



The Legal Concept of “State of Emergency”: A Comparison Between Romania and Other European Countries

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Abstract: We aim at identifying the characteristics of “state of emergency” in Romanian legislation, and how it compares in international context. There is important work done on the following related topics: the state of emergency in Romania, the state of emergency as an international concept, and comparisons on this matter between different countries. The legal concept of “state of emergency” in Romania is compared to that from other countries, namely France, Germany, Italy, and Hungary, as well as put into a wider international context. In order to make this comparison, we study several laws and the related literature review, and then create country-focused case studies. Romania has a balanced, rule-of-law approach concerning the state of emergency. The probability for abuse is lower than in other states. This paper contributes to the understanding of the concept of “state of emergency” in Romanian law, useful for both researchers, and policy makers. This subject is of the highest relevance in the context of the 2020 state of emergency in Romania, but also because of the lack of a paper on this topic that puts Romania at the centre of the analysis.

Keywords: state of emergency; emergency powers; state of exception; martial law

1. Introduction

The importance of the legal concept of “state of emergency” cannot be denied, since it enables the authorities to take measures for the greater good in the context of life-or-death struggles. In defining this concept, legislators from different countries have struck different balances between conserving the rights and freedoms of their citizens, and granting more power to the authorities of the state. On one hand, this concept is completely necessary in for a swift and adequate response in the face of immediate and significant danger. On the other hand, it is potentially dangerous in relation to essential human rights and freedoms

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This concept was first introduced in the Western European space in the 19th century. Theoretically, the concept of “state of emergency” is built on the dichotomy between norm and exception, which some authors criticise as being “somewhat artificial” and because it “endorses a bifurcated approach to balancing the interests of societal goals and individual rights” (Sheeran, 2013, p. 493). There are two main schools of thought concerning the state of emergency: the *rule-of-law* school, and the *sovereignty* school. The second favours the establishment of clear laws, norms and rules for the state of emergency, while the second flows from the idea that the state of emergency is extrajudicial, something that cannot be reduced to prior laws (Sheeran, 2013, p. 500).

Although several studies have conducted comparisons in relation the legal concept of “state of emergency”, none have put Romania in the center of the discussion; they are either extensive studies, concerning a high number of countries, such as the one by Anna Khakee, or limited-scope studies, focusing on other countries rather than Romania, such as the paper of William Feldman.

2. The Concept of “State of Emergency” in Romanian Law

The Romanian “state of emergency” legal concept and main provisions follow the *rule-of-law* approach. The main sources of Romanian law concerning the concept of “state of emergency” are the Constitution, Emergency Ordinance of the Government no. 1/1999, Law no. 453/2004 and Law no. 164/2019. The Constitution does not define the state of emergency, but offers some clarifications regarding the powers of the president, and the parliament, as well as the relation between it and some types of laws.

The state of emergency signifies a set of exceptional measures which can be political, economic or related to public order; these can cover the whole country or can be limited to some administrative-territorial regions. This official definition for the state of emergency is included in the Emergency Ordinance of the Government no. 1/1999, which was actually approved through Law no. 453/2004. These measures can only be declared by authorities in such crisis situations that require exceptional measures, which are necessarily determined by at least one of the following:

- a disaster or a calamity (more precisely, the efforts to limit or completely eliminate it);

- grave dangers regarding Romania's defence and security;
- grave danger regarding Romania's constitutional order.

In order to prevent the abuse of the extensive powers associated with the state of emergency, the law contains some important specifications. First of all, the calamities or dangers invoked need to be imminent or to have already happened. Second of all, the state of emergency can be maintained "only in the measure required by the situations that cause it", according to art. 3 of the Emergency Ordinance of the Government no. 1/1999. Third of all, the international law must be respected, and not all rights can be restricted – under the state of emergency, the following remain illegal: the limitation to the right to live, torture and degrading or inhumane treatments or punishments, including torture, condemning individuals for crimes not included in law, and limiting the access to justice. In general, the rights and freedoms of individuals can be restrained, as long as these are not in the category of fundamental rights or freedoms.

