

COVID-19 AND CONSTITUTIONAL LAW: ROMANIA

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SUMMARY: I. The legal framework for crisis response. II. A sanitary crisis meant to conceal a constitutional crisis. III. Restrictions to the exercise of fundamental rights. IV. Diaspora and the social contract enshrined in the Constitution.

Although essentially a sanitary crisis, in Romania the COVID 19 pandemic has triggered the institution of emergency measures that helped concealing an on-going political and constitutional crisis. The legal regime of restrictions to the exercise of fundamental rights has been the focus of constitutional debates and it has allowed the Constitutional Court to display a rather formalistic approach of the Constitution.

I. THE LEGAL FRAMEWORK FOR CRISIS RESPONSE

In Romania, the COVID 19 pandemic has been dealt with as an emergency situation and not as a sanitary crisis.

The state of emergency – together with the state of siege – is provided for by Article 93 of the Constitution, which grants the President of Romania the power to resort to such measures under the oversight of Parliament. The state of alert has been established by a piece of delegated legislation meant to prevent risks and threats to national security. It is only Law n°55/2020 which has been adopted by Parliament in May 2020 in order to specifically deal with the COVID 19 pandemic.

The legislation implementing Article 93 of the Constitution on the *state of emergency* and the state of siege was adopted in 1999 in response to an internal political and social crisis which threatened to jeopardize the at this

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time still fragile Romanian constitutional democracy: what had started in December 1998 as a strike of coal miners from an industrial region in decline escalated into open confrontations with the police and, by the beginning of January 1999, threatened to degenerate into a general riot led by the miners, who took toward the capital of Romania (Bucharest) to demote the Government. Thus, Emergency Ordinance of Government (hereafter EOG) n°1/1999 set forth the legal framework of the state of emergency, defining it as “a set of exceptional measures of political, economic and public order nature” to be established in case of current or imminent dangers regarding national security or the functioning of constitutional democracy” or “imminence of calamities or national disasters”. It also developed the constitutional provisions according to which the state of emergency can be declared by the President of Romania and has to be confirmed by Parliament within 5 days; it may last for a maximum of 30 days and may be renewed as many times as needed for a maximum of 30 days, each time with the approval of Parliament. The presidential decree instituting the state of emergency is a normative administrative act, which is subject to judicial review; it may restrict the exercise of some fundamental rights (bar the right to life, legality of crimes and access to justice), but may do so only in compliance with Article 53 of the Constitution (that is only if necessary, for a limited number of reasons and respecting the principle of proportionality).

On the other hand, Emergency Ordinance of Government n°21/2004 pertaining to the *state of alert* was adopted in order to deal with the wave of terrorist attacks that hit EU and NATO members during 2004, so in response to an international security crisis. It defines the state of alert as a “response to an emergency situation of particular magnitude and intensity” consisting of temporary measures necessary for the prevention and removal of threats - among others - to life and human health. Initially, the state of alert was meant to address a different type of crisis and therefore its legal regime was oriented more towards the executive power; it could be declared by an inter-ministerial body (National Committee for Special Emergency Situations) with the approval of the Prime minister. However, after its revision in 2014 and again in 2020, the legal regime of the state of alert became similar with the one of the state of emergency, despite the fact that the state of alert is not explicitly mentioned in the Constitution among the exceptional measures at the disposal of the executive. The state of alert can be declared by the Government and has to be approved by Parliament within 5 days and may last maximum 30 days, while it can be renewed as many times as needed, for durations not longer than 30 days, each time with the approval of Parliament.

Finally, Law n°55/2020 on measures for preventing and combating the effects of *COVID-19 pandemic* was adopted in order to deal with the specific situation at hand, but also to avoid an escalation of a political crisis on-going in Romania at the breakout of the pandemic. Law n°55/2020 basically regulates a state of alert meant to deal with the sanitary crisis and replicates the legal regime of the general state of alert.

II. A SANITARY CRISIS MEANT TO CONCEAL A CONSTITUTIONAL CRISIS

Measures meant to fight the COVID19 pandemic in Romania were first imposed towards the beginning of March 2020, *id est* as soon as the first infections started to be confirmed on the national territory. A minority interim Government initially decided to cancel selected international flights, close down schools and impose a 14 days institutionalised quarantine for persons entering Romania. Following a vote of confidence on March 14th, a still minority Government imposed a strict lock-down for 30 days, which was extended for 30 more days, based on the legislation pertaining to the *state of emergency* (between March 16th and May 14th 2020). During three days (May 14th – May 17th) this was replaced by a relaxed lock-down based on the legislation pertaining generally to the *state of alert*, only to be followed by another relaxed lock-down during 30 days (between May 18th and June 18th 2020) based on legislation adopted specifically in order to deal with COVID 19 pandemic (Law n°55/2020). Thereafter the lock-down was relaxed gradually, although the second phase of relaxation could not start on July 1st as initially announced by authorities, due to the still high number of confirmed infections.

