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# COVID-19 Legal Insights



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## 1. Who legislates during the state of emergency?

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This text discusses which authority should legislate during the state of emergency declared in Romania, particularly when the laws and regulations seek to limit the exercise of the fundamental rights and freedoms provided by the Constitution or to amend or suspend the existing legislative framework. The question of knowing who has the power to legislate in such exceptional circumstances is extremely important as a matter of principle.

#### 1. Practice

Two presidential decrees were issued and regulate the state of emergency, i.e. Decree No. 195/2020 in force as of 16 March 2020 and Decree No. 240/2020 in force as of 15 April 2020. These two decrees limited certain fundamental rights, namely (a) free movement; b) the right to privacy; c) inviolability of private premises; d) the right to education; e) freedom of assembly; f) the right to private property; g) the right to strike; h) economic freedom, while a series of directly applicable so-called measures of first emergency were adopted, such as direct procurement of goods by public authorities, suspension of certain public officials from management positions, prescription terms and forfeiture terms being suspended or not starting to run, suspension of civil and criminal trials, discontinuance of the time-limits for filing for appeal, etc. The Constitutional Court declared, in its Decision of 6 May 2020, that such measures are explicitly or implicitly derogations from the laws in force when the state of emergency was declared.

#### 2. Theory

The state of emergency is declared by the President of Romania in accordance with Article 93 of the Constitution and Article 14 of Government Emergency Ordinance 1/1999 concerning the rules of the state of emergency. The President has an obligation to ask the Parliament to approve said measure within 5 days after taking it. If the Parliament is not in session, it will be convened de jure within maximum 48 hours after the state of emergency is declared and will operate while the state of emergency is effective.

Nevertheless, the President does not have legislative powers *per se*, and the Parliament is and remains the supreme law-making authority. Under strict conditions and subject to the Parliament's control, the Government is able to pass primary enactments by means of simple or emergency ordinances.

### 3. Relevance

Many scientists, activists and politicians have been warning us for some time that we are surrounded by threatened catastrophes of giant proportions: there already is a *climate emergency*, the coral reefs are dying, we are in the midst of the *sixth mass extinction* but also of other existential *threats*, such as the rise of artificial intelligence, nuclear war, catastrophic volcanic eruptions, immense migration. All these notwithstanding all kinds of swine fevers and bird flus, which, in the experts' opinion, require nothing less than the *en masse* killing of thousands or millions of healthy animals. Faced with all these risks, it seems we are accelerating towards a state of permanent emergency, or at least towards one that is so repeatable that it becomes commonplace. The precedent now created from a legislative point of view is therefore essential for the direction that society will take in the future.

### 4. The limitation of fundamental rights is of exceptional nature

The most important rights of Romanian citizens are acknowledged in the Constitution. They may only be limited under the law and only proportionally to the threat against which a response is sought. The matter of proportionality is a problematic one since no clear boundaries are in place. It requires an analysis conducted on a case-by-case basis, which at times may lead to different outcomes, depending on who carries out the analysis. However, theoretically, it implies that the measures taken must be adequate in relation to the practical objective that is pursued and with the social need that must be solved. For instance, if our objective is to eliminate deadly car accidents (or perhaps to reduce gas emissions), the measure that will most definitely lead to achieving this objective would be to limit free movement (*la liberté d'aller et venir*, as beautifully put by the French) by forbidding the use of vehicles. Nevertheless, such a measure is not proportional considering that the number of accidents may also be reduced by less severe regulations, such as imposing a speed limit, safer cars and roads, technological improvements, etc. It may seem like a speculation, but such a measure was actually adopted in Romania in the late 1980s, when the use of private vehicles was entirely banned during winter.

In the case of COVID-19, the measures limiting constitutional rights will therefore be valid only provided that they are proportional to the pursued objective. Nevertheless, a double issue arises here. First of all, nobody knows whether the measures severely limiting citizens' movement or completely shutting down industries were indeed proportional. We have at least one democratic European state (Sweden) and another one rather falling in the category of authoritarian states (Belarus) that enacted "lighter" legislative measures without this leading to the disastrous evolutions predicted by the applauders of sanitary desperation. In fact, an Israeli scientist noted that his *mathematical analysis* demonstrated that the spread of COVID-19 peaks after 40 days and declines to almost zero after about 70 days, regardless of the measures imposed by governments.

Another rule is for the measure to be adequate in relation with the objective pursued. In this case, the problem is that the objective pursued by the authorities was rather unclear. Was it to completely eliminate the pandemic and kill the Sars-Cov-2 virus? Or merely to temporarily slow down the pandemic? Or maybe some other objective?

Perhaps it would be worth noting that GEO 1/1999 does not allow for the state of emergency to be declared in case of epidemics or pandemics or, generally, in case of sanitary threats, but rather for: a) current or imminent serious threat against national security or against the operation of constitutional democracy; or b) the imminent occurrence or the actual occurrence of calamities that require prevention, limitation or mitigation, as appropriate, of the consequences of disasters.

