ARTICLES

RESPONDING TO A MAJOR HEALTH CRISIS: STATES OF EXCEPTION AND THE RULE OF LAW. AN INTRODUCTION

Bianca SELEJAN-GUȚAN*

"*The pandemic is an economic crisis. A social crisis. And a human crisis that is fast becoming a human rights crisis*." (World Health Organisation)

Is the pandemic also a legal crisis? The present issue of the Romanian Journal of Comparative Law covers, from the perspective of comparative law, the most debated event in the last two years - the Covid-19 health crisis and the states' legal response to this major challenge extended at worldwide scale. Out of the numerous problems raised by the fight against the effects of the pandemic, the articles collected in this issue focus on the consequences of the states of exception in some European countries on the rule of law in general and on fundamental rights protection in particular.

The context of the start of the pandemic is well-known. It is also well-known that, regardless the diversity of legal systems and type of response of the various jurisdictions, there are many similarities in the states' reactions, including, in most cases the recourse to some kind of state of exception. Are these states of exception necessary in the context of such an extended and rapidly advancing pandemic? Are the measures taken within the framework of these states of exception proportionate with their purposes? Are these states of exception enhancing already established illiberal, authoritarian or dictatorial regimes? Are democratic authorities functional and can they fulfil their original tasks during the states of exception? How are the principles of the rule of law and fundamental rights protection affected by these states of exception ? These questions and others have been the concern of the editors of the journal when they asked

* Professor, Lucian Blaga University of Sibiu, Romania.

contributors from various jurisdictions to share their respective experiences. The contributions finally came from four jurisdictions, all EU Member States: France, Hungary, Poland and Romania. Despite the variety of solutions and degree of response, there are common features which will be highlighted below. It is worth noting, from the outset, that out of these countries, Poland is the only one where a framework-state of exception has not been declared, although exceptional measures have been taken.

"The pandemic has not changed systems, so much as revealed them: it has exposed both the fragility of democracies and autocracies. Political and social instability have always provided opportunity and impetus for populist and anti-democratic forces, and the furthering of authoritarian trajectories."[1]

The quality of the law and the proportionality of the fundamental rights restrictions are guarantees of the rule of law. States of exception, provided or not by constitutional texts, could be, in this context, real challenges to these guarantees. This is due to the fact that, firstly, states of exception are determined by exceptional circumstances, of extreme urgency – of a military, natural calamity, health natures. Therefore, the response and especially the speed of the response are essential in order to diminish the effects of these events on the society as a whole. Secondly, in such exceptional circumstances, the reaction of the legislator is deemed too slow and therefore many constitutions have special rules for exceptional situations, in a framework designed by the constitution, with enhanced powers given to the executive: state of emergency, state of siege, state of war etc. These states of exception are designed to provide a speedy response to an exceptional situation. Certainly, in consolidated democracies, the constitutions provide various forms of control preserved by the legislative over the actions of the executive and even on the instauration of the state of exception itself. Judicial review can also be provided for. Constitutional review, on the other hand, could be considered less effective, from the point of view of the speediness.

---

[1] Joelle Grogan, *Power, Law and the COVID-19 Pandemic – Part II: Preparing for Future Emergencies. VerfBlog*, 2021/5/15, https://verfassungsblog.de/power-law-and-the-covid-19-pandemic-part-ii/.

The Covid-19 pandemic has been such a situation which determined the declaration of states of exception almost everywhere in the world. Even in the countries where no official state of exception has been declared, a *de facto* exceptionality was instated. The necessity of taking exceptional measures cannot be denied. Diminishing the consequences of the pandemic on the life and health of citizens and on the economic and social life in general has not been possible without taking some kind of restrictive measures. However, proportionality and clarity of the law instituting these measures are essential for complying with the principle of the rule of law.