This is to say that, towards the beginning of March 2020, when the sanitary crisis began, Romania was facing a constitutional crisis. Confronted with an ad interim liberal Government supported by a minority of MPs, the country was contemplating the possibility of anticipated general elections: presidential elections had been clearly won in December 2019 by the incumbent of the position, of liberal extraction; a Government supported by the liberal minority in Parliament had been in power since October 2019 (until February 5th, when a motion of censure had been adopted by the social democrat majority in Parliament); so the executive branch was looking for ways to determine a political shift in Parliament as well through anticipated general elections. However, all political calculations were stopped in their tracks upon the discovery of the first confirmed infections, which came from abroad. Amid political distrust and out of necessity the majority in

Parliament reluctantly acquiesced to grant confidence to the liberal (minority) Government in a sort of political truce, but only for the duration of the sanitary crisis. However, this did not mean that the Government enjoyed full support in Parliament, not even with regard to the management of the sanitary crisis, which led to original legal constructions and iterative decisions of the Constitutional Court, under the permanent threat of a motion of confidence once the sanitary crisis is over.

Thus, while the first time Parliament simply confirmed the institution of the state of emergency through the presidential Decree n°195/2020, upon the renewal of the state of emergency, through the presidential Decree n°240/2020, Parliament decided to review the normative substance of the administrative act and recommend changes in view of better expressing “the will of the representatives of the people” with regard to the legal details of the lock-down. The President however maintained the original version of his decree, which raised the main constitutional issue discussed all-along the pandemic, namely what is the precise legal regime of restrictions to the exercise of fundamental rights according to article 53 of the Romanian Constitution?

Doctrine noticed that while previous to the revision in 2003 of the Romanian Constitution such restrictions could be enacted by laws of Parliament and emergency ordinances (delegated legislation) adopted by Government, after that revision this competence only belongs to Parliament. Since EOG n°1/1999 had been adopted before the revision of the Constitution and it did provide for restrictions to the exercise of some fundamental rights, the President of Romania decided to implement those provisions and not take into account parliamentary recommendations not foreseen by the relevant legal framework. This antagonised the political majority in Parliament and ultimately led to Decision n°152/2020 of the Constitutional Court, who found that the powers granted to the President of Romania by EOG n°1/1999 do not infringe upon the separation of powers and are respectful of Article 53 of the Constitution, but, in a strange *obiter dictum* (paragraphs. 100-106), also found that the presidential decrees had overstepped their constitutional limits, which justified a parliamentary control on the substance of the administrative act. A separate opinion signed by two judges signalled this *ultra vires* of the Constitutional Court, who can only review primary legislation and not secondary one, and argued that it infringes upon the separation of powers, specifically on the power of ordinary courts to review normative administrative acts such as presidential decrees.

However, invoking the general principle of the executive’s responsibility in front of Parliament, the social-democrat majority searched for alterna-

tive ways to restrict the emergency powers granted by the Constitution to the executive. Towards the end of the second period of 30 days of state of emergency it became clear that Parliament had lost its patience with the minority Government and threatened not to agree with a third period of state of emergency. This forced the minority Government to resort to the state of alert, which was also regulated through delegated legislation and raised the same issue of restrictions to be imposed on fundamental rights. In decision n°157/2020 (press release in English) the Constitutional Court found that EOG n°24/2004 pertaining to the state of alert is valid only in as much as it does not restrict the exercise of fundamental rights, which is hardly possible. A separate opinion signed by the same two judges pointed to hyper-formalistic interpretation of articles 53 and 115 of the Romanian Constitution, the first requiring that restrictions on fundamental rights be imposed only through laws (interpreted by the Constitutional Court as normative acts issued only by the Parliament and not by the Government) and the second declaring in paragraph 6 that emergency ordinances “cannot [...] affect the status of fundamental rights”.

Therefore, the Government resolved to present the Parliament with a draft law dealing specifically with the COVID-19 pandemic, in order to allow the imposition of quarantine directly by Parliament. Parliament obliged and adopted Law n°55/2020 at great speed (roughly in two days) but, because according to Article 77 of the Constitution laws come into force only 3 days after their publication in the Official Journal, the new law could not be used immediately upon the expiration of the state of emergency. This explains why a state of alert based on EOG n°24/2004 has been used as a “bridge” for 3 days (between May 15th and until May 18th) and a different one has been implemented after May 18th, based on Law n°55/2020.