#### **5. The fundamental rights may only be limited under the law**

A question that could arise is whether the Parliament is able to merely indicate the possible restrictive measures that can be imposed throughout the state of emergency, while such measures would be actually implemented by the government bodies. Theoretically, this mechanism is possible, however only provided that Article 53 of the Constitution is observed, which in fact drastically limits such an option. Article 53 of the Constitution allows for the limitation of fundamental rights to be imposed under the law. This would not necessarily exclude the government's entitlement to adopt restrictive measures, yet it seems necessary for the Parliament to decide at least the practical criteria that must be considered by the government.

#### **6. But is there time to legislate?**

There is a strong pragmatic justification for the shift of the legislative powers to the executive branch. The state of emergency means, well, a sense of urgency, namely the need to rapidly respond to exceptional situations - and parliamentary procedures do not necessarily excel in rapidity. On the other hand, the Constitution is clear when stating that the fundamental rights can only be limited by means of a law (which is an act of the Parliament; the issuance of simple Government ordinances could potentially be allowed) and that no regulation allows the suspension or amendment of existing legislative provisions by means of legal acts issued by the government.

It is true that the declaration of the state of emergency was approved by the Parliament, yet the decisions taken by the latter do not seem to also ratify the detailed measures imposed under the presidential decree. Quite the contrary, Decision No. 4/2020 of the Parliament provides that, during the state of emergency, the limitation of the exercise of certain rights or freedoms can only be ordered by law.

#### **7. Effects of the Decision of the Constitutional Court of 6 May 2020**

The Constitutional Court referred the [\*Ombudsman\*](#) with a plea of unconstitutionality of certain provisions in GEO 1/1999 concerning the rules of the state of emergency. The Court broadly dismissed the plea but noticed that the presidential decrees are issued *ultra vires*, i.e. by exceeding the constitutional duties conferred upon the President by the Constitution or by GEO 1/1999. The

President's Decrees are administrative and normative in nature, and the Court lacks jurisdiction to rule on the legality thereof. Hence, formally, the presidential decrees are not (yet) affected.

As regards the finding of the Court, it is however possible to initiate administrative claims seeking annulment of the presidential decrees and compensation for the damage incurred by the individuals who are affected by the measures limiting their fundamental rights and freedoms. An essential aspect that should be clarified by the administrative courts is the extent to which they are or are not bound by the reasons of the decision given by the Constitutional Court on the President exceeding his constitutional and legal duties. If the decrees are annulled, the annulment thereof shall only be effective for the future, but the entitlement to compensation for the damage incurred shall remain unaffected in principle.

## 8. How other countries have dealt with the issue

Certainly, the COVID-19 crisis generated *major challenges* in relation to the respect for the rule of law and for the fundamental rights of citizens. The measures taken in this context are essentially unprecedented in the history of humankind. Almost 4 billion people, more than half of the planet's population, were forced *to stay* at home for several weeks, and the state of lockdown shall only be lifted gradually and with severe limitations.

Not all countries declared a state of emergency when faced with the crisis. England approached the issue at the parliamentary level, by adopting the *Coronavirus Act*, a 359-page law, which, interestingly enough, *does not confer* upon the government any powers in relation to the lockdown. On the other hand, the measures restricting free movement were adopted based on a legislative instrument passed based on the 1984 Public Health Act. The measures ordered by the British government and the alleged lack of transparency thereof are currently *being challenged* in court. Also, in *Germany* or in *Canada*, the state of emergency was not formally declared at national level.

## 9. Conclusions

Within the current constitutional framework, the measures limiting the exercise of fundamental rights and freedoms, as well as the change of the legislation in force can only be implemented by laws passed by the Parliament (excluding, insofar as the fundamental rights are concerned, the emergency ordinances, according to Article 115 of the Constitution). The bodies of the executive branch are able to pass acts for the enforcement of the law, but not for the amendment or the suspension thereof. However, the state of emergency can only be managed efficiently through the loyal collaboration of all authorities involved in the legislative process, and the Parliament and the Government have the duty to respond efficiently in order to take the most suitable legislative measures.

Pursuant to the decision of the Constitutional Court of 6 May 2020, those affected by measures taken at the level of the executive branch, whereby the fundamental rights are limited or the primary law in force is changed, have the option to initiate administrative complaints seeking annulment of the relevant administrative acts and compensation for the damage incurred.

## Editors

**COVID-19 - Legal Insights** is our response to the COVID-19 outbreak. We shall keep you informed on the various legal challenges posed by the coronavirus, thanks to a dedicated practice group comprising lawyers with different backgrounds, such as compliance/regulatory, corporate and commercial, insurance, labour and employment, litigation and arbitration, insolvency, public procurement, data privacy, tax and customs. In addition, our taskforce offers strategic advice on crisis-specific matters: corporate restructuring, review and (re)negotiation of agreements (including collective bargaining agreements and individual employment contracts), performance of the contracts which are affected by force majeure and hardship, unblocking pre-litigation relationships, etc. To be up to date with the news in these matters, you may access the resources available at the following link: <http://www.tuca.ro/covid-19/>



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