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ORIGINAL PAPER

Analysis of the normative framework of the state of emergency in Romania

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Abstract:
The regime of the state of emergency is one of the areas to which the Constitution has given additional importance, ordering that it be regulated by an organic law. Despite this, legal provisions have been slow to emerge. It was only in 1996 that the Ministry of National Defense began drafting a project that it discussed with specialists from other institutions in the defense, public order and national security sector, a project that was submitted to the Government in the fall of 1997. Despite all the favorable opinions, the project did not appear on the agenda of the Government meetings and, of course, it was not included in the Parliament's debates either. A few months later, taking advantage of the competence granted to him by art. 114 para. (4) of the Constitution, the Government adopted Emergency Ordinance no. 1 of January 21, 1999 regarding the regime of the state of siege and the regime of the state of emergency. What determined the Government to enact a normative act of such importance in one night? I think that, in terms of motivation, the most suggestive picture could be provided by the way in which the circumstances of the moment were presented in the print media. "Mineriada 1999", as the miners' protest from Valea Jiului was nicknamed, showed the importance of the existence of clear and coherent legislation in such a sensitive field. The normative act drafted in haste and under the pressure of emotional factors contained, as we will show, some provisions that were outside the limits of legality.

Keywords: *State of Emergency, Fundamental Rights.*

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Analysis of the Constitutionality of emergency ordinance number 1 of January 21, 1999

The starting point for this analysis is the initial legal act that regulated, for the first time, the applicable legal regime in the event of a state of siege or state of emergency.

The regulation of the state of emergency regime through an emergency ordinance is clearly unconstitutional because it should have been done by law in a narrow sense, more precisely by the normative act issued exclusively by the Parliament. There are 3 constitutional arguments that require the regulation of the state of emergency by the Parliament:

Article 2 (1) of the Romanian Constitution

Under this article, the Parliament is described as the representative body of the Romanian people, thus the normative acts issued by the Parliament are based on the national sovereignty. The individual can consider that he remains free, even in the context of a possible state of emergency during which the exercise of his rights and freedoms would be restricted, only if the normative act regulating this state of emergency is issued by the holder of sovereignty. Such a sensitive area should not be regulated by legislative delegation, by adopting an emergency ordinance.

Article 53 of the Romanian Constitution

Restriction of the exercise of certain rights or freedoms can only be carried out by law (Dogaru, Dănișor & Dănișor, 2008: 359). If we understand the phrase (only by law) using the broad meaning of the term law, then the restriction could also be ordered by emergency ordinance (Decision no. 277/2001). Such an interpretation is not permissible in the context of restricting the exercise of certain rights or freedoms, because the purpose of Article 53 is not to authorize the state to restrict the exercise of individual freedoms, but to protect rights and freedoms from unjustified state intervention. In accordance with this purpose, the acceptance of the term law can only be that of the law in a restricted way, so the normative act issued exclusively by the Parliament (Dănișor, 2018: 367).

The state of emergency foresees the possibility of state intervention in the sphere of individual freedom to restrict the exercise of rights and freedoms. Therefore, Article 93 must be correlated with Article 53, the measures taken by the state during the state of emergency must respect the limits imposed by Article 53 of the Romanian Constitution.

Thus, in addition to the restrictive interpretation of the legal term, the measures taken during the state of emergency must comply with all the normative coordinates imposed by Article 53 of the Romanian Constitution.

Articles 93 and 73 correlated with article 115 of the Romanian Constitution

The 1991 Constitution stipulates in article 93 that the President of Romania institutes, according to the law, a state of siege or a state of emergency in the entire country or in some administrative-territorial units and requests the Parliament's approval of the adopted measure, within 5 days at most from its taking.

Also, Art. 72, para. (3), letter e) of the Constitution stipulated that the legal regime of the two states must be regulated by organic law.

However, the Government invoking the exceptional case contained in art. 114, para. (4) of the Constitution, issued an emergency ordinance to regulate this area, reserved only for an organic law.

Emergency ordinances can be adopted only in case of an extraordinary situation whose regulation cannot be postponed, their adoption during the state of emergency being justified. However, in my opinion, it is not permissible to regulate the state of emergency by emergency ordinance.