In the general context created by the pandemic, the response of states has been diverse and in different degree of severity: certain countries have created a special legislation (UK, Switzerland), others have created "special" states of exception (France, Bulgaria), others adapted existing legislations on states of exception which had not been applied for decades (Romania). A common feature specific to all European democratic states is the enhancement of the powers of the executive (which can also be met in non-European countries). This generated a so-called "democratic deficit" of the anti-pandemic measures, especially from the point of view of the fundamental rights. Nevertheless, a balancing has always been necessary between the right to health (public and individual) and the right to life, on one hand, and other rights – essential for a democratic society: freedom of movement, freedom of assembly, economic freedom. Other rights have also been affected, especially the right of education. In less developed countries, such as Romania, with less developed educational systems, the access to education was extremely affected by the closing of schools, because a huge percentage of pupils did not have access to online education. This generated a serious gap within the society, accentuating the differences between the poorly developed areas (especially in the rural part of the country) and the more developed ones. Freedom to manifest one's religion has also been affected, but also the right to information, political rights (the right to vote), access to justice, freedom of assembly. In Turkey and Poland, for instance, peaceful protests were banned but political gatherings in support of government were praised and took place without restrictions being enforced.

In many countries, the legislation prescribing the restrictive measures created serious tensions not only between the government and the citizens,

but also between the central government and local authorities. A common feature of this kind of legislation has been, in many cases, the lack of clarity, predictability and legal certainty in general, especially at the beginning of the pandemic. In several countries, some dispositions have been declared unconstitutional by the Constitutional Courts or were annulled by ordinary jurisdictions, but many times it was long after the measure ceased to apply.

What are the lessons learned from these experiences, from the point of view of the rule of law and respect for fundamental rights? There is no single answer to this question, but the authors of the studies collected in this thematic issue provide essential information and insight in order to have a pretty good image of what happened in their jurisdictions.

Gilles Toulemonde analyses the cases of possible malfunctioning of the French Parliament during the states of exception. He explains how, to the states of exception already present in French law, in 2020 it was rapidly created a new one, by a new law of 23 March 2020 instating the state of sanitary emergency (*état d'urgence sanitaire*). Facing the exceptional circumstances, the Parliament had to adapt its functioning to the new state of facts and, in this equation, consensus between political actors has been an essential tool. One potential element of malfunctioning of the Parliament was identified in the unequal contribution of the executive and of the legislative to the production of norms, in favour of the executive. To this has been added the exacerbation of the number of ordinances (delegated legislation), thus being in place a "quasi-depriving" the Parliament of its legislative function. Another factor of malfunctioning was the absence of political responsibility of the members of the executive. The author notes that "the French Parliament did not escape its culture of obedience to the Government, largely related to the rationalization of parliamentarianism" and qualifies the entire pandemic period as a "missed opportunity to [achieve] a reinvented parliamentary control [over the Government]".

In his article, Cosmin Cercel provides a comprehensive theoretical and a much needed historical approach, which "aims to contribute to the ongoing discussion concerning the legal and political relevance of past authoritarian practices and the dissolution of liberal legality during the

interwar period", emphasizing the role of the states of exception in this equation. As an illustration of the historical analysis of states of exception, the author uses the case of Romania in the interwar era, "as another possible model for understanding how liberal legality can recede in contexts of crisis". Cercel aims to fill a gap in the contemporary debate on populism and erosion of liberalism, by attempting to clarify the role of the law "within this process of devaluation of the legal form in relation to democracy". In doing so, he focuses on the institution of the state of siege from a historical-comparative perspective, which he considers both a feature and a mark of the crisis of the interwar in Central and Eastern European countries. This choice of focus is explained by the danger that the state of siege may pose on the democratic constitutional regimes in the current international and geopolitical context, " with its specific mixture of militarisation and suspension of constitutional process". That is why it is useful to know and learn from past experiences which led to sometimes catastrophic results. The recourse to history of law is not only an invaluable methodological tool, but it is offering a rich body of information while ensuring the essential foundation for a critical analysis of the current situation. After providing a theory of an autonomous concept of the state of siege and a very detailed historical account of the French heritage in the matter, the author looks into the Romanian case and the authoritarian turn of the state of siege application in the history. He concludes that the state of siege has proven a threat to liberal democracies and that further analyses are necessary on periods from recent history in order to determine how this institution "has acted as a hidden *nomos* of the borderlands, a legal instantiation of state fragilities and inner tensions of liberal legality."

