COVID-19 PANDEMIC AND THE ROMANIAN CONSTITUTION

Elena Simina Tanasescu
Professor, University of Bucharest, Judge, Constitutional Court of Romania

ABSTRACT

As of recently, the world has been confronted with environmental disasters, terrorist attacks, financial breakdowns, and globalized pandemics, all of them crisis that required immediate and efficient responses both at national and international level. At domestic level it was the urgency of such circumstances that imposed the recourse to emergency powers, i.e., the legitimate use of extraordinary means by the state in order to deal with such exceptional situations. How the same issues have been dealt with at global level is not the topic of this paper, although there is a certain imbrication of these two types of responses.

Emergency powers in constitutional democracies remain tributary to the ways in which sovereign states traditionally responded to security crisis that threatened their very existence. Generally, the politics of security at state level is intrinsically linked to the logic of war. When at war, states tend to focus on the main objective, namely winning the war, while other concerns tend to recede into the background. However, a pandemic is a different threat to the state than war, both in kind and nature; therefore, it demands a different answer than pure and simple emergency powers. Generally, resorting to emergency powers has a cost: while attempting to secure the survival of the state, legal regimes of exception have mitigated results in securing the survival of democracy and particularly in securing the fundamental rights of citizens. On the other hand, the very idea of emergency powers and their regulation through legal regimes of exception is based on the premise that there is a clear distinction between a state of normalcy, where all constitutional checks and balances are in place

and functional, and a state of exception, where adjustments to the normal functioning of a constitutional democracy are needed to deal with the exceptional situation at hand. In other words, exceptional situations may justify the use of emergency powers, but in order to remain within the realm of constitutional democracy they have to be controlled through and by the law. Hence, the quest for the adequacy and the betterment of the legal regime of states of exception in nowadays democracies. Consequently, it is necessary to analyse how a constitutional democracy such as Romania adapted to the reality of the Covid-19 pandemic and what was the impact this situation had on its Constitution, political institutions, and citizens' fundamental rights.

I. LEGAL FRAMEWORK OF EMERGENCY POLITICS

The concept of state of exception is not universal or homogeneous as it enjoys variable geometries in time and space[1]. The following analysis takes as starting point the fact that the state of exception is ontologically legal and not only juridical[2]. According to this approach states of exception are not a suspension of regular rules and norms. There is a continuum of the normal functioning of the state and emergency powers provided by its legal system. In fact, the goal of states of exception is to normalize emergency powers by regulating exceptional situations through regular legal norms. This is not only a doctrinal standpoint, but also a factual reality as, in Romania, the state of exception is regulated by the legal system from which it derogates.

Exceptions depend upon norms. This implies that in a legal state of exception rules do not disappear, but they may temporarily be adapted to the exceptional nature of the factual situation. A legal state of exception cannot mean arbitrariness or lawlessness, it rather designates a state of exception as provided for by regular/ordinary law and not an exception that would consist of the denial or ignorance of law. Insofar as the state of exception follows the rules established by regular/ordinary law it remains a possible derogation within the framework of the rule of law. In other words, if the law provides the criteria for distinguishing between exceptional and regular situations, the state of exception becomes part of regular/ordinary law. To do this, the law must refer to the facts, but this is not unusual insofar as any postulation of a legal norm is aimed at a certain factual situation. The unanticipated, unpredictable or exceptional

[1] On one hand, the qualification of an exceptional situation –likely to attract an exceptional (legal) state– may be approached differently in different historical, political, social, and other contexts. On the other hand, legal terminology may vary: states of exception refer to exceptional, extraordinary, catastrophic, special or emergency situations and each label may have an impact on the legal regime to be followed, i.e. on the degree of exceptionalism implied by each situation, on the margin of discretion preserved for the decision-making authorities, on the values likely to be affected etc. Generally, democratic states provide for three types of legal regimes of states of exception according to the severity of the threat posed to their security: martial law when dealing with war or threats to national security, state of siege when dealing with insurrections or threats to constitutional democracy and civil emergency when dealing with natural disasters.

[2] "For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists." C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty,* 2005. See also G. Agamben, *State of exception,* 2005.

character of the occurrence and, above all, of the content of the exceptional situation, which is often put forward when invoking the paradox of the state of exception[3], should not mystify the jurist – every rule was created to bring legal predictability into the factual chaos, so this does not mean that no legal rule should be incidental to an exceptional factual situation. On the contrary, the fact that a legal system provides for exceptions is evidence of the comprehensive and predictable nature of that legal system, and thus evidence of the effectiveness of that legal system even in exceptional circumstances. It is therefore not only possible but also necessary that any legal system provides for: (i) criteria for the identification of exceptional (factual) situations, (ii) rules applicable in such circumstances, (iii) powers that can be activated in such cases. This allows for the evaluation of the legality of a state of exception and makes possible an assessment of its compatibility with a democratic form of government. The fact that states of exception are a reality in the legal life of contemporary states must be and remain reassuring.

Accordingly, Romania has put in place a three-tier system of states of exceptions. Two of them, *state of siege* and *state of emergency*, dealing with threats to national security and to constitutional democracy, are provided by the Constitution, while the third one, *state of alert*, dealing also with some civil emergencies, is provided only by law. Like other European states[4], considering that existing states of exception are not fully adequate for a sanitary crisis while existing legislation dealing with infectious diseases is not sufficient, during 2020 Romania adopted a specific piece of legislation dealing with this new type of civil emergency and created a special *state of alert for Covid-19 pandemic*. However, it is interesting to note already here that, in Romania, Covid-19 pandemic has been dealt with initially as an emergency as if it was threatening the very existence of the state, almost like a situation of war, and only later as a sanitary crisis.

