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Emergency Powers and The Rule of Law: Theoretical Reflections and Legal Realities

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Abstract:
This paper investigates the enduring tension between states of exception and constitutional frameworks, seeking to understand how democratic societies can effectively manage crises such as terrorism, pandemics, or war, without undermining the very legal and institutional norms that define them. Drawing upon a range of theoretical perspectives on sovereignty, legality, and exceptionality, including the works of Carl Schmitt, Giorgio Agamben, and contemporary constitutional theorists, the study critically examines the legal and political implications of emergency powers.

Keywords: *State of exception, Rule of law, Emergency powers, Sovereignty, Fundamental rights.*

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The state of emergency is a tempting instrument that allows states to derogate from fundamental human rights and freedoms in order to combat certain dangers (Sall, 1996: 16). The constitutions of most states include a derogation clause, which sets out the grounds that may be invoked for declaring a state of emergency, as well as the list of non-derogable rights (Constitution of the Republic of Estonia, Art. 130) or the list of rights from which states may derogate (Constitution of the Kingdom of Spain, Section 55). Similarly, international conventions allow states to derogate from their international obligations under certain exceptional circumstances. However, the restriction of individual rights is permitted only to the extent provided by the derogation clauses and solely for the purpose of protecting other rights and freedoms.

However, it is also true that emergencies challenge the state's commitment to the rule of law (Ramraj, 2008: 4) and that the state of emergency puts legality to its greatest test (Sarat, 2010: 1). Indeed, as one author states, once law has been established to maintain social order, emergency remains the enemy of the law, the unrestrained force that threatens to dismantle the meticulously crafted frameworks built upon legal principles and practices (Sarat, 2010: 4). The state of emergency represents a danger to the normal legal order.

Therefore, we tend to place greater trust in those who govern during emergencies. A general pattern is that we are more tolerant toward leaders who are responsible for managing a crisis facing the nation. In times of emergency, we often hear expressions such as “this is not the time to criticize the government,” or “the situation cannot be handled any other way,” and so on. But sometimes, this perception leads to a lack of scrutiny regarding how exceptional powers have been exercised, and it becomes difficult to distinguish which measures are truly driven by the necessity of addressing an emergency and which are the result of an executive that has grown too comfortable in exercising exceptional powers.

Opinions on how a government should act when faced with a crisis that threatens its existence are divided into two camps.

In short, supporters of legalism argue that crisis situations which endanger the state and the constitutional order must be resolved exclusively through means provided by law. Even if the responses may differ from those adopted in times of peace or under normal conditions, they must always fall within the constitutional framework, thus ensuring that the conformity between the measure and the Constitution is respected. Only by proceeding in this manner can the constitutional state preserve its existence and overcome the crisis (Scheppele, 2009).

On the other hand, proponents of the theory of extra legalism, inspired by the idea that necessity knows no bounds, argue that only by resorting to means that go beyond the legal framework can crises threatening the very existence of the state be resolved.

They argue that legal norms, crafted for predictability and governance under ordinary circumstances, inevitably prove inadequate and ineffective during periods of profound disorder or constitutional crisis (Agamben, 2008: 9).

Although this conceptual distinction provides a certain degree of theoretical latitude, its limitations become apparent when the analysis shifts to empirical data. At present, the state of exception is widely codified in the legislation of numerous states, even if it appears under various denominations and through differing procedures (for instance, the 'state of siege' in the French legal tradition, the 'state of emergency' in the German Constitution, etc.) (Scheppele, 2009).

Moreover, the state of exception has acquired a significant role in international

law as well. Consequently, the emphasis no longer lies merely on its formal incorporation into legislation, but rather on a more nuanced analysis: Does the integration and regulation of the state of exception through constitutions and normative acts truly imply that states consistently adhere to these rules and operate within the confines of the legal framework?

An examination of the COVID-19 crisis in Romania and the Republic of Moldova reveals that the core issue does not lie in the fact that the state of exception derives its legitimacy from *jus scriptum*, but rather in the potential for the arbitrary expansion of executive authority. This chain of events highlights that, although the state of exception was invoked in accordance with the law, it effectively generated a distinct legal regime in practice, thereby undermining the foundational principles of the rule of law.

Essentially, the fundamental issue lies in ensuring that the state preserves both its legitimacy and its capacity to respond to crises without exceeding the boundaries of the legal framework. In other words, we are faced with the risk that the executive power may extend its prerogatives beyond constitutional limits, thereby creating a law of exception, a permanent state of emergency that erodes the principles of the rule of law (Ticu, Diaconu, 2021: 94-97).

