Romania in the Covid Era: Between Corona Crisis and Constitutional Crisis

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In Romania, the sanitary crisis caused by the SARS-COV-2 pandemic started in March 2020 during an existing political crisis and overlapped, at a few crucial moments, with a constitutional crisis. On 5 February 2020, a motion of censure against the minority liberal Government had been adopted by the social-democrat majority in Parliament. This was one step in a more elaborate political scenario, which started right after the presidential elections that took place in December 2019, and which should have led to early parliamentary elections, should the constitutional criteria have been met. On 9 March, when the sanitary crisis began, the country still had a minority interim Government, led by the dismissed Prime-Minister Ludovic Orban. Even before the declared state of emergency, the interim Government started to take emergency measures on 9 March, such as suspension of flights from various countries, the quarantine for persons coming from certain countries and the closing of schools. After a failed attempt to obtain a vote of confidence (because the nominated candidate withdrew on 12 March), President Iohannis nominated again Mr. Ludovic Orban and, following hasty hearings of the candidates by the parliamentary committees, on 14 March the “new” minority Government obtained the vote of confidence of the Parliament and was officially appointed. The conflict between the President and the Government, on one side, and the parliamentary majority, on the other side, will have an impact on the whole future development of events.

On 16 March, the President declared by decree a state of emergency for a period of 30 days. On 18 March, the Government notified the Secretary General of the Council of Europe that Romania applies the derogation in case of state of emergency clause of the European Convention on Human Rights.

The State of Emergency (16 March-14 May 2020)

According to Article 93 of the Romanian Constitution,

> “(1) The President of Romania shall, according to the law, institute the state of siege or state of emergency in the entire country or in some territorial-administrative units, and ask for the Parliament’s approval for the measure adopted, within 5 days of the date of taking it, at the latest.
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> (2) If Parliament does not sit in a session, it shall be convened de jure within 48 hours of the institution of the state of siege or emergency, and shall function throughout this state.”

Therefore, the institution of the state of emergency is a shared power: it can be declared by the President and it is placed under a formal control of the Parliament, through a vote of approval or rejection, but without being able to modify it. However, as the presidential decree is a normative administrative act, it can be submitted to judicial review according to the law on administrative litigation. It is worth mentioning that the institution of the state of emergency has never been used before, under the current constitutional order.

The legal regime of the state of emergency is set forth by the Emergency Government Ordinance no.1/1999, which, at its turn, has been approved by the Parliament by a law, in 2005. According to this legal framework, during the state of emergency, there can occur limitations of rights, within the limits set forth by the Constitution in Article 53 and the presidential decree must indicate the rights which will be limited in the concrete state of emergency period. However, there are a few rights excepted from any limitation: the right to life, the right not to be subjected to torture and other inhuman or degrading treatments, the principle *nulla poena sine lege,* access to justice. A state of emergency can be instituted for a maximum of 30 days at a time and can be extended by presidential decree, which is also subject to parliamentary approval. During a state of emergency, the specific measures are provided by the presidential decree and by "military ordinances" adopted by the authorities set forth in the presidential decree.

The presidential Decree 195/2020 expressly provided most of the directly applicable measures necessary within the state of emergency: closing of all education establishments, economic measures (including support of companies affected by the state of emergency), social measures (including social benefits for employees affected by the state of emergency). The decree also provided that the "gradually applicable" measures of primary emergency will be taken by military ordinances, issued by the Minister of Internal Affairs, with the approval of the Prime-Minister. Such measures include: isolation and quarantine of persons coming from risk zones or of their contacts; quarantine instituted in buildings, towns or other geographic areas; closing border control points; limitation or prohibition of circulation of vehicles or persons in certain areas or between certain times; the gradual prohibition of circulation on roads, railways, maritime, fluvial, of airlines and of metro; temporary closing of restaurants, hotels, cafes etc.

During the whole period of state of emergency, the Parliament has not been suspended. It continued to work remotely for five weeks, but on 23 April it resumed its normal activity, subject to special measures (disinfection, temperature scanning, wearing of masks, social distancing).

On 6 April 2020, the Government adopted an Emergency Ordinance to postpone the local elections to an undetermined date later this year and extended the mandate of the local elected officials.

On 14 April, the President extended the state of emergency for a further period of 30 days, by Decree no. 240/2020, which maintained the same provisions and measures. During the 60 days of state of emergency, 12 military ordinances were adopted, which set forth the concrete measures directed at limiting the effects of

the pandemic. Besides the Minister of Internal Affairs, other authorities involved in the process of adoption of military ordinances were the Minister of Health and the National Committee for Special Emergency Situations. The Government also issued an EGO by which it increased the amount of fines to be imposed to persons infringing the provisions of the decree and of the military ordinances and enhanced the severity of criminal sanctions in the case of some criminal offences related to the state of emergency (e.g. that of hindering the fight against the diseases).