Among the specialists, the opinions regarding the constitutionality of this approach were divided. Even in the decisions of the Constitutional Court, separate opinions were expressed on this topic (Decision no. 15 of January 25, 2000). In addition, in the specialized literature this action was described as a legislative anomaly of the state of emergency (Tofan, 2020: 7).

As is well known, the Constitution does not define the exceptional case. However, the Constitutional Court, in one of its decisions, specified that the meaning of exceptional cases, in the sense of art. 114 of the Constitution, represents those situations that cannot be included in those expressly considered by the law. The public interest harmed by the excessive nature of exceptional cases justifies the intervention of the Government through the emergency ordinance, based on art. 114, para. (4) of the Constitution. Therefore, such a measure can only be based on the necessity and urgency of regulating a situation which, due to its exceptional circumstances, requires the adoption of an immediate solution, in order to avoid serious harm to the public interest (Decision no. 65/1995).

Regarding the exceptional case, later, the Constitutional Court added that it has an objective character, in the sense that its existence does not depend on the will of the Government, which, in such circumstances, is forced to react promptly to defend a public interest through emergency ordinance (Decision no. 83 of May 19, 1998).

We will not analyze all the opinions expressed in the legal doctrine, but we will emphasize that, applying the principle of good faith, we are of the opinion that, by means of emergency ordinances, the Government could not rule in areas reserved for organic law.

I also believe that this principle must be abandoned because countless abuses have occurred in practice. I believe that, in this case, the cause that allowed the abuses, namely, a constitutional wording that lacks rigor, must be removed.

a) Analysis of the contents of emergency ordinance number 1 of January 21, 1999

As I have shown, the circumstances of issuing this normative act were not under the best auspices. Perhaps, in this case, some errors of form would be excusable, but we cannot judge the same when they relate to matters of substance. I will try to outline the general way of action, originally designed, in the two types of exceptional states.

The first article of the emergency ordinance establishes what the state of emergency is. The state of siege and the state of emergency are exceptional measures that are instituted in cases determined by the appearance of serious dangers to the country's defense and national security or constitutional democracy or for the prevention, limiting and removing the consequences of disasters (GEO no. 1/1999).

A problem raised by the definition of the state of emergency in this legal text, which is also maintained in the contemporary regulation, is the way in which the legal

text relates to the strictly enumerated social values and the protection of human rights. The legal text describes these listed social values as ends in themselves, on the basis of which the exercise of fundamental rights and freedoms can be restricted. Thus, the ultimate goal of any restriction - the protection of human rights - is ignored. So the text establishes abstract social values, without a predetermined content, as ends in the name of which individual freedom can be sacrificed.

Both the ordinance and the law amending the ordinance should specify that exceptional measures apply in case of serious dangers affecting those social values, with the aim of protecting individual rights and freedoms.

Article 2 defines the state of siege as the set of measures of a political, military, economic and social nature that are instituted in certain areas or on the entire territory of the country in order to increase the defense capacity of the country, in the event of the imminence of an action or inaction directed against sovereignty, independence, state unity or territorial integrity.

As for the phrase "actions or inactions" in the definition, I appreciate that it was inappropriate in that context. It is possible that I was also influenced by the fact that I know that, in a draft of the ordinance, instead of this formula, the term aggression was used. I opt for it, being defined in an international act, to which we can refer (Resolution no. 3314/1974).

Article 4 initially provided for the possibility that during the state of emergency, the exercise of some fundamental rights or freedoms, enshrined in the Constitution, could be restricted, with the consent of the Minister of Justice. This mention, however, exceeded the constitutional provisions and was modified by the approval law. Also, the approval law introduced Article 3^2, which provides for a series of non-derogable rights.

In Article 8, regarding the military ordinances, there was originally a phrase from the interwar period - "military authorities issue military ordinances that have the force of law" - a phrase that I consider unacceptable. Since the Constitution provides in art. 58, para. (1) that the Parliament is the only legislative authority of the country and only under the conditions provided by art. 115 legislative delegation can take place, to specify, even for exceptional situations, that any unit commander or officers empowered by a secretary of state, can issue rules with the power of law, is clearly unconstitutional. Currently, Article 8 is repealed by the law approving Ordinance no. 453 of November 1, 2004.