When executive authorities acquire powers significantly exceeding those initially prescribed, there arises a danger that they may act unpredictably and evade oversight. Beyond the legitimate need to respond swiftly in times of crisis, be it security threats, natural disasters, or pandemics, it is essential that any exceptional measure remains strictly aligned with the Constitution and the principles of fundamental rights and freedoms.

For this reason, I believe it is imperative to develop a theoretical framework for the state of exception and to clarify the role this ambiguous phenomenon occupies within the modern rule-of-law state.

I. The Sovereign and the Law: Carl Schmitt's Theory of Decision

In the legal framework of the modern constitutional state, if the state of exception emerges as an anomaly, Carl Schmitt regards it as an occasion to revitalize the figure of the individual sovereign and reaffirm its indivisible character. For this reason, in his view, it may be deemed a miracle.

Adopting this perspective, he assigns autonomous significance to the act of decision, as the quintessential expression of sovereignty, a principle encapsulated in his renowned dictum: *"Sovereign is he who decides on the exception."* Here, the sovereign's authority is defined not through adherence to norms but through the unilateral capacity to suspend the legal order itself, thereby asserting sovereignty's indivisible and transcendent nature (Schmitt, 2005).

In his study of political theology, sovereignty, and the state of exception, Schmitt strongly criticizes liberal constitutional theories influenced by neo-Kantian ideas. He claims these theories ignore or downplay the importance of the state of exception. Instead, they pretend the legal system is a perfect, all-encompassing set of rules with no room for exceptions. Schmitt argues that by ignoring the exception, liberal theories miss a key point: true sovereignty lies in the power to suspend normal rules during emergencies. For him, sovereignty isn't about following fixed laws but about who has the authority to act decisively when crises break the ordinary legal order (McCormick, 1997: 124-129, 148-152).

Inspired by Hobbes, Schmitt emphasizes the need to reinforce sovereign authority, especially during crises that threaten the state's stability. Like Hobbes, he views decisive, centralized power as essential to maintaining order when normal governance is

disrupted.

As a legal theorist affiliated with the Nazi regime, his objective was to surpass the constitutional constraints of the modern state's structure in order to safeguard the continuity of the Weimar State. Schmitt challenges the perspectives of liberal-leaning constitutional theorists, focusing especially on critiquing the ideas of Hans Kelsen, a prominent representative of neo-Kantian rationalist jurists.

Schmitt's critique centers on what he sees as Kelsen's flawed assumption that law operates as a self-contained, exceptionless system. By dismissing the existential role of sovereign authority in navigating crises, Schmitt argues, such theories undermine the state's capacity to act decisively when its stability is threatened.

From the perspective of Kelsen's liberal legal philosophy, the state does not create the legal order but merely enacts laws, abstaining from any intervention beyond this role (Schmitt, 2005: 18).

Liberal theory, which envisions the state as holding an neutral role, either deliberately omits the issue of sovereignty or seeks to circumvent it through its denial (Schmitt, 2005: 23). Within this framework, the legal norm occupies a central position, serving as the foundational element of the entire legal system. As such, sovereignty and the exception, as its most salient manifestation, are excluded ab initio from this legal structure. Legal theorists aligned with this perspective systematically eliminate the concept of exception, thereby implicitly nullifying the sovereign decision as well.

However, in Carl Schmitt's view, the legal order rests upon two fundamental pillars: the norm and the decision. The norm is applicable solely under conditions of normality and institutional stability; it proves inadequate in times of crisis or systemic disorder. Thus, by its very nature, the norm cannot contain or integrate the exception. In such exceptional contexts, where the normative framework is suspended or rendered inoperative, the sovereign decision emerges ex nihilo, as an act that re-establishes order. Schmitt attributes to the decision an distinct status, considering it a constitutive element in the preservation of the legal order.

According to Schmitt's perspective, every legal order is ultimately grounded in a decision, which, in turn, inevitably leads to the emergence of the exception (Schmitt, 2005: 10). He challenges the traditional definition of sovereignty as the supreme and primary power of governance, arguing that such a definition is functionally inadequate (Schmitt, 2005: 36–40). Instead, Schmitt advocates for a concrete, case-based conception of sovereignty, emphasizing that in moments of conflict or crisis, sovereignty is defined by the actor who holds the authority to decide on matters such as public interest, national security, public order, general welfare, and other fundamental concerns of the state. (Schmitt, 2005: 6)

Nevertheless, the exception does not constitute a universal concept encompassing all forms of security measures, as previously emphasized. Its true character lies in vesting the authority with boundless power. Through this mechanism, a sovereign figure emerges, one capable of suspending the existing legal order and asserting authority by instituting a new normative framework. The sovereign's supreme authority is not diminished by this act; on the contrary, it is reinforced, as sovereignty is defined precisely by the capacity to decide on the exception.