Romanian scholars Ramona Popescu and Bogdan Dima are focusing, in their article, on the role of the Constitutional Court regarding the current state of exception legal regime and practice in Romania. After presenting the constitutional and legal framework of the states of exception, they are analysing the application of the constitutional provisions (state of emergency) and legal provisions (state of alert) during the pandemic, together with the response of the Constitutional Court to the various requests of unconstitutionality on the matter. The Court had a rather activist position in deciding these cases, especially in those regarding the guarantees of fundamental rights: it consolidated the rigid interpretation of the Constitution, according to which any restrictions of rights can be

disposed only by a law adopted by the Parliament; it "stated that all legal conditions governing the declaration and prolongation of the state of alert by Government`s decision become effective only in so far as there is a mechanism for monitoring the compliance of these decisions with the law and for sanctioning any legal infringements."; it established the obligation for the legislator to effectively protect the free access to justice by providing a clear, precise and predictable procedure to review the legality of administrative decisions and orders issued by public authorities under the Law 55/2020 on the state of alert. Thus, the authors concluded that, "by its case-law, the Constitutional Court influenced the construction of a specific institutional and decisional framework within the confines of the constitutional order."

Hungary is a country in which the pandemic-generated state of exception produced long-term effects, exceeding the original purpose of hindering the spread of the virus and going into the zone of hindering the spread of democracy.

Lorant Csink introduces the reader into the problematic of states of exception in Hungary, by a comprehensive overview of the measures taken under these circumstances, emphasizing the differences between the various legal regimes of these states of exception. The focus of the article is on rights restrictions and on the dangers of the extended powers of the Government permitted by the Constitution in such circumstances. The author proposes a strict interpretation of the fundamental law concerning rights restrictions and presents, in a critical manner, some of the most relevant decisions of the Hungarian Constitutional Court on the matter.

Laszlo Kührner draws the attention, in a very critical study, to the manner in which the state of danger enhanced the powers of the illiberal regime in Hungary. Firstly, he shows that the special legal order has become the norm, as it has been perpetuated, under different guises, since March 2020. Secondly, he argues that the declaration of the special legal order is not by itself problematic, but the way in which it has been used by the government to enhance its powers and restrict rights that are essential for the normal functioning of a democracy, such as the freedom of assembly, freedom of expression and right to information, academic freedom: "The Enabling Act therefore authorised the Government to adopt and extend

decrees that may derogate from provisions of laws and suspend or restrict the exercise of fundamental rights without the need of individual authorisation for these measures by the National Assembly". Kührner also finds a possible explanation for the use of the enhanced powers of governments under the quasi-permanent special legal order, despite the large majority in Parliament of the governing party: "The illiberal regime simply used the opportunity the pandemic provided to remind everyone that it can transform into a despotic regime anytime it wants to, but for the time has no intention to do so and is content to uphold some formal aspects of democracy and the rule of law, such as implementing seemingly effective control measures and ending the first state of emergency in a timely manner, not long after the 90 day period requested by the opposition has passed." This practice was doubled by the support of the Constitutional Court and by the "boons to the electorate", which generated the absence of reaction from the majority of the population.