1. CONSTITUTIONAL FRAMEWORK[5]

The Romanian Constitution uses the term "exceptional measures" in Article 93, which mentions the *state of emergency* and the *state of siege* without specifying neither the criteria that identify and distinguish them, nor their legal regime, for which Article 73 letter g) of the Constitution refers to an organic law. However, Article 93 does fix the powers that can be activated, stating that the President can declare a state of emergency but the measure has to be confirmed by Parliament within 5 days; if Parliament is not in session it convenes *de jure* within maximum 48 hours after the state of emergency was introduced and it has to function during the entire duration of the state of emergency.

On the other hand, according to Article 56 of the Constitution, the state may impose other dues on its citizens "in exceptional situations". The Constitution does not elaborate on the concept of "exceptional situations" mentioned in Article 56, nor does it establish any relationship with the situations that may determine the "exceptional measures" provided for in Article 93.

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3 C. Schmitt, *Political Theology,* ib.

4 N. Alivizatos/V. BÍlková/I. Cameron/O. Kask/K. Tuori, *Respect for democracy, human rights and the rule of law during states of emergency – reflections*, Venice Commission, CDL-PI(2020)005rev, 2020.

5 This section draws on S. Tanasescu, 'L'état d'exception, nouveau régime de droit commun des droits et libertés ?', in *Annuaire international de justice constitutionnelle,* 2020.

Furthermore, Article 53 of the Romanian Constitution makes possible, under certain conditions "necessary in a democratic society", to restrict the exercise of fundamental rights in situations that are similar to states of exception, such as "the protection of national security, order, public health or morals", or "to prevent the consequences of a natural calamity or an extremely serious disaster". A necessary condition for these restrictions to be constitutional is that they are to be implemented "solely by law". Before the constitutional revision of 2013 this phrase was interpreted in a broad sense by both practice and doctrine, which also included delegated legislation. After the constitutional revision, the Constitutional Court imposed a strict view of the concept of law and invalidated the restrictions on the exercise of fundamental rights accomplished by delegated legislation on the basis of a systemic interpretation of Articles 53 and 115(6)[6] of the Constitution.

Furthermore, the delegated legislator is empowered to intervene urgently in situations qualified by the Constitution as "extraordinary"[7], without any distinction being made between this notion and the "exceptional situations" referred to in Article 53 or the "exceptional measures" referred to in Article 93. It should be noted in this context that the wording of the Constitution before the 2013 revision made it possible to adopt emergency ordinances (acts of delegated legislation) "in exceptional cases"[8].

2. LEGAL FRAMEWORK[9]

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 the 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 insurrection led by the miners, who took toward the capital of Romania (Bucharest) to demote the Government. Thus, Emergency Ordinance of Government (hereafter EOG) no. 1/1999 on the state of siege and state of emergency 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", thus mixing security threats with civil emergencies. 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 since

[6] ARTICLE 115 - Legislative delegation: [...] *(6) Emergency ordinances may not be adopted in the field of constitutional laws, may not prejudice the regime of the fundamental institutions of the State, the rights, freedoms and duties provided for in the Constitution, electoral rights, nor aim at measures of seizure of certain goods in public property.*

[7] ARTICLE 115 - Legislative delegation: [...] *(4) The Government may adopt emergency ordinances only in extraordinary situations whose regulation cannot be postponed, being obliged to justify the urgency in their content* [...].

[8] In the original drafting of the Constitution this provision red as follows: *"(4) In exceptional cases, the Government may adopt emergency ordinances. These shall not come into force until they have been tabled for approval by Parliament. If Parliament is not in session, it shall be convened by right".*

[9] This section draws on and up-dates S. Tanasescu, 'COVID-19 and constitutional law: Romania', in Serna de la Garza/José María (eds) *Covid-19 and Constitutional Law. Covid-19 et droit constitutionnel,* 2020, pp. 191-197.

it was introduced; it may last for a maximum of 30 days and may be renewed as many times as needed for a maximum duration of 30 days, each time with the approval of Parliament. The presidential decree instituting the state of emergency is a normative administrative act. Legal scholarship is still divided whether this specific administrative act can be subject to judicial review by administrative courts[10]. It may restrict the exercise of some fundamental rights which have to be expressly provided in the decree, bar the right to life, the protection against inhumane or degrading treatment or punishments, the legality of crimes and access to justice, and it may do so only in compliance with Article 53 of the Constitution. The presidential decree instituting the state of emergency is implemented through executive orders, which are military acts not subject to judicial review According to Article 126 of the Constitution.

On the other hand, EOG no. 21/2004 pertaining to "the national system of management of emergency situations" created a third type of state of exception, namely state of alert. It 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 emergency situation as "an exceptional event, of non-military nature, that threatens the life and health of the population, the environment, important material and cultural values" and the state of alert as a "response to an emergency situation of particular magnitude and intensity" that consists of "temporary and proportional measures" necessary for the prevention and removal of threats –among others– to the life and health of persons. So, despite the different name and juridical anchor (in the law and not in the Constitution), the state of alert was initially meant to address also threats to constitutional democracy but of non-military nature. However, the enumeration in article 2 of the EOG no. 21/2004 of possible risks that can be addressed via the state of alert includes also force majeure, fire and blaze, earthquakes, various accidents, mass diseases, other natural calamities etc., so it seems safe to infer that the state of alert does serve the purpose of dealing with some civil emergencies mixed with threats to constitutional democracy other than those of military nature. The state of alert may be introduced at national level by the National Committee for Emergency Situations with the approval of the Prime minister, and at local level by local committees for emergency situations with the approval of prefects, for durations which cannot exceed 30 days each, and may be extended by the same authorities for durations which have to be specified in the respective administrative acts. No parliamentary oversight of these emergency powers of the executive is foreseen by EOG no. 21/2004. All administrative acts issued in relation with a state of alert are subject to judicial review by administrative courts.