In this context, the sovereign entity holds the authority to decide:

1. whether a state of emergency exists; and
2. what measures are necessary to address and resolve it.

In other words, the sovereign is the one who determines the nature and severity

of the emergency that threatens the survival of the state and its legal order. At the moment of decision, the sovereign entity assumes the role of the guardian of the legal order.

Thus, where is the guardian of the legal order situated in relation to the law itself? In *Political Theology*, Schmitt argues that by making such a decision, the sovereign is, on the one hand, positioned outside the ordinary legal order; yet, on the other hand, since the possibility of suspending the constitution in its entirety depends on him, he simultaneously remains within that very legal order (Schmitt, 2005: 7). In other words, it is an authority that exists simultaneously "here and there," capable of adapting its position according to the demands of the situation, legitimate and positioned beyond the bounds of legality at the same time.

It is situated within the legal system because it has the power to generate its own order, yet it is positioned beyond the legal system due to its ability to suspend the general normative framework. In this way, Schmitt places the law (in its strict sense as positive law) in a subordinate position to the political realm, allowing politics to prevail over the law. As previously mentioned, Schmitt sought to reaffirm the authority of the sovereign, arguing that it is most clearly manifested in the capacity to decide on the state of exception. By suspending the law, the rule of law could be reshaped in the benefit of the ruler.

Therefore, it is not surprising that Schmitt's contemporary rivals, primarily Hans Kelsen, challenged his exceptionalism, arguing that, in practice, it renders any constitutional provisions completely redundant and irrelevant. In the context of the Weimar Constitution, Kelsen argued that Schmitt's theory reduces the constitution to nothing more than Article 48 (McCormick, 1997: 144).

II. The Rule of Exception: Giorgio Agamben on the Suspension of Law

Although Carl Schmitt remains the most controversial figure in modern theory of the state of exception, Giorgio Agamben's contribution to the reinterpretation of this concept through a radical philosophical-political analysis deserves distinct attention. Agamben's theory of the state of exception is based on ideas such as Walter Benjamin's concept of law-making violence and the biopolitical concepts developed by Michel Foucault, but he directs them along a different conceptual path. Among the significant influences on Agamben, Carl Schmitt is undoubtedly also present. In this context, I will analyze the final work in his trilogy, *State of Exception*, in order to highlight his perspective.

Agamben argues that legal doctrine suffers from a major flaw because, following Schmitt, public law has failed to address the concept of the state of exception in a critical and comprehensive manner. He claims that jurists have treated the state of exception as a mere *quaestio facti* (a question of fact), even though it actually constitutes a genuine juridical problem (Agamben, 2008). The need for such a profound legal analysis, coupled with the reduction of the state of exception to a purely factual framework, reveals a significant gap in the field.

As previously mentioned, the state of exception lies within a zone of ambiguity. Agamben argues that

> "only if the veil covering this ambiguous zone is lifted will we be able to approach an understanding of the stakes involved in the difference -or the supposed difference - between the political and the juridical, and between law and the living being" (Agamben, 2008: 2).

Agamben's stated objective is to integrate the state of exception into a theory of sovereignty and politics. In developing his theory, he frequently engages in a dialogue both with the present and with antiquity, particularly Roman law.

In the Middle Ages, necessity was considered the foundation for justifying exceptional measures. According to this view, the state of exception was reduced to a situation of necessity (such as civil war, chaos, crisis, etc.), and necessity, by definition, was regarded as existing outside the legal framework. Thus, the issue of the legitimacy of the state of exception was simplified: the measures taken were justified by the fact that they were indispensable. At that time, necessity was seen as a sufficient reason to break the legal order and was accepted as an explanation, especially in specific, urgent situations. Laws were created for the common good, but under conditions of necessity, it was considered legitimate to depart from them if they proved inadequate in an unexpected or conflictual context.

In the modern era, the historical analysis proposed by Agamben (Agamben 2008: 27–51) highlights the fact that the state of emergency is omnipresent, appearing both in constitutions and in legislation. In practice, most contemporary constitutions include provisions concerning the state of emergency or have adopted specific laws to regulate such situations. Recent examples from various countries, along with the frequent declaration of states of exception, emphasize that the temporary suspension of the normative legal order has become a long-standing governmental practice (Agamben, 2008: 7).

For example, this can be observed in Germany in 1923, in France on several occasions in 1925, 1935, and 1937, in the United Kingdom in 1920, and in Italy following the 1908 earthquake (Agamben, 2008: 11–22). More recently, the state of exception has also been invoked during the pandemic period.