Among the measures taken by the authorities by military ordinances were: limitation of the circulation of vehicles in certain areas and at certain times; limitation of the circulation of persons: the circulation was allowed only on the basis of an auto-certification (a signed statement comprising the name, home address and purpose of leaving home; only certain purposes were permitted, among which procurement of strict necessity goods, professional activities upon presentation of a certificate from the employer, helping vulnerable persons etc.); persons over 65 were only allowed to leave their home between certain hours, except for professional purposes; restaurants, bars and terraces were closed, as well as big shopping centres (however, open-air fruits and vegetables markets remained open); all gatherings of more than 3 persons were prohibited; religious services were carried out without public; most of the international commercial flights were suspended; all persons entering the country and coming from the "red" zones (e.g. Italy, Spain, France, Germany a.s.o.) were automatically placed in quarantine; unauthorised departure from the quarantine spaces was punished a.s.o. These measures, although set forth by secondary legislation were based on the "rights' restricting" provisions of the framework law on the state of emergency, therefore they were not in violation of Article 53 of the Constitution, which imposes that restrictions of rights be "established by law".

One of the most problematic provisions of the presidential decree, in terms of rights protection, is that, although the framework law (OUG 1/1999) expressly prohibits the limitation of access to justice, the decree comprises detailed "measures in the field of the judiciary" establishing that, for instance "during the state of emergency, the activity of the courts continues in cases of special emergency", that in the criminal field, the judicial activity may continue only in cases in which preventive measures have been imposed or that some delays, including the delays for the statute of limitations in the criminal field are suspended. Measures for the online continuation of some judicial activities were also prescribed. The explanation for these restrictions lays on the requests made by the courts, before the institution of the state of emergency, that their activity be regulated so that contagion of judges, prosecutors and registrars, as well as of the public, should be avoided. Some courts even suspended their activity with the public before the institution of the state of emergency.

The Unconstitutionality Claims and the Constitutional Court's Decision

Soon after the institution of the state of emergency, the clashes between the parliamentary majority and the minority Government started to show their effects. Thus, the legal framework of the state of emergency, as well as, indirectly, the presidential decree and the emergency measures taken were challenged by the Ombudsperson (*Avocatul Poporului* – a function that is occupied by a person close to the parliamentary majority) before the Constitutional Court, on grounds of infringing, *inter alia*, on the one hand, the principles of separation of powers and of the rule of law (Articles 1 (4) and (5) of the Constitution) and, on the other hand, of violating fundamental rights. The claim of infringement of the separation of powers regarded the fact that the framework law allows the President, by issuing the decree on the state of emergency, to "act as legislator" and to take "primary" measures of restriction of fundamental rights. The Ombudsperson also claimed that the provisions of the EGO establishing the increased fines for the administrative offences infringing the military ordinances are contrary to the principle of legality of penalties.

On 6 May 2020, the Constitutional Court issued Decision no. 152/2020 (press release in English) on the Ombudsman's complaint. As regards the powers of the President, the Constitutional Court dismissed the claims of unconstitutionality and stated that there is no disposition of the framework law that would allow the President to exceed his constitutional powers and that most of the measures imposed by the decree were taken within the limits of these powers. However, in a strange analysis – paragraphs 100-106 of the Decision 152/2020 – the Constitutional Court criticised *obiter dictum* the presidential decree for taking some measures "outside the powers given by the constitutional and legal dispositions". This claim is clearly an expression of an *ultra vires* action of the Court, as the presidential decrees are not formally submitted to the review of the Constitutional Court, but to the judicial review of the administrative litigation courts. In this context, a completely erroneous statement of the Constitutional Court is that such decrees are "excepted from the judicial review", as they are "acts adopted in the relation with the Parliament" (paragraph 93 of the Decision). In reality, as stated above, and as acknowledged by the Constitutional Court, these decrees are administrative normative acts which can be subjected to judicial review. The excepted "acts adopted in the relation with the Parliament" could be, for example, political acts such as messages addressed to the legislative. Therefore, neither the Parliament, nor the Constitutional Court are competent to review the presidential decree instituting the state of emergency, but the administrative litigation courts, within their jurisdiction according to Article 126(6) of the Constitution. In their very well-documented concurring opinion (which is, in fact, a separate opinion as regards this part of the Decision, but, due to internal pressures on dissenting judges, the opinion counted as "concurring" and the vote on the decision appeared as unanimous), judges Simina-Elena Tanasescu and Livia-Doina Stanciu argue that this *obiter dictum* analysis is an unjustified extension of the Court's jurisdiction:

> “The idea that the Parliament could arbitrarily exceed the powers given by Article 93 of the Constitution and could disregard the competences of the ordinary courts, expressly and formally set forth by Article 126(6) of the Constitution, by reviewing the normative administrative act of the President, is contrary to the letter of the Constitution and against the principle of separation of powers (Article 1(4)) and contrary to the fundamental right to access to justice.”