Poland is the odd one out in the series of jurisdictions covered by this special issue because it is the only one where a state of emergency/danger/crisis has never been formally declared. In her contribution, Monika Florczak-Wątor argues that this affected the assessment of human rights restrictions from the constitutionality point of view. After introducing the reader to the various types of states of exception provided by Polish law (at constitutional and statutory levels), the author analyses the alternative regimes for restricting human rights, both under the regular legal order and under the special legal order, as well as the main differences between them, arguing that "as a state of natural disaster was not declared in Poland due to the pandemic, the legality of the restrictions to individual rights and freedoms introduced during the COVID-19 outbreak should be assessed through the prism of principle of proportionality based on Article 31, section 3 of the Constitution (...). The application of this test leads to the conclusion that many of the statutory and sub-statutory solutions adopted in Poland during the pandemic should be deemed unconstitutional". The article also discusses the extent of the judicial and constitutional review of the measures taken in Poland outside the realm of the state of emergency and the difficulties thereof. Florczak-Wątor concludes that the regime of exception without formally declaring a state of emergency has resulted in a formal unconstitutionality of some of the measures taken by the

authorities, although most of the restrictions were justified by the danger posed by the pandemic.

The most controversial case is the one of the limitations of the freedom of assembly, which is also discussed in the article of Przemysław Tacik. Firstly, the author discusses the role of exceptionality within the legal order, based on the "rifle theory" on literary works, belonging to Anton Czekhov: "there should not be an element of the narrative that does not find its completion in an appropriate *denouement*". In a coherent legal order, this would be the role of exceptionality, by "reducing contingency of the law and replacing it with necessity". This is a very interesting approach towards exceptionality and the case-study of Poland's *de facto* exceptionality during the Covid-19 pandemic illustrates it perfectly. Tacik makes theoretical remarks from interdisciplinary angles: socio-legal and political science and argues, *inter alia,* that exceptionality might turn into a "toxin" permanently present in the legal order, which can establish itself as a permanent method of government, menacing the regular functioning of the legal order.

In some countries, "the pandemic has created opportunities for the consolidation of democracy and innovation in the protection of rights, as well as the opportunity to prove the resilience of democratic institutions. Where it has exposed and deepened endemic socio-economic inequalities, it has also shown us how and why they must be remedied through global efforts and worldwide solidarity."[2] In other countries, it has turned into a trigger for using states of exception as a tool for illiberal governments, turning democracy into a shallow concept.

The examples discussed in detail by the present contributions show that, no matter the type of state of exception, adequate means of control should be provided in order to comply with the rule of law principle and to reduce as much as possible the "democratic deficit" that is inevitably produced by introducing exceptional legal orders. They also show that an active parliament does not equate with a normal functioning of the legislative power and also that "active" constitutional courts do not always mean that an adequate constitutional review has been provided. Most countries have

[2] Joelle Grogan, *ibid*.

lived for at least two years under special legal orders, before lifting them, or most of the measures taken under their effect, in Spring 2022. Others still do, after extending the exceptionality beyond the immediate necessity generated by the pandemic growth. Exceptionality remains the "sleeping dragon" awakened by the pandemic which has not yet shown all its potential in relation with rule of law and fundamental rights protection.

LE DYSFONCTIONNEMENT DU PARLEMENT FRANÇAIS EN PÉRIODE D'ÉTAT D'URGENCE SANITAIRE

Gilles TOULEMONDE*

Résumé

Le Parlement français, comme beaucoup d'autres parlements européens, a profondément souffert de la pandémie de Covid-19. S'il a, de manière inventive, réussi à se réorganiser pour faire face aux défis nouveaux causés par ce virus, il a en revanche quasiment abandonné son pouvoir législatif au Gouvernement et n'a pas su réinventer le contrôle qu'il fait peser sur ce dernier afin d'éviter une concentration totale des pouvoirs en faveur de l'Exécutif.