Finally, Law no. 55/2020 on measures to prevent and fight the effects of Covid-19 pandemic was speedily adopted by Parliament in order to deal with the specific situation at hand. It merely replicates the legal regime of the state of alert, with the only difference that the state of alert meant for Covid-19 can be introduced by Government, irrespective it this concerns the full territory of the

[10] For a nuanced analysis and negative opinion see B. Dima, *Consideratii cu privire la regimul constitutional si legal al starii de urgenta*, Revista de drept public 2020, pp. 67-71; B. Dima, *Care este natura juridica a decretelor presedintelui României emise pentru instituirea si prelungirea starii de urgenta ?*, AUBD - Forum Juridic, 2020, link. For a positive opinion see C.-L. Popescu, *Decret sau Decret-lege de instituire/prelungire a starii de urgenta/de asediu?*, AUBD - Forum Juridic, 2020, link.

state or only parts of it. Outcome of a political compromise, the initial version of Law no. 55/2020 provided for a legal *novum*, stating that the governmental decision introducing the state of alert for Covid-19 had to be approved by Parliament. This legal provision was put in practice in May 2020 when Parliament approved through a standing order the Governmental decision declaring a state of alert on the entire territory of Romania due to COVID-19 pandemic. The originality of this intermingling of powers brought about by this legal and institutional arrangement did not escape the Advocate of the People (Romanian Ombudsperson), who addressed the issue to the Constitutional Court. In decision no. 457/2020 the Constitutional Court struck down the legal provision requiring the ex-post approval by Parliament of a Governmental decision for which the law already gave an ex-ante mandate. Besides, the invalidated legal *novum* also questioned the constitutional role of ordinary courts, which can review administrative acts such as Governmental decisions activating the state of alert. Thus, the state of alert for Covid-19 is another state of exception provided by the law and not by the Constitution for which parliamentary oversight of the executive's actions is not required.

3. ASSESSMENT OF THE ROMANIAN LEGAL FRAMEWORK ON STATES OF EXCEPTION

From the above it can be safely inferred that the Romanian legal regime of states of exception is at best unclear. The three types of states of exception it provides for deal with more or less the same types of threats to national security and constitutional democracy, all blended with civil emergencies and, as of recently, specifically with threats to public health. The actual scope of each state of exception has been devised rather by practice than by law. However, their respective legal regime is quite different, with the state of emergency enjoying constitutional status and involving power-sharing between the President and the Parliament, while the state of alert is provided by delegated legislation, and it activates administrative authorities without parliamentary oversight. The common features of the legal regimes of these states of exception are: (i) their derogatory character from regular/ordinary law, (ii) their temporary character, (iii) the fact that they may be established over part or all the national territory. However, while both allow for the continuous functioning of courts of law, judicial review of implementing administrative acts is limited only to the state of alert.

II. A SANITARY CRISIS THAT CONCEALED A POLITICAL CRISIS WITH LIMITED INSTITUTIONAL IMPACT

From an institutional point of view, the legal framework dealing with states of exception in Romania sets out to specify the powers of the legislative and the judiciary and it organizes the limits to be imposed on the executive power in such circumstances. Thus, the Constitution provides for the necessary collaboration between the President and Parliament concerning the introduction of a state of emergency or a state of siege; the duration of Parliament's term of office is automatically extended during certain exceptional situations (state of mobilization, war, siege or emergency) until they cease; Parliament cannot be dissolved during a state of mobilization, war, siege or emergency; and the term of office of MPs can be extended if it

is due to end during a state of emergency or state of siege. Also, no situation can justify the creation of exceptional courts because the Article 126 paragraph (5) of the Constitution expressly prohibits them. And, according to Article 152 paragraph (3), the Constitution cannot be revised during the state of war, the state of siege or the state of emergency.

However, the state of alert created by EOG no. 21/2004 and the specific one created by Law no. 55/2020 enjoy a different legal regime. Under EOG no/21/2004 a National Committee for Emergency Situations or local committees for the management of emergency situations are empowered to activate the state of alert through administrative acts that can be subject to judicial review. These committees are interinstitutional bodies with variable 'geometry', i.e., made up of either ministers or head of local public authorities identified in each case according to the type of risks encountered. They may activate or put an end to the state of alert for durations that may not exceed 30 days, and which may be prolonged indefinitely with no parliamentary oversight. Each decision activating or prolonging the state of alert must provide for its legal basis, the duration of the state of alert, the measures taken to ensure the resilience of communities and to diminish the impact of each type of risk, the beneficiaries of these measures and the concrete conditions of their implementation, as well as the public authorities that have to implement or monitor their implementation. The only difference of the state of alert introduced under Law no. 55/2020 on measures to prevent and fight the effects of Covid-19 pandemic is that it may be activated or prolonged only by the Government.