The state of emergency can be established in Romania only with the decision of the President, according to Constitutional law. Normally, the Parliament has to approve or reject this decision within five days, at most. However, there is an exception: if the Parliament does not sit in session, the state of emergency is automatically approved in 48 hours. In the literature, the role of the Parliament in this matter is described as a "guarantor against possible abuses" (Levai & Tomescu, 2012, p. 91). The regulation of the state of emergency can only take place through organic law. Moreover, the state of emergency brings exceptions to the usual Constitutional order:

- the mandates of the Chamber of Deputies and the Chamber of Senate can be extended beyond the normal term of office of four years;
- the Parliament cannot be dissolved;
- the Constitution cannot be revised.¹

Not least, the state of emergency implies several important changes to the central and local administration. Certain attributes of both local public administration, as well as specialised central public administration are transferred to either military authorities, or other public authorities, depending on the particular case of the

¹ Romania (2003). The Romanian Constitution, amended and supplemented by the Law on the revision of the Romanian Constitution no. 429/2003, published in the Official Monitor of Romania, Part I, no. 758 of October 29, 2003.

emergency. Moreover, the rest of the authorities are under the obligation to support the former.

The actual authorities that are responsible for coordinating the emergency measures are determined by the nature of the threat. On one hand, in the case of national security or democracy related threats, the implementation is the responsibility of the Ministry of Internal Affairs, and the Local Police can be totally or partially transferred under the Ministry's authority. On the other hand, in the case of a disaster or calamity, the implementation becomes the responsibility of the National Emergency Management System, which is directly overseen by the Minister of Internal Affairs and coordinated by the Prime Minister. Depending on the case, the Ministry of Internal Affairs or the National Emergency Management System can issue military ordinances and orders.

These main legal provisions concerning the implementation of the state of emergency amidst the authorities are supplemented by provisions concerning economic, transport, and communication operators.

3. The Concept of “State of Emergency” in Different European Countries

3.1. The State of Emergency in France

The concept of “state of emergency” is introduced in the French Constitution in article 16, where it is not named as such, even though the term is later used twice, in articles 42 and 48. The French concept rather uses the sovereignty approach, rather than the rule-of-law approach. The President is given extensive powers, with no details about their limitations being provided in the Constitution. In order to establish a state of emergency in France, at least one of the following must be true:

- There are serious or immediate threats to the public institutions, to the independence of France, to its territorial integrity or to the fulfilment of its international commitments;
- The constitutional public authorities cannot function properly and are interrupted from doing so.

Before declaring state of emergency, the French president is required to have a formal consultation with the Prime Minister, the Constitutional Council and with the Presidents of the Houses.¹

The literature contains balanced opinions on the subject of how the state of emergency is regulated in France. Ackerman notices that, on one hand, “the French solution is undoubtedly extreme”, and on the other hand, it should be taken into consideration that “a constitution’s framers cannot know the details of the particular apocalyptic threat endangering the regime before it happens. Given their ignorance, any effort to restrict emergency powers may deprive the government of the very tools it needs to counter the threat to its survival” (Ackerman, 2004, p. 1038). However, when comparing the French system with the American one, Feldman considers that, even though both can be subject to abuse, the French one has the advantage of involving more branches of the government in the process of decision-making, and, therefore, is better able to deal with emergency issues (Feldman, 2005, p. 1048).

For a fully democratic and developed state, extensive powers, as are the ones in France’s case, increase the efficiency of a state’s response in the face of danger. However, for less developed democracies, such a system opens the path to abuse in relation to the rights and freedoms of its citizens.

3.2. The state of Emergency in Germany

Because the state of emergency was historically significantly abused in Germany, the German Constitution was modified with plenty of limitations and rules concerning the implementation of the state of emergency. These amendments are so detailed that Khakee notices that they “encompass aspects of emergency rule that few other constitutions (or even ordinary laws) touch upon” (Khakee, 2009).

In the German Constitution, the term “internal emergency” is used in order to refer to an imminent danger posed to the free democratic order or to the existence of the Federation or of a Land. When there is an internal emergency, police forces can be supplemented from other Lands.

Unlike some other Constitutions, the German one does not have a single section

¹ France (1958). The French Constitution, adopted by the referendum of September 28, 1958 and promulgated on October 4, 1958. French text and English translation. New York: French Embassy, Press and Information Division.

dedicated to the state of emergency. For example, Article 104b regarding the financial assistance for investments also contains provisions applicable in times of exceptional emergencies or natural disasters.

