

## State of Emergency Decrees and Laws Legislative Delegation in the Rule of Law

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### **Abstract:**

*Like any state, and the rule of law can go through moments of crisis, triggered either by internal factors or external factors. Serious hazards may threaten the rule of law and the normal social life, economic and political. In such situations it is needed sometimes prompt and vigorous measures limiting citizens certain rights and a transfer of certain powers of Parliament over the Executive. Taking these steps should be within the limits set by the Constitution, taking into account that today constitutions are based generally on the idea of rule of law.*

**Keywords:** *constitution, rule of law, legislative delegation, state of emergency, law decree*

### **1. GENERAL CONSIDERATIONS**

The old Roman principle "salus rei publicae suprema lex" (state saving is the supreme law) He meant that when exceptional circumstances that can put in danger the very existence of the state, its bodies may take appropriate action even if to do so would violate the law. Under this principle, as saving the state is the supreme law, all others must obey its laws.

Principle "Salus reipublicae suprema lex" reported to the idea of rule of law or as we express Cicero, "inter weapon silent leges" would be to say: whenever occurs a state of emergency, state bodies can assess the circumstances the extent to which laws will be applied. [1, p. 126] If the end of the last century some German jurist of great prestige (Gerber, Ihering, Jellinek) tried to argue that the state ceases to be subject to the laws that he himself set when they no longer serve their interests, today is outdated one also because conception is not compatible with the idea that the state is not only an instrument in the service of the people. Since the State can not invoke the interest of which would be in contradiction with all rights, rule of law can only be foreign to the idea that he ceases to be subject to the laws when those rights are contrary to the interests of. [2]

To combat the serious dangers that can threaten the rule of law and strong measures should be taken without further delay. As the prolonged debate and parliamentary procedure involves the assertion of divergent views, it is too slow to be able to react in exceptional circumstances. Therefore, to combat hazards that threaten the existence of the state is required by the government exercise of duties which parliament. This may be because it is an organ of state government based on a closer cooperation and solidarity among its members and is endowed with the capacity to act faster. [1, pp. 126-127] Thus, in the special circumstances necessary to limit citizenship rights.

Given these realities inherent in any society, most constitutions based on the idea of rule of law allow a transfer of certain powers of parliament over the executive in exceptional conditions and limitations on citizens' rights. The problem presents no difficulty in legally if flexible constitutions. Thus, in England, as parliament powers are limited by legal rules with a higher value ordinary laws, it may delegate any of its powers to the government to deal with exceptional conditions. There were also practiced in England delegate powers during the two world wars, in emergency situations.

We must point out that the English parliament has used its power government delegation in peacetime, when in exceptional circumstances considered that it was unable to act quickly enough.

For countries that have constitutions rigid matter is more complicated, however, and the US Constitution in 1787 which is the oldest constitution in the world, contains provisions Crisis allow parliament to transfer certain powers of government or make restrictions of individual freedoms.

When the constitution of a country includes provisions Crisis allow parliament to transfer certain powers of government or make restrictions on individual freedoms only condition that is required for these measures to take place is that this is done within the limits set by constitution. Any empowerment of the government is limited in time. [3, p. 200]

Today all constitutions based on the idea of rule of law and include provisions for exceptions for the state of emergency. Astfe, the Italian Constitution of 1947 states: "In

exceptional cases of necessity and urgency provided by law authorities public safety may take provisional measures that must be communicated within 48 hours to the judicial authorities and if the authority does not confirmed in the next 48 hours are considered as retracted and remain without any effect" [Article 13 (IV)]. Article 77 of the same Constitution provides that "no government delegation Chambers can not bring decrees having the force of ordinary law." The Constitution specifies both where the state of emergency can lead to the loss of certain freedoms and the conditions that allowed a transfer of powers from parliament to the government.

And the German state of emergency constitution is object of regulation. Thus, article 80 of this constitution recognizes that Parliament may delegate certain powers to the federal government, a federal minister or Länder governments provided by law to determine the contents, purpose and scope of that authority. By Federal Law of 24 June 1968 the German was introduced X section devoted entirely to state regulation of defense.