In practice, the President of Romania introduced a severe lockdown through the state of emergency declared on the entire territory of the state on March 16th, 2020, for the maximum period of 30 days, and prolonged it on April 14th, 2020, for another 30 days. During these 60 days the executive power has been exercised through 12 military ordinances imposing mandatory measures for implementing the presidential decrees. It is important to stress that these military ordinances are administrative normative acts which, according to Article 126 paragraph (6) of the Constitution, may not be subjected to judicial review because they are acts of military command[11]. Between May 14th and May 17th, a relaxed lockdown was imposed based on the state of alert provided for by EOG no. 21/2004. Starting with the May 17th, 2020 Law no. 55/2020 came into force, introducing the state of alert for Covid-19, which has been extended each time for 30 days through governmental decisions and it is still in force at the date of drafting the present contribution. The national lockdown has been significantly eased starting with the introduction of the state of alert and its legal regime has been modulated ever since based on the number of confirmed infections and the pressure felt by the intensive care units coupled with the impact of lockdown measures on the national economy.

However, it is important to recall the political and institutional context: all along the sanitary crisis in Romania was unfolding a political crisis due to the cohabitation of a minority Government supported by the President and a hostile parliamentary majority that used all institutional means

[11] ARTICLE 126 - Courts of law: [...] *(6) The judicial control of administrative acts of the public authorities, by way of the contentious business falling within the competence of administrative courts, is guaranteed, except for those regarding relations with the Parliament, as well as the military command acts. The administrative courts, judging contentious business have jurisdiction to solve the applications filed by persons aggrieved by statutory orders or, as the case may be, by provisions in statutory orders declared unconstitutional.*

available in order to temper or block the executive, particularly in the management of the sanitary crisis. While the sanitary crisis helped concealing the political crisis, the actual institutional impact of the Covid-19 pandemic on the functioning of public authorities has been rather limited.

1. THE IMPACT OF COVID-19 ON ELECTIONS

A. Failed anticipated elections

Towards the beginning of March 2020, political actors were contemplating the possibility of anticipated general elections, but political calculations were stopped in their tracks by the sanitary crisis. Thus, a vote of non-confidence passed on February 5th, 2020 led to an interim Government. This could have developed into an opportunity for anticipated elections if the requirements of Article 89 of the Constitution could be met, namely if Parliament had failed twice within 60 days to vote a new Government. On one hand, the President of Romania, a minority of MPs and some members of the interim Government were actively looking for ways to bring about a political shift in Parliament through anticipated general elections. On the other hand, the prime-minister and the majority in Parliament used delaying tactics, keeping an eye on the sanitary crisis to come. By mid-February, the interim Government adopted a piece of delegated legislation in order to facilitate the organization of anticipated general elections. The Ombudsperson challenged the constitutionality of this emergency ordinance, and, in decision no. 150/2020, the Constitutional Court found that it was breaching legal certainty because it made possible the simultaneous organization of parliamentary and local elections, thus puzzling the voters. A dissenting opinion signed by one judge explained why the simultaneous organization of different types of elections is not unconstitutional and, in fact, regular local, parliamentary, and presidential elections will take place in Romania in 2024.

Against this background, the political consultations, provided by Article 85 of the Romanian Constitution, and meant to end-up with the designation of a candidate to the office of prime-minister have been stalled based on political statements made by the President of Romania, who, while designating a candidate for the position of prime minister, also explicitly referred to early elections as one of the possibilities offered by the Constitution in order to sort out the constitutional crisis. The Speakers of the two Houses of Parliament asked the Constitutional Court whether such political declarations do not obstruct ongoing political consultations. In decision no. 85/2020 the Constitutional Court considered that the President of Romania has conducted political consultations “formally” because he declared he was looking forward for anticipated elections, and obliged him to start them again, only this time also respecting his “obligation of loyal cooperation”. A dissenting opinion signed by two judges explained why political declarations cannot trigger legal conflicts of constitutional nature and how the designation of a candidate to the office of prime minister was an issue to the political crisis and not an institutional blockage.

Since on March 11th 2020 the World Health Organisation declared a global pandemic sparked by the Covid-19, amid political distrust and out of necessity, the majority in Parliament reluctantly acquiesced on March 14th 2020 to grant confidence to a minority Government in a sort of political truce meant to last only during the sanitary crisis. Thus, a political crisis was narrowly avoided, while the sanitary crisis was taking over.

B. Postponed local elections

Regular local elections were scheduled on June 6th, 2020. However, since the electoral campaign should have started at least 45 days earlier, i.e., during the second month of total lockdown and while Romania was still in a state of emergency, the Government decided to postpone local elections until September 27th. The duration of the mandate of locally elected officials being fixed through an organic law, this is technically possible without tampering with the Constitution. The extension of the mandates of locally elected officials has been decided through a piece of delegated legislation adopted by Government on April 8th, which was altered during the adoption by Parliament as to fit the political interests of the political parties opposing Government. The Government challenged the alterations at the Constitutional Court. Also, later during April, the majority in Parliament opposing Government initiated and adopted another law on the same matter but did not coordinate it with the piece of legislation initiated by Government and already altered and approved by Parliament. The minority in Parliament supporting the Government challenged the law at the Constitutional Court. Three days before the expiry date of the mandate of locally elected officials, in decision no. 242/2020, the Court ruled that the parliamentary initiative was unconstitutional because it lacked coordination with an existing piece of legislation, namely the delegated legislation adopted by Government. On the same day, in decision no. 240/2020 the majority of judges of the Constitutional Court ruled that the delegated legislation had been adopted *ultra vires* and invalidated it as well, stating that Parliament could not adopt a valid law based on a flawed initiative (as was the one promoted by Government). A dissenting opinion signed by two judges and appended to decision no. 240/2020 noticed that the Court had been vested by Government with the law adopted by Parliament and not with its own piece of legislation, hence it was the majority of judges who ruled *ultra vires* when they declared the delegated legislation unconstitutional and not the law adopted by Parliament, as it was specifically demanded by the claimant. Nevertheless, the mandate of locally elected officials has been extended de facto and the fate of local elections could not be settled until July 2020, when Parliament decided to adopt a law setting the date of local elections on September 27th. Thus, local elections were organized on the same day as initially decided by Government, but it was the Parliament who finally decided so and not the executive.

