Legal Aspects of the State of Emergency versus the Fundamental Rights and Freedoms of the Citizen

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Abstract: In Romania, the state of siege and state of emergency is regulated by GEO no. 1/1999 approved by Law no. 453/2004 of the Romanian Parliament. The emergency ordinance expressly provides that the decree of the President of Romania on the establishment of a state of emergency or state of siege must provide for first-line, emergency measures to be taken in such situations, namely the fundamental rights and freedoms whose exercise is restricted, within the limits of the constitutional provisions and of the emergency ordinance. In relation to the above constitutional and legal provisions, arises the question 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 a state of siege, under the subsequent control of a Parliament which enjoys only the power to approve the measure? Or does it refer to the fact that the President has the competence to implement / execute the provisions of the law that establishes the legal regime of the state of siege or of the state of emergency in Romania? In this context, it is necessary to look at the limits of the fundamental rights and freedoms of the citizen in the event of a state of emergency.

Keywords: *the right fundamental rights and freedoms, state of emergency, institution according to the law, emergency ordinance.*

How to cite: Nemțoi, G., & Leuciuc, E.G. (2020). Legal Aspects of the State of Emergency versus the Fundamental Rights and Freedoms of the Citizen. *Logos Universality Mentality Education Novelty: Law*, 8(2), 35-43. doi:10.18662/lumenlaw/8.2/43

1. Introduction

Starting from the constitutional premise that by presidential decree the Head of State has the power to establish a state of emergency, we accept the idea that the establishment of these states on a geographical area of a state requires the limitation of civil rights.

From the point of view of legal technique, both the decree establishing the state of emergency and the decree extending this reserve state signal elements that refer to human rights on which derogatory measures have been decided.

In this respect, we recall the rules of domestic law that decide on derogating measures, so exceptional, serious limitations on human rights, must satisfy a more severe test of clarity, rigor, than those concerning only interference, meaning only the usual limitations of human rights.

If national legal rules deciding on measures derogating from human rights do not have a high degree of clarity, they are not valid from a conventional and constitutional point of view.

We aim to verify whether, on the whole, the conventional and constitutional condition of validity of legal norms deciding on measures derogating from human rights, consisting in their clarity / predictability, is respected in the case of decrees by which it was established, then extended the state of emergency.

We have in mind: - The Decree of the President of Romania no. 195/2020 on the establishment of the state of emergency on the territory of Romania (P.O.G. no. 212 / 16.03.2020); - Decree of the President of Romania no. 240/2020 on the extension of the state of emergency on the Romanian territory(P.O.G. , no. 311 / 14.04.2020).

We will refer to human rights, as they are enshrined in: - The Constitution of Romania (P.O.G., no. 767 din 31.10.2003); - the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and its Additional Protocols; - European Social Charter (revised); - Charter of Fundamental Rights of the European Union; - International Covenant on Civil and Political Rights; - International Covenant on Economic, Social and Cultural Rights.

2. The phrase on the notion of state of emergency

From a historical point of view, it must be said that in our law the institution of the state of siege, a state that would be equivalent today to the state of emergency, has been regulated since 1864, by law, being a broader concept, determined by a "danger of state". Art. 128 of the 1923 Constitution specified that only in case of state danger can the state of general or partial siege be established by law, but the doctrine of the time (Rarincescu, 2019, p. 302) recognized the right of the government, based on art. 107 para. final of the Constitution of 1923, to establish by decree the state of siege, an act of provisional government that had to be submitted after the ratification of the Parliament.

Due to the fact that this decree was an act of government, which intervened when public order or state security were threatened by serious and imminent dangers, and urgent measures were taken to prevent and eliminate these dangers, the decree establishing the state of the siege could not be censored by the administrative courts.

Consequently, the state of emergency does not appear as a new phenomenon in the present but undergoes a mutation appropriate to the historical situation.

At present, it is necessary to specify that, according to art. 93 of the Constitution in force, *the state of emergency* is an exceptional measure established by the President of Romania by decree, countersigned by the Prime Minister (art. 100 of the Constitution), and is subject to Parliament's approval within 5 days of its adoption.

The state of emergency is detailed by GEO no. 1/1999 approved by the Organic Law no. 453/2004, which defines it as a set of exceptional measures of a political, economic and public order nature, applicable in the event of situations of serious danger, concerning national security or the functioning of democracy or in the event of imminent or occurring calamities.

It can be observed that GEO no. 1/1999 takes over in the definition of the state of emergency notions from the elements of the governing act from the interwar period, a fact that consolidates the idea that the state of emergency has a legal regime, organized by law.

3. Legal framework and constitutionality of the presidential decree establishing the state of emergency

The decree establishing the state of emergency is *an administrative act with a normative character, with the force of law*. From a constitutional point of view, it is positioned in the hierarchy of normative acts, on the same podium with the emergency ordinances, through which the government takes over the legislative function, but exercises it under parliamentary control (art. 115 of the Constitution).

