
The Parliament in the time of coronavirus

Romania

The Role of the Romanian Parliament during the COVID-19 Sanitary Crisis.

A diminishment of the executive decision-making power

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In Romania, the sanitary crisis triggered by COVID-19 forced the application of two consequential, yet different constitutional and legal regimes of an exceptional nature: the state of emergency and the state of alert. The first is regulated by the Article 93 of the Constitution and by the Emergency Ordinance no. 1/1999 concerning the state of siege and state of emergency¹ (hereafter EOG). The second is regulated by the Emergency Ordinance no. 21/2004 concerning the National System of Emergency Situations' Management² and the Law no. 55/2020 concerning measures for the prevention and fighting against the outcomes of the COVID-19 pandemic³ (hereafter Law no. 55/2020). Originally, the EOG no. 21/2004 has been adopted to prevent risks and threats to national security. It was only the Law no. 55/2020 which has been adopted by Parliament in May 2020 to specifically deal with the COVID-19 pandemic.

In this article, we shall present the constitutional and legal regime of the state of emergency and the state of alert emphasizing the role of the Parliament (see Section 2). Also, we shall present how the Parliament organized its functioning under the imperative of physical distancing imposed by the need to temper and eventually stop the spread of the SARS-COV-2 virus. Finally, we shall assess how the Parliament exercised its legislative and control functions during the state of emergency and the state of alert (see Section 3). The relevant case-law of the Constitutional Court of Romania (hereafter CCR) on the matter will be inserted in each Section.

1. Executive-Legislative Relation during the State of Emergency and the State of Alert

1.1. State of emergency

Article 93 of the Romanian Constitution provides that “*the President shall, according to the*

¹ Approved by Law no. 453/2004 of the Parliament, published in the Official Gazette no. 1052 on 12th November 2004.

² Approved by by Law no. 15/2005, published in the Official Gazette no. 190 on 7th of March 2005.

³ Published in the Official Gazette no. 396 on 5th of May 2020.

law, declare the state of siege or state of emergency in the entire country or in some territorial-administrative units, and ask for the Parliament's approval for the measure adopted, within 5 days of the date of taking it, at the latest". If Parliament does not sit in a session, it shall be convened *de jure* within 48 hours of the institution of the state of siege or emergency and shall function throughout this state.

The legislation implementing Article 93 of the Constitution on the *state of emergency* and the state of siege was adopted by emergency ordinance in 1999 in response to an internal political and social crisis. It set forth the legal framework of the state of emergency, defining it as “*a set of exceptional measures of political, economic and public order nature*” to be established in case of current or imminent dangers regarding national security or the functioning of constitutional democracy or “*the imminence of calamities or national disasters*”. It also developed the constitutional provisions according to which the state of emergency can be declared by the President of Romania and has to be confirmed by Parliament within 5 days. It may last for a maximum of 30 days and can be renewed as many times as needed, each time with the approval of Parliament.

Considering the constitutional and legal framework regulating the declaration of the state of emergency and the state of siege, the President of Romania has chosen to issue on the 16th of March 2020 the Decree no. 195/2020⁴ declaring the state of emergency for 30 days on the whole territory of Romania. On the 14th of April 2020, the President has prolonged the state of emergency for another 30 days by Decree no. 240/2020⁵.

The role of Parliament reflects the classical control function of the legislative branch over the executive branch. According to the Constitution and EOG no. 1/1999, the Parliament has the competence to approve the measure adopted by the President within 5 days at the latest. Following the Presidential Decree no. 195/2020 declaring the state of emergency the Romanian Parliament adopted Decision no. 3/2020 on the 19th of March 2020⁶. Parliament limited itself to approve the measure of declaring the state of emergency by the President. However, after the state of emergency was prolonged by Presidential Decree no. 240/2020, Parliament did not limit itself to approving the measure of prolonging the state of emergency by Decision no. 4/2020⁷. Among others⁸, it established that the restriction of rights and liberties (i) should be regulated only by normative acts with the force of law, exclusively for the prevention and fighting against COVID-19 pandemic and (ii) should be thoroughly motivated and in accordance with Article 53 of the Constitution. Moreover, the Parliament's Decision provided that the duration of the restriction of rights and liberties should not

⁴ Published in the Official Gazette no. 212 on 16th of March 2020.

⁵ Published in the Official Gazette no. 311 on 14th of April 2020.

⁶ Published in the Official Gazette no. 224 on 19th of March 2020.

⁷ Published in the Official Gazette no. 320 on 16th of April 2020.

⁸ For example, the Parliament's Decision established also an obligation for the Government to present a report at every 7 days or anytime it is necessary concerning the measures adopted by the Government or the measures intended to be adopted by the Government, as well as the reasons which determined the adoption of these measures. Also, the Parliament established that the Court of Accounts should draft a report in 60 days since the end of the state of emergency depicting the findings regarding the way in which the Government managed public resources during the state of emergency, together with conclusions and proposals.

be longer than the duration of the state of emergency.