In the second part of the Decision, the Constitutional Court stated that EGO 34/2020, which increased the fines for the administrative offences committed during the state of emergency against the imposed measures, is “wholly unconstitutional”. In the Court’s view, the Government was “in breach of the constitutional limits of legislative delegation”, i.e. the impugned ordinance “affected” fundamental rights, which is expressly prohibited by Article 115(6) of the Constitution. Also, the Court ruled that the text of Article 28 of the EGO 1/1999, which defines the administrative offences during a state of emergency, lacks clarity and predictability in that it 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.

The Constitutional Court’s decision is excessive: it is true that some of the provisions of the impugned ordinance do not observe the principle of proportionality (the maximum amount of the fines is excessively high by reference to the average income in Romania – e.g. the maximum of the equivalent of approx. 4000 euros), but the EGO 34/2020 should not be declared unconstitutional *as a whole* on this ground. On other occasions, administrative fines were established by emergency ordinances and the Constitutional Court endorsed them as constitutional. Administrative fines can also be established by secondary legislation. The two judges mentioned earlier dissented from the majority on this aspect, too, emphasizing that

> “the lack of elements allowing the differentiation of administrative penalties, corroborated with the substantial increase of the amount of the fines, can lead to the conclusion of infringing the principle of proportionality required by Article 53 of the Constitution and not of Article 115 (6).” *(Concurring Opinion, paragraph 17)*

The Conundrum of the State of Alert

As the state of emergency approached its end (in a very tense political climate generated by the open conflict between the President and the parliamentary majority), the President of Romania said, in a press statement, that from 15 May it will be replaced by a “state of alert/ *stare de alert#*”, as part of the “exit plan” of the authorities. Therefore, the framework legislation on the state of alert came into the public eye. The state of alert is not one of the states of exception provided for by the Constitution. Therefore, its regime is provided by a framework law – in fact, another emergency ordinance – EGO no. 21/2004, approved by the Parliament by Law no.15/2005. According to this EGO, the state of alert is “the response to an emergency situation determined by one or more types of risk, consisting in a series of temporary measures, proportional with the degree of seriousness (…)

and necessary for the prevention and removal of imminent threats to life, health, environment (…)" and can be instituted by a resolution of the National Committee for Special Emergency Situations (an inter-ministerial organ established by the same law), with the approval of the Prime-Minister and on the proposal of a ministerial committee for emergency situations.

The situation started to escalate quickly from the point of view of constitutional law. Days after the President's statement, the Ombudsman challenged the EGO 21 before the Constitutional Court, claiming, *inter alia*, that its dispositions regarding the measures to be taken during the state of alert (Article 4) are lacking clarity and predictability and therefore cannot impose restrictions on fundamental rights, as predicted by the President and the Government. On 13 May 2020, the Court issued its ruling in Decision no. 157/2020 and stated that the impugned act is "constitutional insofar as the actions and measures prescribed during the state of alert do not restrict the exercise of fundamental rights". Therefore, through this "interpretative decision" the Court considered that some of the provisions of the EGO – those which provide a possible "evacuation from the affected area", "the participation to community work activities" and "any measures necessary for eliminating the *force majeure*" – could "affect fundamental rights", thereby "infringing Article 115(6) of the Constitution". Unlike in the previous Decision 152/2020, which dealt with a similar problem regarding EGO 34/2020, the Constitutional Court did not rule that the impugned act is "wholly unconstitutional" but applied a substantive analysis of its provisions. Secondly, as stated in the separate opinion of the same two judges Tanasescu and Stanciu, the ordinance provides that the measures taken "should be proportional with the situations that determined them and are applied according to the conditions and limits provided by law", which could imply that the constitutional provisions regarding restrictions of rights are indirectly referred to.

Two days before the Constitutional Court's Decision, the Government announced that it was preparing a legislative initiative on the state of alert, which will be forwarded to the Parliament for adoption in emergency procedure. Debates in the parliamentary committees and fierce political negotiations started and continued over two days. The final draft provided, *inter alia*, that the state of alert can be declared by Government Resolution, for a limited period of 30 days and must be submitted to the approval of the Parliament within a delay of 5 days. The Parliament can also modify the terms of the Government Resolution. The draft law also provides various measures that restrict the exercise of rights and administrative and criminal offences and the corresponding penalties.