In terms of sanctions, it should be noted that the initial text of art. 31 stipulated that the acts of active or mobilized military personnel, who manifest an attitude of defeatism, incites disobedience or does not carry out the orders received, constitutes a crime and is punishable by imprisonment from 15 to 20 years or life imprisonment. Of course, all the listed facts are very serious. However, we wonder if these aggravating factors included in the text are seriously justified, since the punishments are much higher than those provided for the same acts committed during wartime. The legislature probably noticed this discrepancy and repealed that article.

Also, Article 20, in its initial version, specified that for the application of the provisions of this emergency ordinance, as well as the measures provided for in the decree establishing the state of siege or the state of emergency, the civil and military authorities have the following duties and responsibilities:

a) to order the temporary deposit of weapons, ammunition and explosive materials found on the population and to proceed with their search and removal; upon termination of the exceptional measure, they will be returned

to those entitled to possess them; to order the temporary closure of companies that sell weapons and ammunition and to establish their security;

If we applied the grammatical interpretation, it would mean that public authorities could search and seize weapons, ammunition and explosive materials whenever they wanted. Thus, there would be a new intrusion in the sphere of rights protection, suppression resulting from the lack of a deadline for laying down arms. A deprivation of a right from the guarantee of its legal protection is equivalent to its abolition.

By law no. 453/2004, a modification of the ordinance took place, in the sense that it is expressly specified that a deadline will be established for their submission and only if they have not been submitted within the established deadline, the public authorities can continue their search.

b) to carry out searches wherever and whenever needed;

The ordinance stated that among the duties and responsibilities of the civil and military authorities is that of conducting searches anywhere and at any time, without specifying a limit in this regard. Thus, the right to private life and the right to the inviolability of the domicile are suppressed, contrary to Article 49 of the 1991 Constitution. Law 453/2004 amends the provisions of the emergency ordinance, in the context of the 2003 Constitution revision, stipulating, in Article 4, that during the state of siege or state of emergency, the exercise of fundamental rights and freedoms may be restricted, with the exception of human rights and fundamental freedoms provided for in art. 3, only to the extent that the situation requires it and in accordance with Article 53 of the Romanian Constitution. Article 20 letter (d) is also amended, in the sense that public authorities can carry out checks on certain persons or places, when they are necessary.

c) to temporarily suspend the broadcasting of radio or television;

During a state of emergency or siege, which requires exceptional measures involving the restriction of certain rights and freedoms, the right to be informed and to have access to several sources of information is a right of particular importance. The reason for this temporary suspension is not specified and thus, public authorities may intervene to censor the information that the population of the country receives during the state of emergency. Censoring information from radio or television betrays influences of the communist doctrine that imposed a single official truth, suppressing the fundamental right to pluralism. The fundamental right to pluralism also implies the right to have access to multiple sources of information. Therefore, in the absence of the guarantees expressly provided by the text of the law, I consider that the temporary suspension can be equivalent to censorship, which can be taken to the extreme in the absence of express limits. Unfortunately, through the approval law, this point was maintained and even supplemented with the possibility of temporarily suspending certain publications. Therefore, this article leaves open the possibility of the state to censor information, therefore we consider it necessary that the provision be completed, in the sense of expressly mentioning the limits and reasons for the temporary suspension;

b) How long can the state of emergency last?

From a theoretical point of view, the nature of states of emergency requires that they should be instituted for a limited period of time. In practice, however, states of emergency, regardless of their official name, show us that they often exceed this temporary limit.

Article 93 paragraph 2 of the Constitution stipulates that the Parliament functions for the entire duration of the state of emergency. The Constitution, however, did not highlight a maximum time duration for the existence of this state of emergency. However, through grammatical interpretation, we can reach the conclusion that the term "duration" signifies a determined interval in time, therefore, a time limit is mandatory. This duration cannot represent an eternity because it does not imply the idea of permanence, but imposes a temporal limit.

Article 5 of GEO no. 1/1999, as we have shown above, stipulates that the state of emergency can be instituted for a maximum duration of 30 days. Also, article 15, from the same Government ordinance, provides that, taking into account the evolution of the danger situation, the President, with the permission of the Parliament, can extend the established state of emergency, but is obliged to comply with the duration condition provided for in art. 5 of GEO no. 1/1999. This obligation was introduced through law no. 453/2004. Unfortunately, this obligation was not found in the original version of the ordinance. Therefore, the original form did not stipulate a maximum term for which it was possible to establish the extension of the exceptional state. Therefore, at least theoretically, the state of emergency could be extended, by the President, with the permission of the Parliament, for an indefinite period.