From a legal-technical perspective, the main inter-connected topics reflecting the power relations between the executive and the legislative branches of government during the state of emergency focused on the legal nature of the presidential decree for declaring and prolonging the state of emergency, as well as on the identification of the public authority entitled under the Constitution to regulate restrictions of fundamental rights and liberties in order to fight against COVID-19 pandemic. To these questions, which were heavily debated in the political arena, the response was finally given by the CCR. Thus, in Decision no. 152/2020⁹, prompted by the request of the Ombudsman to verify the constitutionality of EOG no. 1/1999, the CCR established that the presidential decrees for declaring and prolonging the state of emergency are normative administrative acts, issued by a member of the executive branch and meant to enforce EOG no. 1/1999 which regulates the legal regime of the state of emergency. However, according to the majority of the constitutional judges, because this normative act is approved by Parliament, it means that it is an administrative act of the President concerning Parliament. As a consequence, according to Article 126 § 6¹⁰ of the Constitution, the legality of such administrative acts cannot be judged by a court. Building on this premise-argument, the CCR went further and established that the content of the presidential decree implementing measures provided by EOG no. 1/1999 might be submitted to a two-tier successive control mechanisms. First, there is an *ex officio* parliamentary control over the presidential decree's content, based on the constitutional obligation of the Parliament to approve the declaration of the state of emergency by parliamentary decision. This control allow the Parliament to sanction the *ultra vires* exercise of the constitutional prerogative by the President if the latter regulates by presidential decree measures which are not provided by or are contrary to the provisions of the EOG no. 1/1999¹¹. Second, there is an optional *ex-post* constitutional control delivered by the CCR concerning the parliamentary decision approving or not the state of emergency declared by the President.

Concerning the public authority entitled under the Constitution to regulate restrictions of rights and liberties of citizens during a state of emergency, the CCR provide an answer in this same Decision no. 152/2020. In a crystal-clear, yet very formalistic manner, considering the limits provided by Article 53 of the Fundamental Law, the CCR established that only Parliament is entitled to restrict by law the rights and liberties of citizens. As a consequence of the constitutional revision which took place in 2003¹², nor the President by a decree issued under Article 93 § 1 of the Constitution, neither

⁹ Published in Official Gazette no. 387 on 13th of May 2020.

¹⁰ According to the Constitution, the judicial control of administrative acts of the public authorities, by way of the contentious business falling within the competence of administrative courts, is guaranteed, except for those regarding relations with the Parliament, as well as the military command acts.

¹¹ A separate opinion to Decision no. 152/2020, signed by two judges, signalled this *ultra vires* of the Constitutional Court, who can only review primary legislation and not secondary one, and argued that it infringes upon the separation of powers, specifically on the power of ordinary courts to review normative administrative acts such as presidential decrees.

¹² The constitutional revision brought significant changes to the legislative delegation in 2003. Art. 115§ 6 of the Constitution interdicts the adoption of emergency ordinances affecting the the rights, freedoms and duties guaranteed by the Constitution. Corroborating art. 53 and art. 115 § 6 of the Constitution, the conclusion was pretty much clear: the Government cannot restrict rights and liberties by emergency ordinance. See DEACONU (Ş), "Comentariu articol 53", in MURARU (I.), TĂNĂSESCU (E.S.), (dir.), *Constituția României. Comentariu pe articole*, C.H. Beck, 2019, p. 461-462; DĂNIȘOR (D.C.), "Un

the Government by emergency ordinances or simple ordinances can regulate restrictions of the fundamental rights and liberties of citizens¹³.

1.2. State of alert

The state of alert is not provided by the Constitution¹⁴. It was introduced by EOG no. 21/2004 in the aftermath of the terrorist attacks that hit EU and NATO Members States in 2004. The state of alert is defined as a “*response to an emergency of particular magnitude and intensity*”. It allows temporary measures necessary for the prevention and removal of threats - among others - to life and human health. Initially, the state of alert was meant to address a different type of crisis and was subject to the discretion of the executive power. As such, it could be declared by an inter-ministerial body (National Committee for Special Emergency Situations) with the approval of the Prime minister.

After its revision in 2014 and again in 2020, the legal regime of the state of alert became somehow similar to the state of emergency.

EOG no. 21/2004 has been submitted to a constitutional review by the Ombudsman on the 3rd of May 2020, during the second period of the state of emergency. On the 13th of May 2020, one day before the state of emergency expired, the CCR took a decision regarding the constitutionality of EOG no. 21/2004. In this Decision no. 157/2020, published in the Official Gazette on the 15th of May 2020, the Court stated that several provisions of the EOG were constitutional only if actions and measures taken during a state of alert were not implying a restriction of fundamental rights¹⁵.