On 13 May, hours after the Constitutional Court's Decision was announced (but not yet published), the Parliament adopted the new law on the state of alert. However, this did not solve the conundrum. Due to the constitutional delays – two days to allow a request for constitutional review before promulgation and another three days after the publication in the official journal in order to enter into force – the law can only produce effects from 18 May 2020. Considering that on 14 May the state of emergency expired, the Government (more precisely the National Committee for Special Emergency Situations) was forced to declare a state of alert on the basis of the EGO 34/2020 in its initial form, for a period of 30 days and comprising specific

measures designed to fight the epidemic: limitations on the circulation outside the localities, obligation of wearing face masks in indoor public spaces, restrictions on public activities that involve a large number of people etc. Some of the restrictions instituted during the state of emergency were removed – e.g. the lockdown, the suspension of the activity of hairdressers and dental practices, the suspension of the activity of some stores including “shopping malls smaller than 15,000 sqm” etc. Restaurants, bars and terraces remain closed, as well as hotels, but museums can open. Schools and universities remain closed. Public religious service can only take place outside the churches and access to churches is restricted (max. 8 persons for private religious services such as weddings). Access to public and private institutions and companies must be preceded by an epidemiologic triage, which may comprise the filling of a questionnaire and the measurement of the body temperature. This is a problematic measure with respect to the individual right to privacy and other fundamental rights, because most of the times, although the consent of the person is requested, the procedure is carried out in public and by non-medical staff (e.g. a guard or a policeperson), without any guarantees of the accuracy of the devices used and of the relevance of the result from a medical point of view (e.g. a higher body temperature can be caused by other reasons than Covid-19, whereas asymptomatic carriers of Sars-Cov-2 might not present a higher body temperature but could still transmit the virus).

On 15 May 2020, the new law on the state of alert was promulgated by the President and published in the Official Journal. After its entering into force, on 18 May 2020, a new state of alert was declared by Government Resolution, on the basis of the new law, and it is pending the approval of Parliament.

Conclusions

Never before, in times of peace, has Romania been under such an extensive state of emergency. Never before have its citizens had to be submitted to such a strict lockdown and rights restrictions. The authorities were caught insufficiently prepared. The legislation on emergency situations was unclear and incomplete.

In these circumstances, the response was strong, but far from being perfect. Like in other countries, the measures taken by the authorities posed serious risks for certain rights, but it is also true that the rights restrictions were intended to protect other rights and values (public health, the right to life, the right to physical integrity, the individual right to health etc.). Most restrictions of rights were in accordance with the limits set by the Constitution. But there are also potential threats to the rule of law: the restrictions, based on the presidential decree, of the access to justice; the confusion on the state of alert and the adoption of a new law as a “last resort”, thus transforming the state of alert into a “parallel” state of emergency, not provided by the Constitution; the increase of corruption offences, especially as regards direct public procurement of medical supplies in the absence of transparent procedures. Last but not least, the behaviour of the Constitutional Court is not reassuring: in its use and abuse of the Constitution in interpretations that blatantly contradict the previous case-law. It must be pointed out that it is not the first time in its existence and especially in the last 4 years, that the Constitutional Court has become a political

actor, being involved in conflicts between political adversaries and deciding "legal" matters with a major political significance. The very recent ECtHR judgment *Kövesi v. Romania* emphasized the potential negative impact that such an involvement of a Constitutional Court would have on individual human rights. In the case of the sanitary crisis, the Constitutional Court's decision regarding the administrative fines was criticised because it reduced the effectiveness of the measures to fight the epidemic: after its adoption, on the one hand, the police agents were more reluctant in applying fines and, on the other hand, the rules of protection were more prone to be disregarded.

Nevertheless, in spite of all these inconveniences, the country managed, so far, to avoid a complete epidemiologic disaster. Maybe it is a matter of civic responsibility, maybe it is a matter of fear, maybe it is a matter of a subconscious nostalgia for authoritarianism and drastic rules, maybe a combination of all. As to the political and constitutional consequences, which are also inevitable, the conclusion still remains to be drawn. The fact that 2020 is an electoral year had an important impact on the crisis management: on the one hand, the political conflicts increased, but, on the other hand, the fact that the power did not belong to the same political majority (the President and the Government vs. the parliamentary majority) hindered potential major abuses of one of the actors, especially of the President, who has special increased powers in the context of the state of emergency. Parliamentary and local elections will take place at the end of the year, perhaps also in a time of pandemic. Surely, the decisions taken by all political actors from the beginning of the crisis will influence their result.