All these examples essentially reflect contemporary political manifestations of a vision that anchors the state of exception in necessity and urgency. Viewed through the lens of necessity, the state of exception implies the existence of a gap within the law. The problem lies in the fact that this perception seeks to fill the gap, claimed to have emerged in a moment of necessity, through legal means. Far from being a response to a normative void, such a justification of the state of exception actually creates another gap, one meant to protect the norm and the legal order, yet undeniably situated outside the legal sphere.

In his writings, Giorgio Agamben brings to the forefront a remarkable concept "the exception-as-the-rule", emphasizing that in today's political landscapes, the exception has come to function as the norm.

What does Agamben mean when he says that the exception has become the rule? He interprets Carl Schmitt's perspective on the miraculous nature of the exception. As previously mentioned, Schmitt seeks to attribute saving qualities to the act of deciding what constitutes an exception. Only in this way will sovereignty, in its personal dimension, regain its vitality, and the exception will acquire a redemptive role.

When the exception was integrated as a routine part of the legal order, it lost its miraculous character. The state of exception, that moment of decision, thus became a repetitive entity, a regular component of the law.

In this context, Agamben argues that Schmitt's attempt to correlate the exception with the norm has failed, because once the exception becomes routine, it loses its original significance. Agamben's analysis of the state of exception is, in fact, a critique of the failure of Schmitt's model of the exception (Huysmans, 2008). Thus, when the exception becomes the rule (being used frequently and excessively), what Schmitt anticipated or

desired is compromised: The sovereign and the exception cease to play the role of the savior, becoming just a regular part of the order, a mere repetition. Today, the state of exception no longer appears as an anomaly, but transforms into a governmental technique. The practical result is the expansion of executive power, allowing it to assume legislative power through various decrees and legal measures. As Durantaye states, one of Agamben's main goals is to demonstrate that exceptional circumstances are not so rare in the life of the state (Durantaye, 2009: 336).

III. Business as Usual: The Model of Stability in a Changing World

The Business as Usual model rejects the attempt to respond to crises and emergencies by introducing constitutional or legal amendments. Therefore, a state of emergency does not justify a deviation from the normal legal system. The legal system already provides the necessary responses to these crises, without the legislative or executive powers acquiring additional powers not foreseen in the Constitution.

Therefore, the establishment of a state of emergency cannot be used as a reason to suspend any part of the legal system. In this regard, Judge Davis argued in the case of *Ex parte Milligan* that the constitution maintains its applicability equally in times of war and in times of peace (Ex parte Milligan, 1866: 120–121).

Additionally, the Business as Usual model requires that the government cannot legally exercise any special authority to manage emergency situations unless these powers are clearly stipulated in the constitution.

As Judge Davis stated:

> „It is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so." (Ex parte Milligan, 1866: 126).

Benjamin Constant, in a similar manner, suggested the following:

> „All the mediocre minds, ephemeral conquerors of a fragment of authority, were full of all these maxims [public safety and supreme law], the more agreeable to stupidity in that they enable it to cut those knots it cannot untie. They dreamt of nothing else but measures of public safety, great measures, masterstrokes of state; they thought themselves extraordinary geniuses because at every step they departed from ordinary means. They proclaimed themselves great minds because justice seemed to them a narrow preoccupation. With each political crime which they committed, you could hear them proclaiming: Once again we have saved the country! Certainly, we should have been adequately convinced by this, that a country saved every day in this manner must be a country that will soon be ruined.„ (Constant, 1988: 43-138).

A strategy like this is not intended to prevent governments from resorting to exceptional measures. However, it is designed to minimize the likelihood of the government using emergency powers in situations that are not emergencies, or the excessive use of these powers by the government.

Therefore, the introduction of clear prohibitions on certain government actions or the recognition of certain rights as non-derogable can make it more difficult for those in power to exercise extraordinary powers that would deviate from or violate such absolute

prohibitions. Such an approach is necessary given the tendency of governments to infringe upon constitutionally protected rights in times of crisis.

IV. The General Normative Framework of Emergency in Romania

The legal framework governing the state of emergency in Romania can be analyzed through the lens of the three main theoretical models highlighting elements that partially align with each, yet showing a predominant tendency towards the Business-as-Usual model, albeit with risks of sliding toward the normalization of the exception.

The President of Romania's authority to declare a state of emergency reflects Carl Schmitt's assertion that "sovereign is he who decides on the exception," positioning the President as the actor who suspends the normal legal order. However, unlike Schmitt's unconstrained sovereign, the Romanian constitutional system imposes checks: under Article 93 of the Constitution, the President's decree must be submitted to Parliament for approval within five days. This mechanism attempts to anchor Schmitt s sovereignty within constitutionalism, though its safeguards remain fragile in practice.

