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CONSIDERATIONS REGARDING THE LEGAL REGIME OF THE STATE OF SIEGE IN ROMANIA

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ABSTRACT

Considered to be one of the most important functions of the state, the national defense encompasses all the measures adopted both in peacetime and in crisis or war situations in order to guarantee the national sovereignty, independence and unity of the state. An appropriate training for the complexity of a crisis situation can not exclude the proper legal foundation, because without a well-built legislative structure the response to a threat against the state may be delayed or inexistent.

In order to ensure the normative framework, alongside the Romanian Constitution, the Government Emergency Ordinance no. 1/1999 offers, even with small gaps, the legal elements necessary for the realization of a unitary system of response to crisis in which various public, civil and military authorities intertwine their attributions in the establishment and implementation of siege-specific measures.

KEYWORDS: state of siege, national defense, army, public authorities

1. The Legal Notion of the State of Siege

Required to respond to various forms of threats, both external and internal, the state entity has over time generated the most diverse legal mechanisms of managing the situations that jeopardize its existence. The increased complexity of the state functions and, implicitly, the role of its authorities have led to the crystallization of specific legal rules that have differentiated the way in which the intervention takes place and the situations that generated the crisis are managed.

A constant challenge for the states was to find the appropriate way of ensuring effective control over national defense, an essential public service of the state. The solution that was imposed was to divide the exclusive right of political, administrative and military command of a single decision-maker, and to assign separate tasks to the most important public authorities in the state.

From a historical point of view, as a political and legal institution, the state of siege first appeared in France in 1789, and spelled out the special regime of measures meant to protect the state from an armed attack (Şerban, 2005). The state of siege falls within the category of exceptional or extraordinary measures that determine the concentrated action of the executive authorities, the determinant role in these circumstances belonging to the structures responsible for the national defense.

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When the existence of the state or of its essential elements is jeopardized, the executive power is invested in taking measures to save the fundamental values of the state, even if these measures involve the significant restriction of certain rights and freedoms of individuals and legal companies. However, it is absolutely necessary that the set of measures should be imposed to have a legal form of manifestation and a well-articulated legal framework that can provide a well-adapted response to each category of threats leading to the crisis.

The conceptual delimitation of the notion of siege starts from the understanding of the fact that this is not the only political and legal institution that falls within the scope of exceptional measures. By its own domestic legislation and its own system of public authorities, each state creates a unique system of response to threats, a system in whose architecture one can find two, three, four, or even more "states", each of them with its related procedure: "state of siege", "state of emergency", "state of crisis", "exceptional state", "martial law", "alert state", "emergency situation".

2. The Legal Regulation of the State of Siege

In the Romanian legislation, the legal regime of the state of siege is based on the provisions of art. 93 of the *Romanian Constitution*, which states that *"according to the law, the President of Romania shall establish the state of siege or the state of emergency in the whole country or in some administrative-territorial units, and asks the Parliament to approve of the adopted measure within at most 5 days after taking it"*.

The Government Emergency Ordinance no. 1/1999 on the regime of the state of siege and the state of emergency defines the state of siege as being *"all the exceptional measures of a political, military, economic, social and other nature applicable throughout the country or in some administrative-territorial units, established for the adaptation of the defense capability of the country to serious, current or imminent threats that threaten the sovereignty, independence, unity or territorial integrity of the state. In case of imposing the state of siege, exceptional measures can be taken for the entire territory of the country or in some administrative-territorial units"*.

The state of siege is delineated by the *state of emergency*, the second exceptional situation regulated by the above-mentioned normative act. Although it envisages a set of similar measures and involves a similar restrictive regime on the fundamental rights and freedoms, the state of emergency imposes non-military measures of public order and is instituted in case of special threats to the national security or to the functioning of the constitutional democracy, as well as in the case of natural disasters that can cause disasters (Tabără & Tabără, 2016).