The decree must include the fundamental rights and freedoms whose exercise is restricted within the limits of the constitutional provisions (art. 53 of the Constitution), the military and civilian authorities designated for the execution of the provisions of the decree and their competences, as well as the first emergency measures to be taken or other provisions if deemed necessary. The measures adopted by decree establish certain general rules of conduct, of repeated applicability throughout the state of emergency, practically subsumed to this exceptional situation.

In this context, it is observed that Decree no. 195/2020, as well as the Decree extending the state of emergency no. 240/2020, are legal norms in force, which have the nature of organic laws.

Moreover, the expression used in the two decrees "during the state of emergency the exercise of the following rights is restricted" (in the decree of establishment); - "during the state of emergency the exercise of the following rights and freedoms is restricted" (in the founding decree) demonstrates the imperative and important character of the normative act. The phrase "rights and freedoms", used in the second decree, corresponds to the constitutional terminology. Obviously, the wording of the text leads to the conclusion that the express enumeration is exhaustive / limiting. The intention of the author to group the rights referred to in a single article, the importance of the matter proved by placing the text right at the beginning of the act, the form of expression converge towards this conclusion.

As such, this should not be seen as a violation of the Constitution as the very fundamental law allows the restriction of rights and freedoms for the defense of national security, public order and health (art. 53), and GEO no. 1/1999 offers additional guarantees in the sense that during this state the access to justice cannot be restricted, being indispensable other fundamental human rights (right to life, to physical and mental integrity, torture or inhuman or degrading treatment being forbidden, recognition fully the

principles of legality of criminalization of crimes and the application of punishment), enshrined in instruments of international protection (Dragos & Simon, 2020; Florea, 2017; Gălăţeanu, 2016)

Article 4 of GEO 1/1999, enshrines the idea that during the state of siege or the state of emergency, the exercise of fundamental rights and freedoms may be restricted, except for human rights and fundamental freedoms provided in art. 32, only insofar as the situation requires it and in compliance with art. 53 of the Romanian Constitution, republished.

Art. 4 of GEO 1/1999 allows the restriction of rights in compliance with art. 53 of the Constitution, consequently, there is no need for a subsequent “law” of the Parliament to establish these measures. Moreover, it must be taken into account that the President's Decree has the force of law.

In this context, the provisions contained in art. 2 and art. 3 of the Decision of the Romanian Parliament no. 4/2020 approving the extension of the state of emergency, allows the restriction of rights and freedoms, as well as the amendment, completion or repeal of provisions provided in normative acts with the force of law, the symmetrical adoption of normative acts with the same legal force. This in itself is not the *raison d'être* of the state of emergency, which is an exceptional situation in which Parliament cannot legislate as it normally does; in addition, in essence, the state of emergency *implies* the restriction of the exercise of certain rights or freedoms.

Conditioning the adoption of extreme emergency measures by *law* in the narrow sense, ie by a normative act adopted by the Parliament, would make *the exceptional measure of establishing the state of emergency totally inefficient*, the procedure for adopting the law being more difficult (Even if the use of the emergency parliamentary procedure is sought).

4. Rights and freedoms limited by presidential decree in a state of emergency

Both decrees by art. 2 indicates the main rights and freedoms that are subject to the limit framework.

The mentioned article lists human rights, which are covered by the derogating measures. The position of the enumeration, at the beginning of the decree, proves the importance of the matter, ie the importance of the derogating measures in case of the established / extended state of emergency.

The rights listed in art. 2 of the two decrees are eight in number and are the same:

- Free movement (art. 25 of the Constitution) / freedom of movement / right to move freely;
- The right to intimate, family and private life (art. 26 of the Constitution) / the right to respect for private and family life;
- Inviolability of the domicile (art. 27 of the Constitution) / right to respect for the domicile;
- The right to education (art. 32 Constitution); the right to learning;
- Freedom of meetings (art. 39 of the Constitution) / freedom of assembly / right of assembly;
- The right of private property (art. 44 Constitution) / protection of property / right of property;
- The right to strike (Article 43 of the Constitution) / freedom of association / right to strike;
- Economic freedom (art. 45 of the Constitution); freedom to undertake.

In the two decrees, the name of these rights is constitutional.

The intention of the author to group the rights referred to in a single article, emphasizes the importance of the matter proved by placing the text right at the beginning of the act, the form of expression converge to this conclusion. However, indirectly, although there is no clear stipulation, the text of the normative acts, through its general effect, also restricts the citizen's right in case of state of emergency.

The application of these regulations allowed the derogation of the execution of some rights that, although they were not nominated in the normative act, by the effect of this act these rights were subject to restrictions.

We mention here situations that have led to the limitation of rights. justice is virtually suspended, but the right to a fair trial (including the right of access to a court) is not explicitly one of those covered by derogating measures; - citizens may be placed in a state of deprivation of liberty, either in institutionalized quarantine or in self-isolation at home, the right to express consent being limited; and criminal cases (conditional releases, enforcement appeals - the situation according to the first decree) (Barbu, 2016) and civil cases (compulsory medical hospitalizations, administrative detention of aliens) may not be tried, but the right to liberty is not expressly among those covered by derogating measures; - the prohibition of believers from religious activities, but freedom of religion is not expressly included in the derogation; - the online media may be closed and the deadline for

responding to requests for information of public interest is doubled, but freedom of expression (including the right to information) is not expressly included in the targeted measures; - access to public hospitals may be limited to urgent cases only, but the right to health is not expressly included in those covered by derogating measures; - the activity of employers may be totally or partially stopped by the public authorities and they have the obligation, if possible, to impose work at home or in telework, but the right to work is not expressly among those covered by derogating measures; - the time limit for replying to petitions is doubled, but the right to petition is not expressly included among those covered by derogating measures.