According to Article 93 of the Constitution, the President of Romania may declare a state of siege or a state of emergency, in accordance with the law, across the entire country or in specific administrative-territorial units. The President is required to submit the measure to Parliament for approval within five (5) days of its enactment. If Parliament is not in session at the time of the declaration, it must be convened by law within no more than 48 hours after the state of siege or emergency is decreed. Parliament shall then remain in session throughout the duration of the declared state of siege or emergency.

The President's authority to declare a state of siege or a state of emergency, as outlined in the Constitution (Muraru, Tănăsescu, 2008, pp. 868–877), pertains to exceptional domestic circumstances, distinct from cases of external armed aggression. This competence is bivalent, allowing the President to enact either a state of siege or a state of emergency, depending on the situation. Furthermore, the territorial scope of such declarations may extend to the entire country or be limited to specific administrative-territorial units where the crisis arises.

The President declares a state of siege or state of emergency through a decree. This decree must be countersigned by the Prime Minister and published, without delay, in the Official Gazette of Romania (Gîrleșteanu, 2012, 223).

During a state of siege or state of emergency, the exercise of certain fundamental rights and freedoms may be subject to limitations, provided such restrictions are strictly proportionate to the exigencies of the situation and comply with the safeguards outlined in Article 53 of the Constitution (Ticu, Diaconu, 2021: 94-95). Furthermore, the following prohibitions shall apply without exception:

a) Any infringement upon the right to life, except in cases resulting from lawful acts of armed conflict;

b) The use of torture, inhuman or degrading treatment, or punishment under any circumstances;

c) The prosecution or conviction of individuals for acts not explicitly criminalized under national or international law at the time of commission;

d) Restrictions on the right to unimpeded access to justice, including fair trial guarantees.

Thus, the President's decree establishing a state of emergency constitutes an administrative act devoid of legal force. This conclusion arises from Articles 61(1) and

115 of the Constitution, which vest legislative authority, the power to enact primary regulatory measures, exclusively to the Parliament (as the supreme legislative body) and the Government (exercising delegated authority). Since the President lacks legislative competence under this framework, any decree issued cannot hold the status of a normative act equivalent to law. Furthermore, the requirement for parliamentary approval of the decree within five days of its issuance reinforces this distinction. If the decree carried the force of law, submitting it to Parliament, whose decisions are subordinate to statutory legislation, for validation would be logically inconsistent. The necessity of such approval underscores the decree's nature as an administrative act (Mâță, 2020: 90).

The organic law governing states of siege or emergency does not automatically restrict fundamental rights and freedoms upon declaring an exceptional state. Instead, most provisions require explicit activation through measures specified in the President's decree. This framework ensures proportionality, enabling authorities to tailor restrictions to the situation's specific needs rather than imposing uniform limitations on all rights for the duration of the emergency. Without such a system, merely declaring an exceptional state would instantly curtail every right listed in the law. To balance adaptability and proportionality, the majority of provisions in the organic law are not directly applicable but depend on enforcement decisions formalized in the presidential decree.

Moreover, in Decision No. 152/2020, the Constitutional Court also expressed this interpretative direction by rejecting the constitutional challenge brought by the People's Advocate against specific provisions of Government Emergency Ordinance No. 1/1999. The Court underscored that when issuing such a decree, the President operates as a state authority exercising public power in service of a legitimate public interest. This clarifies the legal character of the decree as a normative administrative act, which formally establishes the exceptional legal regime. Through this administrative mechanism, the President fulfills a statutory mandate: delineating emergency measures tailored to the exigencies of the crisis, as well as specifying the fundamental rights and freedoms subject to temporary restriction during the exceptional state.

As we can see, Romania's Constitution (Article 93) strictly regulate the procedures for declaring a state of emergency, requiring parliamentary approval within five days. This mechanism ensures that the executive power does not operate in a legal vacuum but rather within the boundaries of existing laws. This reflects the *Business as Usual* philosophy, which insists on maintaining legal norms even during crises.

However, the Romanian Constitutional Court operates within a specialized and narrowly defined jurisdiction. Its competencies are explicitly and restrictively enumerated by the Constitution and organic laws. Among them, the power to review the constitutionality of presidential decrees is absent. This legal lacuna means that a presidential decree, especially one issued during a state of emergency and carrying the force of law, effectively evades any constitutional validity check. It cannot be reviewed by the Constitutional Court, nor can it be challenged before the ordinary courts. In practice, such a decree may violate constitutional norms without being subject to legal scrutiny. This situation leads to a paradox: although the Parliament must approve the emergency decree, its approval does not represent a substantive constitutional review.

Such a dynamic aligns with Schmitt's warning that the sovereign, in deciding on the exception, may place himself above the law. If the President were to legislate during the state of emergency, thereby usurping the legislative role of Parliament he would commit a grave violation of the constitutional order, an act that could be interpreted as a coup, cloaked in legality.

