constitutional obligation to invoke the approval of the adoption of the measures, must request the approval of the Parliament. Moreover, the constitutional text prescribes to the President of Romania that he can institute such measures “in accordance with the law”. This specification mentioned by art. 93, translates into that of conditioning the President of Romania to respect the legislative framework previously established by the Parliament.

Although there seems to be an aspect of subordination in that matter, this phenomenon created by the relationship between the Parliament and the Head of State is excluded, even if both public authorities are constituted by the sovereign will of the same electoral body.

The events in which the establishment would be required may be related to another prerogative of the President, provided for in art. 92 of the Romanian Constitution, the declaration of the mobilization of the armed forces accompanied or followed by the establishment of a state of siege. In such a situation the President is obliged to address the Parliament requesting not only the approval of his decision to mobilize but also the approval and establishment of the state of siege. In this context, the major role is determined by the Supreme Council of Defence of the Country, which has the authority to propose the appropriate measures to the President in relation to the given circumstances.

The moment that determines the establishment of the proposals of the Superior Council of the Army by the President, actually triggers access to art. 93 of the Constitution. Specifically, the President is not authorized to determine what restrictions will be imposed on citizen rights and freedoms or what powers will pass from the competence of the civil authorities to that of the military authorities by proclaiming the extreme situations.

In the Constitutional spirit, the President can only decree the term from which the legal provisions regarding the extreme condition will be applicable in the territorial area within which they will be operative, as well as some concrete measures to put them in application.

Regarding the relations between the President and the Parliament, we emphasize that from the moment the President addresses the Parliament requesting the approval of the measure, the presidents of the legislative Chambers convene them in a joint meeting for the purpose of approving this decision or in the situation where we are talking about the absence of

the working session, the convening of the Chamber of Deputies and the Senate in a joint session is by law art. 2 para. (2) from the Regulation of the joint meetings of the Chamber of Deputies and the Senate of Romania.

In exercising the prerogatives provided by art. 93 paragraph (1) of the Romanian Constitution, the President collaborates with the Prime Minister, who has the capacity of vice-president of the Supreme Defence Council. Another detail that mentions the relationship between the two-headed executive is the situation whereby the decrees by which the President institutes the state of siege or the state of emergency must be countersigned by the Prime Minister.

Legal significance of exceptional measures

The derogation from a normal situation to a calamity or exceptional situation requires the establishment of a legal framework that allows the implementation of measures in accordance with the given situation.

State authorities must be prepared at all times to deal with crisis situations of any nature that may intervene at the national or local level for a long or short duration. In this situation, the measures taken by the state to prevent or, as the case may be, to limit or end the effects of such events or critical circumstances for the normal life of the state and citizens may affect to varying degrees the exercise of public freedoms. This is also the reason why the regulation of the respective measures in the Constitution are intended to create a clearer and stricter legal framework regarding the application of certain procedures for crisis situations.

The idea of crisis measures was taken from the French legal literature, measures catalogued under the name of “crisis powers” or under an exceptional term “exceptional powers”(O. Duhamel, Y. Meny,1992), but the crisis power does not justify calamity situations but situations with reference to the crisis of a political nature - war, coup d'état, subversive movements, etc.

A different interpretation of the constitutional texts that regulate the state of emergency art. 53 versus art. 93

Exceptional situation represents the set of exceptional measures of a political, economic and public order nature applicable throughout the country or in some administrative territorial units, which are instituted in the event of the appearance of serious or eminent dangers regarding national security or the functioning of constitutional democracy or in the situation where the imminence of the occurrence or occurrence of calamities make it

necessary to prevent, limit or remove, as the case may be, the consequences of disasters.

Finding ourselves in the recent situation of installation of the state of exception on the basis of the constitutional framework, we grant a new interpretation regarding the powers of the President's institution by art. 93 of the Romanian Constitution.

Thus, the adoption by the President of Romania of Decree no. 195/2020 regarding the establishment of the state of emergency on the territory of Romania as a result of the epidemiological situation caused by SARS-CoV-2 raises a series of constitutional questions and calls into question the legality of the exceptional measure advanced in accordance with the limitation of the exercise of some civil rights and freedoms.

The question that arises is what are the rights and freedoms that can be limited and by which acts? In this sense art. 53 of the Romanian Constitution should provide an answer.

The application of measures to limit citizen rights is done in a constitutional context only when it is concretely required. The restrictive measure must be proportionate to the situation that calls for it, be applied in a non-discriminatory manner and be effective. The Constitutional Court has developed a whole body of jurisprudence explaining the meaning of the concept of "law".

Therefore, if we refer to the jurisprudence of the Constitutional Court, to the provisions of art. 53, art. 115 para. 6 and art. 93 para. 1 of the Constitution, as well as the provisions of art. 14 let. d in conjunction with art. 4 of GEO no. 1/1999, it would result that the restriction of a right or a freedom provided by the Basic Law during the state of emergency could only be ordered by a law of the Parliament, not by emergency ordinances.

And despite all this, the state of emergency established by the Constitution in art. 93 para. 1, allows the adoption of limitations that have the effect of diminishing the exercise of certain rights and freedoms. The purpose of these rules is to avoid, remove, reduce the negative effects of serious dangers, of a particularly serious disaster or accident.

In the situation where, in an emergency, the conditions provided by art. 53 of the Constitution are fulfilled, the restriction of the exercise of fundamental rights and freedoms by emergency ordinance can no longer be considered a negative aspect, precisely because the purpose for which the temporary restriction was instituted is a legitimate one, namely to ensure the return to full exercise in the future of those rights and freedoms. Such an interpretation ensures both guarantees for the respect of the constitutional relations between the Government and the Parliament, but indirectly also

guarantees precisely for the constitutional rights and freedoms of citizens, in the sense of formulating a protection for the citizens of the state.

Conclusions

The fading of some public rights and freedoms under the auspices of the existence of calamity situations aimed at a strict interest on the beneficial aspect of the population of a state should always be carried out in a legal framework that does not give the right to interpretations or to an abusive phenomenon on the part of the state.

However, the state of emergency expressed under the conditions of art. 53 is a measure applied only by the President of the State, in accordance with art. 93 of the Romanian Constitution, so as a result, a decision-making element is needed - the Head of State - to institute the state of emergency, an environment in which the limiting control of some constitutional rights and freedoms can be triggered.

In conclusion, the exceptional measures are attributed only to the President, considering that he is the only executive institution that has the obligation to guarantee democratic stability and decision-making balance in order to establish an adequate environment regarding the smooth running of the Government of a state in relation to emergency situations.

References

- C. Ionescu, *The Parliament's Reports with the Government and the President of Romania*, Universul Juridic Publishing House, Bucharest, 2014
O. Duhamel, Y. Meny, *Dictionnaire constitutionnel*, P.U.F., Paris, 1992