The state of necessity in the French Constitution of 1968 has a vague regulation in art. 16; This article states: "When the institutions of the Republic, national independence, territorial integrity or her execution of international commitments are threatened in a manner serious and immediate and regular functioning of public powers constitutional interrupted, President of the Republic shall take measures required by these circumstances, after formally consulting Prime Minister, the Presidents of the Assemblies and the Constitutional Council. He informs the nation by a message. "According to this article two guarantees were instituted to prevent the abusive exercise of his powers the President of the Republic. A guarantee is that if implementation of article 16 of law Parliament meets, and the second is that the National Assembly can not be dissolved during the exercise of exceptional powers. [4, p. 201]

We have given some examples of rigid constitution which allowed even by their text transfer of powers from parliament to the executive in crisis. We must emphasize, however, that not all European constitutions rigid based on the idea of rule of law have established in the past (eg the French Constitution of 1785 or the Romanian Constitution of 1923) provisions to allow a delegation of power from parliament to the

government when there is a state of necessity while others do not devote even today (eg Belgian Constitution) provisions on the delegation of powers from parliament to the government when necessary but mostly by setting curfew certain powers to ensure public order State temporarily transferred from the jurisdiction of civilian bodies on the military authorities.

If the Constitution does not contain provisions regarding the authorization of Parliament to delegate, in crisis, some of the functions of government, but also for governments introduced by the revolution up until the election of a new parliament legislates about government decrees fundamental problem was that the constitutionality of legislative measures taken on the basis of such decrees. In this case there were extensive discussions that one of the rules of public law is that "delegata potestas non delegatur".[5, p. 7] This means that since the constitution has assigned a specific skill organ it may not in whole or in part, to pass on to other state bodies. To do so would be a breach of the letter and spirit of the Constitution, which aims to ensure a balance between state powers through its division of powers between the organs so that it can be declared rights and freedoms. [6, p. 9]

Literature has tried to justify the practice of MPs in crisis conditions have vested the government with broad powers even though the constitution does not contain any provision in this respect, so the government has become a legislator goes to adopt so-called decree laws, that acts which varied, suspended or repealed laws. The justification for recourse to such laws empowerment starts from the idea that there is a practice of the State is that sprang from the general belief and become established within the human community of the state that is the right of Parliament that in exceptional circumstances to delegate the government its powers. [7, p. 5] true custom would be made in this respect and has criticized G. Vedel. [8, p. 499] Of course, it is difficult to accept such an explanation because it is not true that a *communis opinio* this content would exist in different countries resorting to laws of delegation of powers of parliament and the practice decrees law is considered by eminent jurists and important sectors society as unconstitutional.

Another theory in this regard Parliament raises the possibility of turning some legal regulations legally binding regulations by administrative regulations. The government is competent to intervene with its own legal acts in areas of social relations determined.

As stated prof. Tudor Draganu justifications tested material are not convincing and so many authors have concluded that in countries that have constitutions stiff devotes theory the state of emergency "any law that some powers of Parliament would be delegated by the government is unconstitutional therefore decrees and laws based on government data they are illegal." [1, p. 130]

In terms of political government can be accused to the extent that invokes immediate and serious danger to the state under which it operates. In such circumstances, however, the government must submit to Parliament for ratification at the nearest law decrees session to make government act into law. We should mention that the ratification defects are rectified decree law only for the future but not the past. [2; 9]

We share the view prof. Tudor Draganu, that the only solution which we consider rigorously grounded in legal terms is that in a democratic society are inevitable state of crisis, and the idea of rule of law requires that they find regulations appropriate in the constitution whenever they have a rigid character.

In Romania, the Constitutions of 1866 and 1923 did not contain any provision which would allow parliament to delegate some executive functions of the state of emergency. However, in practice the State recognized executive decrees the right to take the necessary measures to preserve state laws provided that they are subsequently ratified by parliament.