Moreover, the Constitutional Court has previously acknowledged that certain emergency measures enacted by the President via decree were not provided for in Article 26 of Government Emergency Ordinance No. 1/1999, the primary legal framework governing states of emergency. (Decision No. 152/2020 of the Constitutional Court: 100-101) The President, in that instance, acted outside the legal framework, derogating from existing norms through an administrative act. Still, the Court refrained from invalidating these measures, citing its limited competencies under Article 146 of the Constitution, which exclude the power to review presidential decrees of this nature.

This legal void, where emergency powers exist without adequate judicial oversight, demonstrates the enduring relevance, and danger, of Schmitt's theory. The sovereign's capacity to define the exception can, in the absence of robust constitutional safeguards, transform from a temporary safeguard of the legal order into an instrument for its suspension or erosion. In the Romanian context, the constitutional architecture attempts to balance sovereign emergency powers with parliamentary oversight, but the lack of judicial control over presidential decrees during states of exception creates a fragile equilibrium that risks tipping toward authoritarianism, undermining the democratic and rule-of-law commitments expressed in Article 1(3) of the Constitution.

Also, Giorgio Agamben warns that modern states increasingly treat emergencies as routine governance tools, eroding legal boundaries. Romania's introduction of the state of alert (via Government Emergency Ordinance No. 21/2004) exemplifies this trend.

This legal construct (state of alert) is not mentioned anywhere in the Romanian Constitution. It was introduced by the executive branch, specifically the Government, through an emergency ordinance, acting as a delegated legislator. In doing so, the Government effectively modified the constitutional framework by adding a new exceptional legal regime, a move which, in our view and that of numerous constitutional law scholars, exceeded its legal powers (Dănișor, 2020).

The original wording of Article 4 of the Ordinance suggests that the state of alert was initially conceived as a lower-intensity version of a state of emergency, one that would still allow public authorities to restrict the exercise of certain rights and freedoms. However, according to Article 53 of the Romanian Constitution, such restrictions can only be imposed by a law passed by Parliament, a formal and deliberate legislative act. An emergency ordinance, as an executive act issued by a temporary delegation of power, lacks the democratic legitimacy and constitutional authority required to limit fundamental rights.

With the adoption of Law No. 55 on May 15, 2020, the possibility of restricting rights and freedoms was explicitly permitted. The Government could issue a decision declaring a state of alert and establishing restrictive measures for a period of 30 days, applicable throughout Romania, in order to reduce and control the effects of the pandemic.

During the period in which the state of alert was in effect, numerous government decisions were issued to extend this exceptional status. However, many of the measures adopted during this time were discriminatory, disproportionate in relation to the circumstances that supposedly justified them, and significantly infringed upon the existence and substance of fundamental rights and freedoms.

Some may argue that these rights continued to exist in the legal patrimony of individuals and that only their exercise was temporarily suspended, until such time as the individuals were vaccinated, tested, or officially confirmed to be ill. Yet this justification cannot withstand serious legal or philosophical scrutiny. At the time, no one could determine the exact duration of this so-called "temporary suspension." In fact, the objective reality

revealed a trend toward the *permanentization* of what was initially presented as a provisional restriction. (Bucharest Court of Appeal, Civil Judgment No. 1796/2021).

This concern is reinforced by the nearly two-year duration of the state of alert, a period in which fundamental rights remained curtailed under a regime of emergency governance. Furthermore, public statements by authorities and ongoing legislative initiatives, both from primary and delegated lawmakers, suggested an openness, if not an intention, to institutionalize these emergency measures.

One can also observe a significant shift in the nature of restrictions imposed during this period: a transformation from *repressive* prohibitions (targeted responses to existing epidemiological situations) to *preventive* ones (aimed at hypothetical, future threats). This evolution marks a profound change in the legal and political logic of emergency: from reactive measures designed to manage real, present dangers, to anticipatory control mechanisms that govern life based on potential future risks.

This shift echoes the core critique of Giorgio Agamben in his analysis of the "state of exception." Agamben warns that modern governments increasingly govern through emergencies, suspending the rule of law not to restore it, but to entrench a new norm where exceptional measures become the standard mode of operation. In this context, the legal and constitutional order is not merely temporarily set aside, it is fundamentally reconfigured. What was once an exception becomes the rule, and the distinction between law and its suspension collapses.

In Romania's case, the state of alert became a vehicle for the normalization of emergency governance. As Agamben explains, the danger is not only that rights are suspended, but that citizens become accustomed to living in a state where such suspensions are continuous, open-ended, and justified by the mere invocation of potential threats.