The necessity to apply the measures of a political, military, economic, social nature in the case of the state of siege takes into account the gradual nature of the danger, and to the extent that the threat becomes serious for the sovereignty, independence and unity of the state or for the constitutional democracy, there can be implemented the provisions of *Law no. 355/2009 on the regime of the state of partial or total mobilization of the armed forces and of the state of war* concerning the extraordinary measures.

From the perspective of the succession of the normative acts applicable to the state of siege, A legal problem signaled by the specialized doctrine refers to the fact that the regulation of the state of siege by the Government through the *Government Emergency Ordinance no. 1/1999* was a violation of the provisions of the fundamental law, which reserves this field of regulation only to the organic law, as can be seen from the art. 73 par. (3) letter g) of the Romanian Constitution.

The successive interpretations of the Constitutional Court tried to harmonize this contradiction and, in 2004, more than 5 years after the issue and entry into force of the Government Emergency Ordinance no. 1/1999, the Law no. 453/2004 was adopted by which the emergency ordinance was amended and approved (Serban, 2005).

3. The Procedure for the Establishment and Cancellation of the State of Siege

According to art. 1 of the Law no. 45/1994 of the national defense, the national defense comprises the set of measures and activities adopted and carried out by the Romanian state in order to guarantee the national sovereignty, independence and unity of the state, the territorial integrity of the country and the constitutional democracy, and the fulfillment of these activities is ensured by the public authorities, according to the competencies established by law.

The national defense is structured as a system consisting of the forces for defense, the resources of the national defence and the territorial infrastructure, elements on which a leadership is assured by the most important state authorities. Thus, according to art. 7 of the Law no. 45/1994 of the National Defense, *"the leadership of the national defense system is an exclusive and inalienable attribute of the constitutional authorities of the state and is carried out by: the Parliament, the President of Romania, the Supreme Council of Defense, the Government of Romania, the Ministry of National Defense and the authorities of public administration with powers in the field of national defense"*.

According to the Romanian Constitution, the state of siege is instituted by the President of Romania by decree, countersigned by the Prime Minister and published immediately in the Official Gazette of Romania. In exercising this role, the role of the President is doubled by his status as commander of the armed forces and, at the same time, as president of the Supreme Council of Defense of the Country, but this does not give him full decisional authority (Deaconu, Muraru, Tănăsescu & Barbu, 2015).

In its content, the decree establishing a state of siege or state of emergency must provide the reasons for the establishment of the state, the area in which the condition is established, the period for which it is being instituted and the first emergency measures to be taken. The decree also mentions the fundamental rights and freedoms whose exercise is restricted, as well as the military and civilian authorities designated for the execution of the provisions of the decree.

The Emergency Ordinance no. 1/1999 details the way in which the President's decree produces legal effects. Thus, the decree establishing the state of siege is immediately communicated to the population through the media, and together with it the urgent measures of application, which immediately enter into force, will be brought to their attention. The decree is broadcast on the radio and television stations within two hours at most of signing, and is repeatedly transmitted within the first 24 hours of the establishment of the state of siege or emergency.

Due to one of the most important features of our constitutional system, which confers limited powers on the President in the field of national defense or in the institution of exceptional measures, the decree of the head of state is subject to the approval of the Romanian Parliament within 5 days from the establishment of the state of siege. If the Parliament does not approve of the established state, the President of Romania is obliged to immediately revoke the decree and the measures disposed will cease applicability.

Also under parliamentary control is the President's decision to prolong the duration of the state of siege or to extend or restrict its applicability, concomitantly with the evolution of the situations of danger.

The state of siege can be established for a maximum of 60 days, and the state of siege is terminated on the date set in the establishment decree or in the extension decree. The Emergency Ordinance no.1/1999 stipulates that in case of the removal of the danger situations before the expiry of the established term, the termination of the application of the exceptional measure shall be ordered by decree, with the prior approval of the Parliament.