## **2. REGULATING THE STATE OF EMERGENCY AND LEGISLATIVE DELEGATION IN THE CONSTITUTION OF 1991**

The question of necessity and state legislative delegation have occupied an important place in the development preoccupations Constituent Romanian Constitution in 1991. The exceptional measures that can trigger a state of emergency since 1991 revised Romanian Constitution regulates two assumptions:

a) in the event of armed aggression against the country President of Romania is authorized to take measures to repel the aggression, and will immediately bring them to the attention of Parliament (Article 92). If Parliament is not in session it shall be convened de jure within 24 hours; in the event of mobilization or war, the Parliament continues its work throughout these states.

b) of the state of siege or emergency (Article 93). The 1991 Constitution does not specify the conditions under which the state of siege or state of emergency may be proclaimed or legal consequences of their establishment. The Constitution establishes the competent body to (President). Since the establishment of the state of siege and emergency involves the restriction of individual rights and freedoms, article 93 of the Constitution of 1991 subject to the condition that a Romanian president to seek Parliament's approval for the measure adopted within 5 days of taking them.

Legislative delegation is regulated by the 1991 Constitution distinct from the revised state of siege or of emergency, being conceived as an independent procedure to the existence of exceptional circumstances. A special way of conducting relations between parliament and government is the legislative delegation (article 115). Whereas legislative delegation involves transferring some powers of the parliament by the government this involves a special law enabling the nature empower the government to issue ordinances. This law must specify the deadline by which such orders may be issued, provided that orders can not be issued in matters covered by organic laws (eg property regime, the status of civil servants etc).

Another way of legislative delegation consists ordinances. They will come into force only after their submission to Parliament for approval. If the parliament is not in session shall be convened necessarily. Parliament can approve or reject those orders through a law that explicitly specify this. It explained this solution because according to the Romanian Constitution the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country. According to the view expressed by the authors specialty parliament has unlimited jurisdiction because it received from the people directly related to the exercise of sovereign powers of power. [4, p. 200] This principle, which has become established in the constitutional practice is

not limited only to the condition of not violate the constitution or parliament to substitute other organs, which would contravene the principle of separation of powers. As regards government, whatever its empowerment to issue normative acts is normal to be limited in time and subject to certain circumstantiation relating to the areas it must cover. For this empowerment laws should define all the ways in which government legislative competence (jurisdiction exception) may be exercised. [10, p. 81; 11, p. 103]

In the theory, underline the fact that a law enabling the Government to issue ordinances by its simple content can not be regarded in itself as unconstitutional, but only orders that would be issued under the Act where they depart from constitutional principles. The jurisprudence of the Constitutional Court on the matter established that the meanings and limits enabling the Government action. The Constitutional Court Decision no. 75 of 13 July 1994 stated that, taking into account the provisions of Article 114 (Article 115 as revised in 2003) of the Constitution that the special law enabling the Government to issue ordinances can not concern the areas covered by organic law that sense of empowerment is the power investiture Government to establish legislative measures but not in any way affect these areas. Thus, materially, empowerment has a limited nature intended purpose not only in enabling law and the constitutional prohibition to go beyond the ordinary law through interference with the organic law. [12, pp. 201-211] The 2003 constitutional reform said better relations between Parliament and the Government and the circumstances in which the Government can issue emergency ordinances.

## **CONCLUSIONS**

Establish a curfew and state of emergency in the future supposed to be adopted in an organic law which determines, based on Article 73 of the Constitution, the limitations that will bring the rights and freedoms and possible transfers of competence from civil to military authorities. Thus, by joint decision of the Boards Parliament declares state of siege or of emergency, and if the President of the Republic, by decree, would establish such a measure; these bodies should operate to implement a pre-existing organic laws would only establish the territorial limits when and where individual freedoms and restrictions of transfers of competence to become operators.

According to article 115, paragraph (4) of the revised Constitution, the Government can only adopt emergency ordinances in exceptional cases, the regulation of which can not be postponed, and the urgency required to motivate their contents. The changes are in line with proposals made in the literature are likely to provide better and proper demarcation between the powers of parliament and government, avoiding situations where ordinances were adopted without taking into account the circumstances which really determines the use of this procedure thus respecting and monitoring reports of the European Commission on the issue of emergency ordinances.

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