In this context it is important to recall that, according to the case-law of the European Court of Human Rights, in principle, the right to participate in free elections at reasonable intervals by secret ballot (Article 3 of the Protocol no. 1 to the ECHR) is not applicable to local elections, but it is protected under the European Charter for Local Self-Government. Romania respected European standards although it delayed local elections by four months.

C. Parliamentary elections under threat

On the other hand, general elections due to the end of the legislative period are covered by the European standards. The mandate of Parliament was due to end on December 11th 2020 and parliamentary elections had to be organised before that day. Government set the date of general elections on December 6th and started to organise them early September, but the majority in Parliament had the intention to extend the mandate of the legislative until the end of the sanitary crisis following the pattern provided by the local elections. However, unlike locally

elected officials, MPs cannot see their mandate extended through a law beyond the constitutional duration of 4 years save during special situations exhaustively enumerated in Article 63 of the Constitution (mobilization, war, siege, or emergency). Since the state of emergency had ceased on May 15th, the precedent set by local elections could not be emulated. Hence, the majority in Parliament adopted a law providing that only Parliament can set the date of parliamentary elections that should have been held in 2020 due to the special circumstances provided by the sanitary crisis. Such a law would implicitly repel existing legislation which allowed only Government to set the precise date when elections should be held and referred only to the specific situation of parliamentary elections of 2020 while not establishing a general rule for future parliamentary elections. Challenged by the Romanian President, the law was found valid by a majority of five constitutional judges who, by the same token also annulled the normative act through which Government had set elections on December 6th although the Constitutional Court does not have jurisdiction over administrative acts (decision no. 678/2020). Nevertheless, the law never came into force because the President made use of his prerogative to return the law to Parliament for reconsideration, and legislative procedures have been tactically delayed by MPs supporting the Government until it was too late. Parliamentary elections finally took place on December 6th and saw the lowest turnout since the beginning of the democratic transition in December 1989 (31,84% of the voters), partly due to the sanitary crisis and partly due to a general fatigue of electors in front of permanent political disputes.

2. THE IMPACT OF COVID-19 ON THE SEPARATION OF POWERS

A. Parliamentary oversight reinforced despite expedient rules of procedure[12]

Under the state of emergency both Houses of Parliament revised their Standing Orders to allow for the use of electronic procedures of debating and voting. According to the new provisions of the Standing Orders, in exceptional situations "officially established by qualified public authorities", meetings of the Permanent Bureaus, of the Committees of the Leaders of the Parliamentary Groups (hereafter Committee of the Leaders), of the permanent committees, as well as meetings of the plenaries should be managed through electronic devices, including mobile phones, following a procedure to be adopted by the Permanent Bureaus. Also, a rather odd provision permitted to the Committee of the Leaders to alter the final vote procedure on bills already on the agenda of the plenary session. Although the revision of the parliamentary standing orders has been contested in front of the Constitutional Court for infringement of the constitutional autonomy of the Houses of Parliament, it has been validated by the jurisdiction (in decision no. 156/2020) with the argument that it provided the necessary "flexibility" for any exceptional situations might arise in the future. Another important issue, which was easily overpassed by the Court, save for the two judges who signed a separate opinion, referred to the fact that the role and importance of the Committee of the Leaders gained too much discretionary power, including the power to decide on how the final vote on a bill must be

[12] This section draws on and up-dates S. Tanasescu/B. Dima, 'The Role of the Romanian Parliament during the COVID-19 Sanitary Crisis. A diminishment of the executive decision-making power', in E. Cartier/G. Toulemonde (eds), *The Parliament in the time of coronavirus*, 2020, pp. 2-10.

expressed. This Committee is neither a leading nor a working structure of the Houses, but a mere political organ that cannot decide fundamental procedures for the functioning of Parliament. However, these arguments were rejected by a majority of constitutional judges, who remained favourable to the idea of "flexibility" of parliamentary procedures used in exceptional situations.

On the other hand, Parliament was highly active in exercising both its oversight function and its legislative function during the state of emergency and the various states of alert.

The Chamber of Deputies and the Senate managed to pass no less than seven motions during the state of emergency; all important ministers of the Government[13] have been subjected to a parliamentary motion[14]. Also, a motion of non-confidence against the Government has been initiated during a one-day extraordinary session of Parliament. The motion was registered on August the 17th, it was read in another extraordinary session of Parliament on August the 20th, and submitted to vote on August the 31st, i.e., the last day of the second extraordinary session of Parliament. Because the quorum needed for the validity of the joint plenary session of the two Houses was not completed, the motion of non-confidence could not be effectively voted by the MPs. Against this background it is worth mentioning that the prime minister has notified the Constitutional Court with a legal conflict of constitutional nature and asked it whether it is possible to register of a motion of non-confidence in one extraordinary session and discuss it in a different extraordinary session of Parliament. In decision no. 609/2020 a majority of seven constitutional judges found that there was no legal conflict of a constitutional nature between Parliament and Government and validated the possibility to initiate a motion of non-confidence during extraordinary sessions, without further examining whether two separate extraordinary sessions of Parliament fulfil the constitutional requirements for this procedure.