The preventive nature of the newer restrictions reinforces Agamben's claim that the state of exception no longer functions to address concrete crises but instead serves as a permanent apparatus of control. By governing through what *might* happen, authorities are no longer bound by actual events, but operate within a horizon of speculative risk. This makes the legal order fundamentally unstable, as it becomes subordinated to administrative discretion rather than democratic legitimacy.

Furthermore, regarding the procedural framework for challenging administrative acts issued under Law No. 55/2020, article 72 stipulated that its provisions would be supplemented by general administrative law, while explicitly excluding the application of several articles, including Article 42 of Government Emergency Ordinance (GEO) No. 21/2004.

A closer analysis reveals significant ambiguities. The first paragraph of Article 72 references general administrative law, particularly Law No. 554/2004 on administrative litigation, which governs the possibility of contesting government decisions declaring or extending the state of alert. However, the second paragraph of Article 72 explicitly states that for the state of alert instituted to combat the COVID-19 pandemic, the provisions of Article 42 of GEO No. 21/2004, which allow judicial review of emergency measures, do not apply. This contradiction creates legal uncertainty.

Article 42(3) of GEO No. 21/2004 originally provided the right to challenge, through administrative litigation, decisions extending or declaring the state of alert, as well as measures adopted during such periods. By excluding this article, Law No. 55/2020 effectively shielded these administrative acts from judicial review. Furthermore, Law No. 55/2020 failed to establish alternative procedures for contesting emergency measures,

resulting in a legal vacuum where government decisions during the state of alert bypassed judicial oversight.

The Constitutional Court addressed these issues in Decision No. 392/2021. The Constitutional Court found that Article 72(1) of Law No. 55/2020 lacks clarity and predictability. Consequently, the provisions do not meet the legal standards of foreseeability and clarity, rendering them unconstitutional under Article 1(5) of the Constitution, while also violating Article 52(1) and Article 21.

The Court emphasized that effective judicial remedies require court rulings to be issued within the timeframe during which administrative acts remain applicable. However, Law No. 55/2020 lacks procedural rules to ensure swift resolution of cases challenging administrative acts that declare or extend emergency measures. Applying standard procedures under Law No. 554/2004 would prevent courts from ruling within 30 days, making any subsequent decision ineffective in overturning the legal consequences of those administrative acts.

This creates a violation of the right to effective access to justice, as individuals harmed by administrative acts cannot efficiently challenge them during the period when those acts are legally active.

The Constitutional Court's Decision No. 392/2021 clarifies that the right to justice is only meaningful if individuals can concretely and effectively remove the harmful effects of contested administrative acts while those acts are still in force. When assessing whether a citizen's right to access justice was upheld, the state must demonstrate that the legal tools provided could genuinely and promptly nullify the challenged act's effects during its enforcement period. As highlighted in ECHR jurisprudence, merely enshrining the right to justice in law, even in the Constitution, is insufficient if practical barriers render it ineffective. The purpose of the European Convention on Human Rights is to protect real, tangible rights, not theoretical or illusory ones. Thus, the absence of expedited procedures to resolve challenges against emergency-related administrative acts undermines the right to an effective judicial remedy.

In conclusion, the Romanian experience during the pandemic illustrates, with striking clarity, the dangers outlined by Agamben and Carl Schmitt. The erosion of constitutional safeguards, the extension of temporary suspensions into indefinite restrictions, and the shift from reactive to preventive governance all reflect a broader tendency: the transformation of the exceptional into the ordinary, and the law into a tool of its own suspension (Ticu, Diaconu, 2021).

V. The General Normative Framework of Emergency in The Republic of Moldova

The Republic of Moldova's legal framework for managing emergencies, particularly during the COVID-19 pandemic, provides a compelling case study to evaluate the interplay between extra legalism and the Business as Usual model. By examining Moldova's emergency measures and the Constitutional Court's response, we can situate its approach within these theoretical paradigms.

According to the law of the Republic of Moldova on Civil Protection, the Parliament declares a state of emergency in the event of danger or the occurrence of exceptional situations (Law on Civil Protection No. 271/1994, Art. 5). Unlike Romania, immediate emergency measures are not implemented upon declaring the state of emergency; instead, they are progressively adopted by the competent authorities of the Republic of Moldova.

Under Art. 17 of the Civil Protection Law, to enable public authorities to fulfil executive and operational functions for the prevention and management of exceptional situations, such as those arising from natural disasters, large-scale accidents, catastrophes or other hazardous phenomena, the Commission for Exceptional Situations of the Republic of Moldova is established, chaired by the Prime Minister. Such restrictions must align with obligations under international treaties on fundamental human rights to which Moldova is a party. They may not involve discrimination against individuals or groups based solely on race, nationality, language, religion, sex, political beliefs, or social origin (Law on the State of Emergency, Siege, and War Regime No. 212/2004, Art. 5).