Mots-clés: *France, Parlement, État d'urgence sanitaire, Commissions permanentes, Groupes parlementaires, Procédure législative, Ordonnances, Contrôle parlementaire.*

Abstract

The French Parliament, like many other European parliaments, has been deeply affected by the Covid-19 pandemic. If, in an inventive manner, it has managed to reorganise in order to cope with the new challenges posed by the virus, on the other hand it almost abandoned its legislative power in favour of the Government and did not know to reinvent the control that it should exercise over the latter, in order to avoid a total concentration of power in the hands of the executive.

Keywords: *France, Parliament, state of health emergency, permanent committees, parliamentary groups, legislative procedure, ordinances, parliamentary control.*

Le constat est largement admis, voire unanime, que les Parlements européens, ces institutions si chères au principe démocratique, ont

* Maître de conférences HDR à l'Université de Lille (CRDP-ERDP, ULR n° 4487).

dysfonctionné durant la pandémie de Covid-19.[1]. L'intitulé de cette étude portant sur le cas français nourrit cette conviction, laquelle se prolonge sans doute au-delà de l'état d'urgence sanitaire mis en œuvre pour combattre la pandémie à d'autres situations d'urgence. En effet, le droit français connaît différents régimes d'exception pour faire face à une situation d'urgence. La Constitution du 4 octobre 1958 en prévoit deux: les pouvoirs exceptionnels de l'article 16[2] et l'état de siège de l'article 36[3]. Ces états d'exception sont trop connus pour que nous nous y attardions. La loi du 3 avril 1955 a créé un autre régime d'exception dénommé « état d'urgence » et que l'on désigne désormais parfois d' « état d'urgence sécuritaire » afin de le dissocier de l' « état d'urgence sanitaire » instauré par la loi du 23 mars 2020 pour lutter contre la pandémie de Covid-19. L'état d'urgence sécuritaire a été organisé par la loi du 3 avril 1955, dans le contexte de ce que l'on appelait encore « les évènements d'Algérie ». Depuis, le début de la V^e^ République, il a été mis en œuvre six fois[4].

L'expérience de cette pratique de l'état d'urgence sécuritaire permet de constater que, lors de ces différentes mises en œuvre, le Parlement n'a pas connu toujours les mêmes difficultés. On peut même considérer qu'il n'y a pas d'homogénéité quant à la condition parlementaire en période de d'état d'urgence sécuritaire. L'usage limité territorialement de l'état d'urgence sécuritaire ou le type de menace auquel il permettait de répondre n'ont

---

[1] Voir, par exemple, Emmanuel Cartier, Basile Ridard et Gilles Toulemonde (dir.), *L'impact de la crise sanitaire sur le fonctionnement des parlements en Europe*, Fondation Schuman: https://www.robert-schuman.eu/fr/librairie/0258-impact-de-la-crise-sanitaire-sur-le-fonctionnement-des-parlements-en-europe.

[2] L'article 16 de la Constitution permet au Président de la République de prendre toutes les mesures exigées par les circonstances. Il a été mis en œuvre une seule fois sous la V^e^ République, du 23 avril au 29 septembre 1961.

[3] L'état de siège a été organisé par la loi du 9 août 1849 puis constitutionnalisé à l'article 36 de la Constitution en 1958. Il n'a jamais été mis en œuvre au cours de la V^e^ République.

[4] En 1961 à la suite du putsch d'Alger (Décret 61-395 du 22 avril 1961); en 1985 en Nouvelle-Calédonie (arrêté du haut-commissaire de la République n° 85-035 du 12 janvier 1985); en 1986 à Wallis et Futuna (arrêté de l'administrateur supérieur n° 117 du 29 octobre 1986); en Polynésie française et plus précisément aux îles du Vent (arrêté du haut-commissaire de la République n° 1214 CAB du 24 octobre 1987); en 2005 à la suite d'émeutes dans les banlieues (Décret n° 2005-1386 du 8 novembre 2005); et en 2015 à la suite des attentats mais alors jusqu'après les élections de 2017 à la suite de prorogations successives (Décret n° 2015-1475 du 14 novembre 2015).