Likewise, the legislative activity of Parliament did not show any signs of slow-down during the sanitary crisis. Parliament has closely followed Government and constantly attempted either to double[15] or reverse[16] the normative acts adopted by the executive.

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[13] The Chamber of Deputies adopted 4 simple motions against four ministers: on the 11.05.2020 against the Minister of Public Finances; on the 25.05.2020 against the Minister of National Education and Research; on the 17.06.2020 against the Minister of Healthcare; on the 07.07.2020 against the Minister of Public Works, Development and Administration. The Senate adopted 3 simple motions against three ministers: on the 18.05.2020 against Minister of Agriculture; on the 26.05.2020 against the Minister of Internal Affairs; on the 09.06.2020 against Minster of Labour.

[14] The Romanian Constitution does not provide for individual motions of non-confidence. Thus, even if adopted, parliamentary motions do not oblige the prime minister to dismiss targeted ministers.

[15] E.g., when the Government adopted an EOG providing for economic and fiscal/tax facilities, Parliament adopted a law on exactly the same topic but with different facilities; the law has been invalidated by the Constitutional Court (decision no. 154/2020) on grounds of legal insecurity (because it doubled facilities already in force). Also, when the Government adopted an EOG prolonging the mandates of the local elected officials and establishing the official date for local elections the Parliament adopted a law on the same matter but with different solutions. (See above section II.2).

[16] E.g., the Government adopted various EOG regulating facilities for bank debtors. Upon approval by Parliament, the normative content of those EOG was significantly changed, altering legal security for all actors involved (banks and their clients). The Constitutional Court invalidated those laws in decision no. 155/2020 and decision no. 600/2020 because they introduced legal parallelism and jeopardized legal certainty. Also, when the Government fixed the date of general elections Parliament adopted a law empowering itself to fix the date of general elections in 2020. (See above section II.3).

However, despite the permanent gridlock between Parliament and Government, political compromise has been reached on issues that allowed the legislative to better control the executive. The best example remains the adoption of Law no. 55/2020 in only two days because existing legislation (EOG no. 21/2004) was deemed insufficient in terms of parliamentary oversight on emergency powers of the executive during the state of alert. The fact that specifically the parliamentary oversight provided by Law no. 55/2020 has been invalidated by the Constitutional Court in decision no. 457/2020 due to its unconstitutional design speaks volumes of the will of MPs to control the Government and of their lack of efficiency when put under pressure. Another example may be the adoption in only ten days of Law no. 136/2020 on measures concerning public health in situations of epidemiological and biological risk following decision no. 458/2020 of the Constitutional Court which invalidated delegated legislation (EOG no. 11/2020) on forced quarantine and isolation of individuals suspected or confirmed to be infected with SARS-COV-2. Since forced quarantine of individuals suspected to be infected with the virus was equated by the Constitutional Court with deprivation of liberty, a restriction of individual freedom that could only be enforced through law and not through delegated legislation, the executive and the legislative quickly found a compromise and set forth the same measures, only this time adopted by Parliament and not by Government.

Last but not the least, although the Constitution expressly requires Parliament to be in session only during the state of emergency, the majority in Parliament opposing Government decided that oversight is necessary also during the state of alert. Therefore, during 2020 MPs did not enjoy their regular summer break and have been convened in a series of extraordinary sessions until the beginning of the regular autumn session (starting on September the 1st) in order to allow the parliamentary majority to control and sometimes block decisions adopted by Government.

B. Regular functioning of courts

The rather limited impact of the Covid-19 pandemic on the functioning of Romanian public authorities is best illustrated by the fact that courts of law have adapted but not discontinued their activity and this concerns both regular courts and the Constitutional Court.

Thus, the two presidential decrees introducing the state of emergency stated that the activity of courts had to be limited only to criminal cases and cases of extreme urgency in non-criminal matters, the list of which has been established by the Executive Collegium of the High Court of Cassation and Justice (HCCJ) and, respectively, by the executive collegiums of the courts of appeal. At the same time, the Superior Council of Magistracy adopted guidelines in order to harmonize the decisions adopted by the executive collegiums of courts during the state of emergency[17]. The 60 days of state of emergency have been used by courts to organise the needed infrastructure and concrete conditions for their continuous functioning on-line where possible, and with the full respect of social distancing in any circumstances, so that upon the activation of the state of alert they were able to resume their activity almost regularly. All executive orders which are not acts of military command and all administrative

[17] See decision no. 257 of March 17th, 2020, of the Superior Council of Magistracy, link.

acts issued by public authorities during the state of emergency and the state of alert can and have been subjected to judicial review, including decisions to quarantine various localities or the preventive quarantine of individuals or decisions to close restaurants or other economic activities[18]. However, if in general courts can suspend administrative acts they verify, article 5 paragraph 3 of Law no. 554/2004 on judicial review of administrative acts makes an explicit exception for "administrative acts implementing the legal regime of the state of war, the state of siege, the state of emergency, acts that concern defence and national security and acts issued to restore public order and to remove the consequences of natural calamities, epidemics and epizooties". Therefore, quarantine or closures have been either validated or interrupted by courts, but not suspended.