Outcome of a political compromise, Law n°55/2020 provided for a legal *novum*, namely it made the institution of the state of alert by the executive pending upon the approval of Parliament. This provision became practise when Parliament approved through an internal standing order the Governmental decree declaring a state of alert on the entire territory of Romania due to COVID-19 pandemic. The originality of the intermingling of powers brought about by this legal and institutional arrangement did not escape the Ombudsman, who addressed the issue to the Constitutional Court. In decision n°457/2020 the Constitutional Court struck down the legal provision requiring the *ex-post* approval by Parliament of a Governmental decree for which the law already gave an *ex-ante* mandate. Besides, this also questioned the constitutional role of ordinary courts who can review administrative acts such as Governmental decrees. Thus, the political

compromise engrained in Law n°55/2020 has become void because it was unconstitutional since the beginning, while the political crisis keeps on like in a pressure cook.

III. RESTRICTIONS TO THE EXERCISE OF FUNDAMENTAL RIGHTS

The Constitutional Court remained consistent in its formal approach with regard to the text of the Constitution: decision n°458/2020 invalidated the possibility of the executive to impose quarantine of persons infected with COVID-19 because such measures can only be taken by Parliament through law.

IV. DIASPORA AND THE SOCIAL CONTRACT ENSHRINED IN THE CONSTITUTION

COVID-19 pandemic has revealed early on another important constitutional issue, namely the nature of the social contract that binds Romanians in a state which is declared by article 1 of the Constitution as a state governed by the rule of law, democratic and social. Public authorities and Romanians in the homeland largely perceived the virus as imported by fellow-citizens who came from abroad, from countries already known as fora of the pandemic. This focused again public attention and constitutional debates on the quantitatively¹ important diaspora and its role and impact on the homeland society.

Traditionally an emigration country, Romania has been confronted with a dramatic exodus of population, particularly after its accession to the European Union in 2007, which obliged the Romanian state to take the diaspora into account at political level. Thus, diaspora got the right to vote in parliamentary and presidential elections starting with 2008 and it has been the trigger of important political changes, particularly during the last two presidential elections (when it decisively contributed to the election of a politically liberal, ethnically German and religiously protestant President of Romania in a country which is predominantly conservative and focused on national values and the Orthodox religion) and the last two referenda (when it decided in favour of the fight against corruption and against the constitutional ban of same sex marriage). The Romanian diaspora retains a strong

¹ Romania has an important diaspora scattered all over the world and particularly in Italy and Spain, roughly 1 million Romanians in each.

influence on the national economy through remittances which represent roughly 3% of the GDP since 2012. Now that this diaspora was in trouble, because of the economic crisis following the sanitary one, the homeland strongly advised it not to come back, particularly during the Easter break – a traditional time to visit family in the Romanian Christian tradition - in order to protect Romanians who remained in the homeland. This questioned the very foundation of the Romanian state, declared in article 4 of the Constitution to lay on “the unity of the people and the solidarity of its citizens”. However, social cohesion prevailed and solidarity proved to be sufficiently strong as to overcome what could have become a polarization of Romanians based on a territorial criteria. Public authorities constantly communicated statistics on the pandemic including figures referring to diaspora, while effectively supporting the repatriation of Romanians from abroad or facilitating their emigration in countries where their skills were needed. Media kept the general public informed on the “good deeds” accomplished by Romanians living abroad for the countries where they are now living. Thus a narrative of “unity in front of a common danger” started to be built with regard to Romanians irrespective of the soil on which they live. When the phasing out of the lock down had started diaspora was once again considered as part and parcel of the Romanian nation and an important trigger of modernisation.

In conclusion, beyond the classical debate on the legal regime of fundamental rights during exceptional and emergency situations, which allowed the Constitutional Court of Romania to exhibit its formalist views, in Romania the sanitary crisis related to COVID-19 pandemic has also raised two other issues of constitutional relevance, namely: *i)* who is better placed to review measures taken by the executive in order to deal with the situation, Parliament or the judiciary? and *ii)* the unity and solidarity of the people refers to all Romanians, including the diaspora.

In this context it is worth mentioning that courts have not entirely suspended activities during the lock-down: criminal cases have continued to be ruled upon, including by using ITC, while all other types of cases and other activities related to justice (enforcement of court decisions, introduction of new cases etc.) have been adjusted as to be continued even under the lock down.