Legalism, as we can see, which emphasizes strict adherence to constitutional and legal frameworks, is initially reflected in Moldova's structure. The Constitution (Art. 54) and Law No. 212/2004 permit temporary restrictions on rights during emergencies, provided they comply with international human rights obligations. The creation of the Commission for Exceptional Situations (CES), led by the Prime Minister under Art. 17 of the Civil Protection Law, exemplifies an institutionalized mechanism for crisis management under parliamentary oversight.

Moldova's pre-pandemic framework aligned with the Business as Usual model. Law No. 212/2004 originally included an exhaustive list of permissible measures. However, amendments to Law No. 212/2004 (via Law No. 54/2020) introduced vague provisions such as "other necessary measures" (Art. 20(k)), diluting legalism's predictability.

By endorsing phrases like "other necessary measures," Moldova implicitly accepts that emergencies require deviations from normal governance. This mirrors Benjamin Constant's warning that appeals to "public safety" justify arbitrary power. More critically, Article 225(3) of the Administrative Code barred proportionality reviews of emergency measures. The absence of proportionality review exacerbates this, as unchecked executive action undermines the rule of law. Thus, while Moldova's original laws reflected Business as Usual principles, the 2020 amendments mark a departure toward extra legalism.

The Law on the Regime of Emergency, Siege, and War expanded executive authority during emergencies. The extra legalist perspective, inspired by Schmitt, posits that crises necessitate measures beyond ordinary law. Moldova's pandemic response exemplifies this: the CES was granted open-ended authority to adopt "any necessary measures," creating a parallel legal regime.

Also, Agamben's notion of the "exception becoming the rule" is evident here. Emergency powers were normalized through legislative amendments, institutionalizing executive dominance. The prohibition on judicial proportionality review (Art. 225(3)) reinforces this dynamic, enabling the executive to operate in a legal gray zone, a governmental technique that erodes the distinction between normal and exceptional governance. By formalizing ambiguous emergency powers, Moldova risks reinforcing extralegal practices and undermining constitutional governance in favor of executive discretion.

In response, a group of deputies filed a complaint with the Constitutional Court, challenging the constitutionality of provisions in the Law on the Regime of Emergency, Siege, and War.

On June 23, 2020, the Constitutional Court of Moldova partially upheld the deputies' claims regarding the COVID-19 pandemic-related state of emergency.

The Court acknowledged that phrases like "other necessary measures" or "other

necessary actions" are indispensable in emergency contexts, as rigid or exhaustive legislative frameworks could hinder executive flexibility. It emphasized that Parliament cannot feasibly anticipate all required measures for every emergency. Flexible regulation of emergency powers was deemed both acceptable and necessary.

This decision underscores the tension between Moldova's legalist aspirations and its extra legalist realities. The Court's reasoning that flexibility is indispensable yet risky, reflects the broader theoretical struggle to balance governance efficacy with democratic accountability.

VI. Final Remarks

The experiences of Romania and Moldova during the COVID-19 pandemic clearly show the ongoing tension between crisis management and the respect for constitutional principles. Both countries faced the same challenge: how to act quickly in an emergency without undermining the law and the protection of human rights. Their methods differed, but the results reflected Giorgio Agamben's warning that "the exception becomes the rule." Temporary emergency measures gradually turned into normal governance tools, blurring the line between extraordinary and ordinary legal systems.

Carl Schmitt's theory is also present here. In Romania, the President's power to declare a state of emergency, though limited by the Constitution, risked resembling Schmitt's idea of a sovereign who operates both inside and outside the law. Similarly, Moldova's amendments, allowing open-ended "necessary measures," gave the executive broad authority to reshape legal limits. In both cases, weak judicial oversight highlighted how fragile constitutional protections can be under executive pressure.

The pandemic revealed a deep paradox: even as states relied on legal systems to justify emergency powers, those same systems sometimes enabled the erosion of their foundations. Romania's extended state of alert and Moldova's vague laws showed how temporary crisis measures can quietly evolve into permanent governance strategies, shifting from reacting to real threats to managing hypothetical risks an example of Agamben's "state of exception" becoming the norm.

Yet the cases also show that Constitutional Court reviewing emergency laws reflected a strong societal demand for accountability. Even in emergencies, the rule of law remains essential. Any restrictions on rights must be strictly limited by law and continually reviewed. Judges, lawmakers, and civil society are vital in preventing emergency powers from becoming authoritarian tools.

Romania and Moldova's experiences show that necessity must not justify despotism. Strong democracies do not abandon legal limits in crises; they ensure that emergency actions stay rooted in the legal framework. As the pandemic taught us, legality is not a barrier to resilience, it is its foundation.

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