As for the Constitutional Court, not only it has not discontinued its activity, but it played a major role in shaping the legal regime of emergency powers and, particularly upon complaints from the Ombudsperson, in the protection of fundamental rights of citizens.

C. Assessment of the institutional impact of the sanitary crisis on Romanian political institutions

Overall, with the help of Constitutional Court, the powers of the executive (President and Government) and the legislative (Parliament) have evolved significantly during the sanitary crisis. The rules of the game were re-written, and the role of Parliament has been rather strengthened, while the executive has seen its decision-making power relatively diminished. The Romanian system of government saw a significant boost of its parliamentary nature, an odd exception to the classic rule postulating that in a state of exception the executive reigns supreme, while the legislative remains quit.

On the other hand, Romania displayed a vigorous judicial review of emergency powers of the executive. Besides the active Constitutional Court, which constantly eroded the powers of the executive, regular courts have also carefully checked the legality of administrative acts issued for the management of the sanitary crisis. And overall, the constitutional judge has carefully monitored the restrictions brought to the exercise of fundamental rights during all states of exception.

III. NORMALCY OF RESTRICTIONS ON FUNDAMENTAL RIGHTS

Regarding the protection of fundamental rights, the main issue debated throughout the Covid-19 pandemic in Romania has been the legal regime of the restrictions that can be imposed on their exercise according to Article 53[19] of the Romanian Constitution. It is interesting to note that, although the protection of public health is one of the possible causes for the restriction of

[18] See link.

[19] ARTICLE 53 - Restriction of the exercise of certain rights or freedoms: *(1) The exercise of certain rights or freedoms may be restricted only by law if it is necessary, as the case may be, to protect national security, public order, health or morals, the rights and freedoms of citizens; the conduct of criminal proceedings; or to prevent the consequences of a natural disaster or an extremely serious calamity. (2) The restriction may be decided only if it is necessary in a democratic society. The measure must be proportional to the situation which has determined it, must be applied in a non-discriminatory manner and must not prejudice the existence of the right or freedom.*

the exercise of fundamental rights according to Article 53 of the Constitution, in Romania the Covid-19 pandemic has been considered first a danger to "national security or the functioning of constitutional democracy", then an "exceptional non-military event endangering the life or health of the person" and ultimately as a pandemic that requires sanitary measures. Concretely, for the citizens and their fundamental rights this had different meanings. During the 60 days of the state of emergency a quasi-military regime was put in place, with harsh restrictions on the exercise of fundamental rights that have been constantly questioned, particularly by the Ombudsperson. The state of alert came along with a variable regime of restrictions, constantly adapted to the evolution of the contagiousness of the disease, where the emphasis fell on the personal conscience of the individual and which combined economic and social protection measures for vulnerable sectors and people with fewer restrictions and less sanctions for non-compliance.

Both courts of law and the Constitutional Court have upheld the protection of citizens' rights, but it was the constitutional judge that had the biggest impact on the restrictions to the exercise of fundamental rights. Thus, citizens and the Ombudsperson have constantly questioned the legality of measures taken during the various states of exception. In some cases, measures have been cancelled, such as fines applied during the state of emergency as a consequence of decision no. 152/2020 of the Constitutional Court, while several quarantine measures have been overturned by ordinary courts. In other cases, the measures have been confirmed: the establishment of the state of emergency, the state of alert and the state of alert to combat the Covid-19 pandemic as well as all their respective prolongations/extensions all have been validated by the Constitutional Court.

In this context it is worth mentioning that, upon activating the state of emergency, on March 18th, 2020, the Romanian executive notified the Secretary General of the Council of Europe that Romania applies the derogation provided by Article 15 of the European Convention on Human Rights. This was valid only during the state of emergency, i.e., May 14th 2020[20], and had no other practical consequences beyond the restrictions to the exercise of fundamental rights that were anyway imposed through the presidential decrees activating the emergency powers.

1. RELEVANT CASE LAW

In Decision 152/2020 the Constitutional Court ruled that EOG no. 34/2020 revising EOG no. 1/1999, which significantly increased the threshold of fines for the offences committed during the state of emergency against imposed measures, was "unconstitutional in its entirety". The Government was found "in breach of the constitutional limits of legislative delegation" because the ordinance "affected" fundamental rights, which is expressly prohibited by Article 115 (6) of the Constitution. The Court also ruled that Article 28 of the EOG no. 1/1999, which defines the administrative offences during a state of emergency, lacks clarity and predictability in that it

[20] N. Alivizatos/V. Bílková/O. Kask/R. Rubio/K. Tuori/B. Vermeulen, *Interim report on the measures taken in the EU Member States as a result of the Covid-19 crisis and their impact on democracy, the rule of law and fundamental rights*, Venice Commission, CDL-AD(2020)018-e, 2020.

does not differentiate between the various degrees of seriousness of the offences, therefore leaving room for arbitrariness from the part of the agents when applying the fines.

In Decision no. 157/2020 the Constitutional Court ruled that EOG no. 21/2004 concerning the state of alert is "constitutional insofar as the actions and measures prescribed during the state of alert do not restrict the exercise of fundamental rights". Thus, through an "interpretative decision" the Court decided that the provisions of the piece of delegated legislation which provide for a possible "evacuation from the affected area", "the participation to community work activities" and "any measures necessary for eliminating the force majeure" are susceptible of "affecting" fundamental rights, thereby infringing Article 115(6) of the Constitution. However, unlike in decision no. 152/2020 although based on the same argument –of an infringement to Article 115 (6) of the Constitution– a majority of seven judges decided not to invalidate the entire piece of delegated legislation and left untouched the rest of it.