4. Competences and Responsibilities of the Public Authorities in the Event of the State of Siege

A very important aspect is related to the fact that, when establishing the state of siege, significant tasks of the specialized central public administration and of the local public administration fall under the competence of the military authorities and of other public authorities, stipulated in the decree establishing the state of emergency or the state of siege. However, the legislation in force does not specify very clearly what these tasks are and what their optimal transfer is, which can create problems in the immediate execution of some measures necessary to limit the danger.

During the state of siege or emergency, for the exercise of their duties, the competent public authorities may issue *military ordinances*, legal acts which in the given circumstances become more than acts of military command and are similar to the administrative acts of authority (Şerban, 2005). The inappropriate use of this legal instrument, as well as going beyond both the limits established by the decree setting the exceptional measure and the other provisions of the law, mandatory during the siege state, is in the responsibility of the decision makers.

When the state of siege is established throughout the country, the responsibility for the issue of military orders lies with the Minister of National Defense or with the Chief of Defence Staff. If the state of siege concerns a territorial administrative unit, the competence to issue military ordinances lies with the commanders of large units within the territorial jurisdiction for which they were empowered by the Chief of Defense Staff.

The co-ordination of the implementation of the measures ordered by the decree establishing the state of siege rests with the *Ministry of National Defense*, a specialized structure of the central public administration, which manages and carries out the activities in the field of the country defense.

According to art. 20 of the Emergency Ordinance no. 1/1999, the military authorities, as well as the other public authorities charged with the management of the measures taken in the case of the state of siege have the obligation to draw up the action plans and the plans for the gradual enhance of the fighting capacity, demanding to temporarily deposit at the police stations the weapons of mass destruction, ammunition and explosive materials on the population, the temporarily close the companies selling arms and ammunition and establish their security, limit or prohibit the movement of vehicles or of persons in certain areas, to carry out controls on individuals or places, when required, to exclusively exercise the right to authorize the holding of public meetings, demonstrations or marches, to rationalize food and other products of strict necessity.

Without exhausting the scope of the responsibilities that the law confers upon the public authorities playing a decision-making role in the case of the state of siege, the following may also be mentioned: the protection of military information intended to be communicated through the media; the temporary closure of petrol stations, restaurants, cafes, clubs, casinos, headquarters of associations and other public institutions; the temporary suspending of the issue or broadcast of publications or broadcasts of radio or television stations.

All these measures are restrictive and may have a major impact on the free exercise of fundamental rights. Their establishment can only be justified by the need to limit threats that seriously jeopardize the sovereignty, independence, unity or territorial integrity of the state. In this regard, for the purpose of proper protection of fundamental rights, the limitation of the right to life is forbidden during the state of emergency and the state of siege, except in the case of death due to legitimate acts of war, torture and punishment or inhuman or degrading treatment, conviction for offenses not provided for in the national or international law, and the restriction of free access to justice.

5. Conclusions

The existence of proper procedures, harmoniously merged from a legal point of view, should not be underestimated in a world where uncertainty becomes a more and more difficult factor to control. By organizing its own defense system, the state decides what the best form of response is for different categories of threats that endanger the values that the state protects. An inflexible normative system, which puts the public authorities in contradiction rather than providing them with the possibility of cooperation, will not be effective in the face of the tests that the crisis brings.

The adaptation of the defense capability of the country to serious, current or imminent threats can not be the result of a single decision, and exceptional measures of a political, military, economic or social nature involve the coordination of the efforts of both civilian and military authorities. By the specific hierarchical structure, the military system can provide a rapid response, but if the decision of the legislative or the executive authority is inadequate or delayed, the qualities of the military reaction will be greatly diminished.

Since the successful management of the crisis that leads to the institution of the state of siege means not only the elimination of the threat at any cost, but also the protection of all values on the territory of a state, understanding the legal status of the state of siege involves more than knowing a set of attributions of the state authorities and calls for the deepening of relations, of social causalities, which puts human rights in a central position. The political decision, the administrative decision, the military decision are the sides of the same set of actions, whose purpose must be the protection of the state and of its constituents.

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