As can be seen, the limitation of rights or the derogation of their actions according to presidential decrees cannot be established only to a group of rights but they work together so that the legal framework confers on material rights an unlimited number of rights.

5. Conclusions

In conclusion, apart from the eight human rights explicitly indicated in the actual contents of the two decrees on the state of emergency as being the subject of derogating measures, although their enumeration indicates to be restrictive, in reality, without being explicitly mentioned, there are a much larger number of rights that are subject to limits.

It is clear that, from the point of view of the conventional and constitutional criterion of clarity of the "law" (legal norm), the derogating measures concerning these rights are only implicit and "hidden" in the annexes, in contrast to an enumeration of rights explicitly indicated in derogating measures, which claim to be exhaustive and which are in the actual content of the decrees and in its very first part, do not pass - in our opinion - the test of conventional and constitutional validity.

In our opinion, such a normative technique, of bad faith, or of serious negligence expresses a manifest excess of power on the part of the presidential institution and the Prime Minister, the two issuers (signatory and counter-signatory) of the two decrees on the establishment, respectively extension of the state of emergency.

References

Barbu, D. (2016). *Drept procesual penal. Partea generală. Caiet de seminar* [Criminal procedural law. General part. Seminar workbook]. Lumen.

- Constituent Assembly. (1991, November 21). Constitution of Romania. *Monitorul Oficial al României*, 767, 2003, October 31 [republished].
- Council of Europe. (1950, November 04). European Convention on Human Rights.
https://www.echr.coe.int/Documents/Convention_ENG.pdf%23page=9
- Council of Europe. (1961, October 18). European Social Charter.
<https://www.coe.int/en/web/european-social-charter/charter-texts>
- Dragoș, D. C., & Simon, A. (2020, April 18). Despre regimul juridic al stării de urgență [On the legal regime of the state of emergency].
<https://www.juridice.ro/680459/despre-regimul-juridic-al-starii-de-urgenta.html>
- European Union. (2000, October 07). Charter of Fundamental Rights of the European Union. https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights_en
- Florea, D. (2017). *Drept internațional public* [International public law]. Lumen.
- Gălățeanu, O. E. (2016). *Evoluția construcției Europene de la Comunitatea Europeană a cărbunelui și Oțelului la Tratatul de la Lisabona* [The evolution of the European construction from the European Coal and Steel Community to the Treaty of Lisbon]. Lumen.
- President of Romania. (2020, April 14). Decret nr. 240 din 14 aprilie 2020 privind prelungirea stării de urgență pe teritoriul României [The Decree of the President of Romania no. 240/2020 on the extension of the state of emergency on the territory of Romania]. *Monitorul Oficial al României*, 311, 2020, April 14.
- President of Romania. (2020, March 13). Decret nr. 195 din 16 martie 2020 privind instituirea stării de urgență pe teritoriul României [The Decree of the President of Romania no. 195/2020 on the establishment of the state of emergency on the territory of Romania]. *Monitorul Oficial al României*, 212, 2020, March 16.
- Rarincescu, C. G. (2019). *Contenciosul administrativ român* [Romanian administrative litigation]. Universul Juridic.
- Romanian Government. (1999, January 21). Ordonanța de urgență nr. 1 din 21 ianuarie 1999 privind regimul stării de asediu și regimul stării de urgență [Emergency Ordinance no. 1 of 21 January 1999 on the state of siege and the state of emergency]. *Monitorul Oficial al României*, 22, 1999, January 21.
- Romanian Parliament. (). Hotărâre nr. 4 din 16 aprilie 2020 pentru încuviințarea măsurii adoptate de Președintele României privind prelungirea stării de urgență pe întreg teritoriul României [Decision no. 4 of April 16, 2020 for approving the measure adopted by the President of Romania regarding the

prolongation of the state of emergency on the entire territory of Romania].
Monitorul Oficial al României, 320, 2020, April 16.

Romanian Parliament. (2004, November 01). Lege nr. 453 din 01 noiembrie 2004 pentru aprobarea Ordonanței de urgență a Guvernului nr. 1/1999 privind regimul stării de asediu și regimul stării de urgență [Law no. 453 of November 1, 2004 for the approval of the Government Emergency Ordinance no. 1/1999 on the state of siege and the state of emergency].
Monitorul Oficial al României, 1052, 2004, November 12.

United Nations General Assembly. (1966, December 16). International Covenant on Civil and Political Rights.
<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

United Nations General Assembly. (1966, December 16). International Covenant on Economic, Social and Cultural Rights.
<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>