Finally, in Decision no. 458/2020 the Constitutional Court assessed the constitutionality of the legal provisions regarding some of the measures meant to reduce the spread of the virus, including the quarantine introduced on the basis of a piece of delegated legislation (EOG no. 11/2020). Another contested measure was the activation of compulsory hospitalization of Covid-19 patients, on the basis of a list of contagious diseases established in a normative administrative act (order of the minister of public health). The Court declared both types of measures unconstitutional on the ground that they are introduced through acts of secondary legislation and therefore violate Article 53 of the Constitution, the measure of quarantine being qualified as 'a true deprivation of liberty'. In practice, this led to a massive discharge of Covid-19 patients upon request and to an increase of the number of infected persons until the quarantine was included by Parliament in Law no. 55/2020.

All three cases were referred to the Constitutional Court by the Ombudsperson and all three have been decided by a majority of seven judges, with the same two other ones signing separate opinions.

2. ANALYSIS OF THE CASE LAW ON THE RESTRICTION OF THE EXERCISE OF FUNDAMENTAL RIGHTS

The restriction of the exercise of fundamental rights is regulated by Article 53 of the Constitution. Legal scholarship noticed that before the revision in 2003 of the Romanian Constitution such restrictions could be imposed by laws of Parliament and emergency ordinances of the Government (delegated legislation), whereas after 2003, validated by a constant case law of the Constitutional Court, this power belongs exclusively to Parliament[21].

Decision no. 152/2020 of the Constitutional Court and the separate opinion which accompanies it encapsulate the main debate on this topic. Based on Article 53 of the Constitution, the majority and minority opinions have advanced two different approaches with regard to the restrictions brought to the exercise of fundamental rights.

According to the majority opinion, legal formalism obliges the Court to note that the

[21] S. Tanasescu, 'Comentariu la Articolul 53', in I. Muraru/E. S. Tanasescu(eds), *Constitutia României – Comentariu pe articole,* 2019, pp. 461-462.

legal regime of the state of emergency was fixed by an act of legislative delegation (OUG no. 1/1999) and that vitiates any restriction brought to the exercise of fundamental rights because Article 115 (6) of the Constitution prohibits the 'affectation' of rights and freedoms by delegated legislation. According to this vision, an 'extrinsic' control, i.e., a formal control of constitutionality, of such an emergency ordinance of the Government is sufficient and it is not necessary to advance with the constitutional review on the substance of the normative act in order to know if the fundamental rights have seen their exercise restricted in accordance with criteria set forth by Article 53 of the Constitution. Moreover, the majority opinion was satisfied to note that "a normative act whose object is a crisis situation negatively affects and restricts the exercise of fundamental rights since its aim is to create the legal framework necessary for exceptional measures", without questioning *how* these restrictions were made and if they were indeed compliant or not with Article 53 of the Constitution.

According to the minority opinion, compliance with Article 53 cannot be verified by a review aimed at Article 115 of the Constitution. On the contrary, monitoring compliance with Article 53 of the Constitution requires an 'intrinsic' control of the normative act, in order to verify whether all the constitutional conditions and criteria have been met. This amounts to saying, as the separate opinion has done, that the restriction on the exercise of fundamental rights "must be limited in time and must cease as soon as the cause which determined it also ceases". In other words, a restriction on the exercise of fundamental rights can be constitutionally justified, but only during a limited period of time, only for the causes expressly enumerated in the Constitution and only if proportionality is respected. As soon as the measure is no longer necessary or proportional, the restriction must end. According to this approach, whether the restriction is imposed by an act of Parliament or by an emergency ordinance of the Government does not change the situation if conditions and criteria set by Article 53 of the Constitution are not met. Both the Parliament and the Government are bound to respect the requirements of Article 53 of the Constitution, and this cannot be verified within the framework of a formal, 'extrinsic' control of the normative act, but only within the framework of a substantive, 'intrinsic' control of the normative substance of the legal act which tries to impose restrictions on the exercise of fundamental rights.

However, the formalistic approach has been favoured by a majority of constitutional judges in all subsequent cases, which made possible the imposition of restrictions to fundamental rights by Parliament irrespective of the fact that they were identical with the ones declared unconstitutional by the Court only because they were introduced by delegated legislation. Nevertheless, the fact that the main debate regarding the protection of fundamental rights focused on the respect of Article 53 of the Constitution, which is regularly used in the constitutional review, is a solid illustration of the fact that all states of exception perused during Covid-19 pandemic in Romania were dealt with as mere derogations from the general framework of the rule of law and not as lawlessness.

CONCLUSION

The "exercise of emergency powers is a phenomenon common to both democratic and undemocratic governments, the only difference between the two being the presence or

absence of check and balances to prevent the abuse and arbitrary use of emergency powers by the government"[22]. In the case of Romania, Covid-19 pandemic revealed a rather paradoxical situation, where parliamentary oversight and judicial control over emergency powers of the executive have been exacerbated to a point where, in practise and at times, they even obstructed measures adopted in order to fight with the sanitary crisis. Nevertheless, Covid-19 pandemic has also revealed that, even though existing constitutional mechanisms for emergency situations are not adequate to deal with sanitary crises, the functioning of the state has not been altered dramatically or permanently and the protection of fundamental rights remains consistent, albeit formalistic. ❑

[22] C. Manga Fombad, *Cameroon's emergency powers: A recipe for (un)constitutional dictatorship?, Journal of African Law*, 2004.