The consequence of this provision, found in article 15 of GEO no. 1/1999, is that the President does not have the possibility to order, for an indefinite period, the state of emergency, without the legislator approving this extension successively, from thirty to thirty days. Therefore, from this new perspective, the provisions found in article 15 of GEO no. 1/1999, as formulated by the Approval Law no. 453/2004, are in accordance with the Constitution and guarantee a regular control of the Parliament regarding the decision to maintain the state of emergency which, as I have already shown, involves serious restrictions on the exercise of certain rights and freedoms (Dima, 2020: 2).

c) Procedure for extending the state of emergency

The wording of article 15 of GEO no. 1/1999 is likely to raise serious problems of interpretation regarding the procedure for extending the state of emergency. If we take into account the fact that we have an exceptional state proclaimed, in the context of a legislature opposing the executive, the provisions of art. 15 can represent the reason for an intense conflict.

So, according to that article (Art. 15 of GEO no. 1/1999), the key question would be the following: should the approval given by the Parliament be subsequent or prior to the issuance, by the President of Romania, of the decree extending the state of emergency?

If we make a grammatical interpretation and take into account the position of the phrase "with the consent of the Parliament", then we will come to the conclusion that said consent must be prior to the decree issued by the President of Romania by which he extended the exceptional state. In addition, we could say that the legislator, precisely due to the fact that he has the constitutional duty to operate for the entire duration of the state of emergency that he has approved, he would have the obligation to rule in advance regarding the extension of that state of emergency. Moreover, another argument would be the fact that Article 15 does not specify any term for the approval, by the legislator, of the extension of the exceptional state by decree. So, from the arguments presented so far, it would appear that the approval given by the Parliament could only be prior to the President's decree to extend the state of emergency.

However, in my opinion, based on the legal arguments that I am about to present and that I personally consider much more solid, a contrary interpretation is correct.

A first argument is that, if the Parliament had intended to specify the moment when it wants to approve the extension of the exceptional state, (before or after the President has issued the presidential decree), it would have been necessary to do it in a direct way. An example would be the way in which it approved the provisions of article 16 para. 2 of GEO no. 1/1999.

A second argument would be that, article 15 of GEO no. 1/1999 does not only regulate the ability to extend the exceptional status. This article also regulates the power to expand or narrow the area in which the exceptional state is applied. Therefore, due to the fact that Article 15 does not make any distinction between measures to expand, restrict or extend the state of emergency, what matters is that the said decision be taken, in a sufficiently short time, by the President of Romania.

Another argument is that, although article 15 does not stipulate a term for the Parliament's approval of the extension of the exceptional state, the latter could not be other than that provided for in the Fundamental Law and in article 12 of GEO no. 1/1999 regarding the establishment of the state of emergency, namely 5 days from the date of the respective measure. An interpretation of this type takes into account what is the aim of the action. In the case of article 15 of GEO no. 1/1999, the goal pursued by the legislator is identical to that pursued by the provisions of article 93 para. 1 of the Constitution, namely, the possibility to ensure the necessary speed, in taking measures, to be able to deal with an exceptional situation.

However, regardless of the legal and constitutional considerations regarding the extension procedure and the duration of the state of emergency, it is very important to be careful that these exceptional situations do not become permanent. If these exceptional states were to become permanent, then they would turn into a state of normality, whose existence would no longer be aimed at protecting fundamental rights and returning to normality. Therefore, it is very essential that, for all members of society and for all state institutions, the priority remains to resolve, quickly, the state of emergency, so that it remains exactly what it is, a temporary state.

States of emergency are therefore a danger to all states governed by the rule of law. The purpose of the state of emergency is a noble one, that of protecting society and the state from an imminent danger, by which its existence is endangered. But if this exceptional state lasts longer than necessary, its noble purpose can turn into a shortcut to authoritarianism.

If the power is left loose, for too long, taming it will not be achieved easy. The only regulation that provides us with an institutional guarantee in this regard is this approval, which occurs every thirty days, which forces the President and the Parliament, the most representative institutions, to collaborate and agree on the extension, modification or termination of the state of emergency. If we eliminate this obligation, we can end up, to paraphrase Giorgio Agamben, in a no-man's land (Agamben, 2005: 1), which is at the intersection between the political act that decides and law that imposes.

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