Moreover, the German Constitution introduces the concept of “legislative emergency”, under a very particular set of conditions: if an urgent legislative bill is rejected, the Federal Government requests it, the Bundesrat agrees and other conditions. Another type of emergency is “the budgetary emergency”.

The list of provisions regarding the state of emergency includes: how to declare and how to end a state of defence, in what conditions and in what manner the two houses of the Parliament can be replaced by a Joint Committee and more.¹

3.3. The state of Emergency in Italy

In the Constitution of Italy, only wartime is mentioned. Article 78 specifies that during a war, the Government can adopt decrees with the same force of law which can derogate from some rights and freedoms. There are some laws that provide extended administrative powers in states of emergencies.

Some authors consider that the text of the Constitution requires updating in order to include emergencies other than war. The recent decrees are thus justified, but, from a legal point of view, they “emphasise the lack, in the Italian Constitution, of a framework regulating emergencies”². A possible explanation for this situation is linked to avoiding the concentration of power, because of the Fascist history of Italy.

3.4. The State of Emergency in Hungary

The Hungarian Constitution is a special case in relation to the concept of state of emergency, because it sets apart five different types. Besides the actual state of emergency, it also includes state of danger, state of national crisis, preventive defence emergency and state of war. A state of emergency can be declared by the

¹ Germany (1949). *Basic Law for the Federal Republic of Germany*. Retrieved from <https://www.refworld.org/docid/4e64d9a02.html>

² Vendaschi, A., Graziani, Ch. (2020). Coronavirus Emergency and Public Law Issues: An update on the Italian Situation. Retrieved from <https://verfassungsblog.de/coronavirus-emergency-and-public-law-issues-an-update-on-the-italian-situation/>

Parliament (or, if the Parliament is unable to do so, by the President) in the following situations:

- armed actions aimed at overturning constitutional order;
- armed actions aimed at the acquisition of exclusive control of public power;
- acts of violence committed by force of arms or by armed groups which gravely endanger lives and property on a mass scale;
- a natural or industrial disaster.¹

The Constitution of Hungary contains a high level of detail concerning the manner and conditions in which a state of emergency can be declared, maintained, or removed.

4. How does the Romanian Concept of “State of Emergency” Compare to other European Cases

First of all, there is a terminological difference to be taken into consideration when discussing the concept of state of emergency. Not every country uses the same terminology. In some cases, such terms are used: “state of exception”, “state of siege”, “martial law”, or even “doctrine of necessity” (in Switzerland). In Romanian law, the concept of “state of siege” exists alongside with “state of emergency”, but the first only refers to the exceptional measures undertaken in order to increase the country’s defence capacity, in certain situations.

Second of all, some countries primarily rely on the Constitution for the definition and explanation of the concept of “state of emergency”, but this is not the case of Romania. The concept is introduced in the Constitution with some important provisions, but the extraconstitutional norms are key in understanding this legal concept, because they include the definition, the two types of state of emergency, in what cases it can be declared, who is responsible for the implementation of measures, and what are the rules (extended rights and prohibitions) that these authorities must follow.

Therefore, when comparing Constitutions, the concept of the “state of emergency” in Romania seems to belong in the category of the sovereignty approach, but,

¹ Hungary (2011) *Fundamental Law of Hungary*. Retrieved from <https://www.refworld.org/docid/53df98964.html>.

taking in consideration extraconstitutional sources, it is clearly a rule-of-law approach.

In some cases, especially in presidential republics, the state of emergency can be declared at the discretion of the President. Such an example is the United States of America, where legislation concerning the state of emergency and emergency powers can be traced back until 1775 (Relyea, 1976, pp. 36-42). More exactly, as far as the institution of the state of emergency is concerned, there are three main approaches:

1. The state of emergency is declared by the executive branch (usually, the President), which has the obligation to inform the Parliament in a given time frame – the case of the USA;
2. The state of emergency is declared by the executive branch, and ratified by the legislative branch (the President declares state of emergency, and the Parliament approves or rejects it) – the case of Romania and Germany;
3. The state of emergency is declared by the legislative (the Parliament) – the case of Hungary.

Romania has a more limited and, therefore, a more secure approach to the conditions necessary in order to declare the state of emergency. For example, the Romanian legislation does not contain a condition related to the impossibility to fulfil international commitments, as there is the case in France.

The Romanian approach to the state of emergency is a differentiated one, which not only introduces the separate concept of “state of siege”, but also creates two separate types of state of emergency, based on the reason why it is invoked. This approach is commended in the literature: “a system that allows for a differentiated approach [...] is less prone to political over-reaction than one that comprises only one single form of emergency powers” (Khakee, 2009, pp. 10-11).

5. Conclusion

The state of emergency is a legal concept which is necessary in order to have an adequate response from the authorities when faced with exceptional challenges. However, it can be dangerous in relation to some human rights and freedoms, since it can be a cover for abuse.

Romania has a rule-of-law approach concerning the state of emergency. When compared with other states in the region, it has a medium degree of detail. Some countries, with a history of abuse in relation to this concept, have much more information in their Constitution (Germany, Hungary), in order to protect their citizens and the state in emergency situations, without dangerously concentrating the powers of the state. Others barely cover the minimum legislative necessities, referring only to particular emergency situations, leaving other cases without legislative cover (Italy).

The probability for abuse is lower than in other states, since both the President and the Parliament have to agree on the necessity of declaring state of emergency. The situation when the situation is too dire and this is not possible was also included in the Constitution, for cases when the Parliament cannot assemble. However, the main source of legislation concerning the state of emergency is extraconstitutional. Even though a detailed account of this concept is not required in the Constitution, future revisions could include the definition and the cases when declaring state of emergency is now possible, which are now part of the Law no. 453/2004 for the approval of the Emergency Ordinance of the Government no. 1/1999. This could both help prevent future abuses – such as those stemming from changing the aforementioned law – and make the concept of “state of emergency” easier to understand for the wider public.

Further research could apply the same method for the concept of “state of siege” or make a wider comparison between different approaches in the matter of “state of emergency”, which would include other countries, possibly from other regions.

References

Ackerman, B. (2004). The Emergency Constitution. *Yale Law Journal*. Vol. 113, No. 5 (March, 2004), pp. 1029-1091.

Emergency Ordinance of the Government no. 1/1999 regarding the state of siege and the state of emergency. *Official Monitor* No. 22, from 21 1999.

Feldman, W. (2005). Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege. *Cornell International Law Journal*. Vol. 38, No. 3, pp. 1021-1048.

France (1958). *The French Constitution, adopted by the referendum of September 28, 1958 and promulgated on October 4, 1958*. French text and English translation. New York: French Embassy, Press and Information Division.

Germany (1949). *Basic Law for the Federal Republic of Germany*. Retrieved from <https://www.refworld.org/docid/4e64d9a02.html>.

Hungary (2011). *Fundamental Law of Hungary*. Retrieved from <https://www.refworld.org/docid/53df98964.html>.

Khakee, A. (2009). *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe*. Geneva: Geneva Centre for the Democratic Control of Armed Forces.

Law no. 453/2004 for the approval of the Emergency Ordinance of the Government no. 1/1999 regarding the state of siege and the state of emergency, *Official Monitor* No. 1052, from 12 November 2004.

Law no. 164/2019 for modifying and completing Emergency Ordinance of the Government no. 1/1999 regarding the state of siege and the state of emergency, *Official Monitor* No. 811, from 7 October 2019.

Levai, M.C. & Tomescu, C. (2012). Atribuțiile președintelui României în raport cu parlamentul – aspecte teoretice și practice. *Revista Transilvană de Științe Administrative*. Vol. 1, No. 30, pp. 84-105.

Relyea, H. (1976). Declaring and terminating a state of national emergency. *Presidential Studies Quarterly*. Vol. 6, No. 4 (Fall), pp. 36-42.

Romania (2003). The Romanian Constitution, amended and supplemented by the Law on the revision of the Romanian Constitution no. 429/2003, *Official Monitor of Romania*, Part I, No. 758 of October 29, 2003.

Sheeran, S. (2013). Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics. *Michigan Journal of International Law*. Vol. 3, No. 3, pp. 491-557.

Vedaschi, A. & Graziani, Ch. (2020). *Coronavirus Emergency and Public Law Issues: An update on the Italian Situation*. Retrieved from <https://verfassungsblog.de/coronavirus-emergency-and-public-law-issues-an-update-on-the-italian-situation>.