In such a context of uncertainty, a hard political consensus has been reached between the Parliament and the Government when the latter decided on the 12th of May 2020 to present a draft law dealing *specifically* with measures for limiting the spread of the COVID-19 pandemic. This Law no. 55/2020 was adopted by Parliament within only two days - a time-record - and it was published in the Official Gazette on the 15th of May 2020, which is one day after the state of emergency expired. This new law puzzled further an already fuzzy legislation regulating measures against the COVID-19 pandemic. It establishes a new procedure for declaring the state of alert only during the sanitary crisis caused by COVID-19 pandemic: a Decision adopted by the Government upon proposal by the Minister of Interior Affairs for 30 days maximum and that can be prolonged for well-grounded

pas important către statul de drept legal-parlamentar și unul incipient către un stat de justiție – cu privire la Deciziile Curții Constituționale nr. 152 și nr. 157 din 2020”, *Revista de Drept Public*, n° 1-2, 2020, p. 33-34. For a different, more contextualized opinion, see DIMA, (B.), "Considerații cu privire la regimul constituțional și legal al stării de urgență", *Revista de Drept Public*, n° 1-2, 2020, p. 67-71.

¹³ EOG no. 1/1999 regulates restrictions for the rights and liberties of citizens in case of a state of emergency or state of siege. However, despite this normative reality, the Constitutional Court decided that EOG no. 1/1999 is not unconstitutional, mainly because it was adopted before the constitutional revision in 2003 when Article 115 § 6 of the Constitution did not provide for the interdiction to adopt emergency ordinances affecting the rights, freedoms, and duties guaranteed by the Constitution.

¹⁴ See POPESCU (C.L.), "Starea excepțională instituită / declarată constituțional, condiție a măsurilor derogatorii privind drepturile omului" *AUBD-Forum*, 26 Apr. 2020 (published on 5th of October 2020).

¹⁵ Again, a separate opinion signed by the same two judges which signed the separate opinion in the Decision no. 152/2020 pointed to hyper-formalistic interpretation of Articles 53 and 115 of the Romanian Constitution, the first requiring that restrictions on fundamental rights be imposed only through laws (interpreted by the Constitutional Court as normative acts issued only by the Parliament and not by the Government) and the second declaring in paragraph 6 that emergency ordinances “cannot [...] affect the status of fundamental rights”.

reasons with supplementary periods of 30 days maximum. The law also provides that Parliament can approve the Decision of the Government within 5 days, with or without changes.

However, according to Article 77 of the Constitution, laws come into force only 3 days after their publication in the Official Gazette. As a consequence, even though the Law no. 55/2020 was published on the 15th of May 2020 in the Official Gazette, it came into force on the 18th of May 2020. At the same time, the state of emergency declared by the President expired on the 14th of May and the Decision of the CCR establishing that EOG no. 21/2020 could not be used to regulate administrative measures restricting the rights and liberties of citizens was also published in the Official Gazette on the 15th of May. Contemplating the specter of a three days absence of any binding restrictions, in some sort of absurd theatre of decision-making, the Government adopted EOG no. 68/2020¹⁶ on the 15th of May, whose aim was to modify the EOG no. 21/2020 to provide an appearance of legality until the new Law no. 55/2020 would come into force on the 18th of May. Following the new rules established by EOG no. 68/2020, the National Committee for Emergency Situations adopted on the 15th of May 2020 the Decision no. 24 declaring the state of alert at the national level. This Decision remained in force only three days, until Law no. 55/2020 came into force, which prompted the Government to adopt the Decision no. 394/2020 declaring the state of alert at national level for 30 days¹⁷. Two days later, applying the provisions of Law no. 55/2020, the Parliament approved, by the Decision no. 5/2020, the Decision of the Government declaring the state of alert with a couple of changes.

Once again, the originality of intermingling of powers vis-à-vis the legal regime of the state of alert regulated by Law no. 55/2020 did not escape the attention of the Ombudsman, which addressed the issue to the CCR. It considered that the Parliament could not approve or revise a legally adopted administrative act issued by the Government since this would grossly violate the constitutional principle of the separation of powers. In its Decision no. 457/2020¹⁸, the CCR struck down the legal provision requiring the *ex-post* approval by Parliament of a Government's Decision enforcing the Law no. 55/2020. As a consequence, all four Government's Decisions prolonging for consecutive 30 days periods the state of alert have no longer been approved by Parliament.

2. The Functioning of the Parliament during the State of Emergency and the State of Alert

2.1. Rules of procedure

Following the declaration of the state of emergency by presidential decree on the 16th of March

¹⁶ Published in the Official Gazette no. 391 on 14th of May 2020. EOG no. 68/2020 provided that the state of alert can be declared at the national level, by the National Committee for Emergency Situations, with the approval of the Prime-minister, for 30 days and it can be prolonged with supplementary periods of 30 days if necessary. At the local level, the state of alert can be declared and eventually prolonged by the Local Committee for Emergency Situations, with the approval of the prefect (local representative of the Government at the county level).

¹⁷ Since then, 4 more Decisions were adopted by the Government to prolong the state of alert.

¹⁸ Published in the Official Gazette no. 578 on 1st of July 2020.

2020 and its approval of the Parliament by Decision adopted on the 19th of March 2020, both assemblies changed their Standing Orders to allow the use of electronic procedures of debating and voting. Thus, the Romanian Senate adopted By-law no. 16/2020¹⁹ on the 26th of March 2020, and the Chamber of Deputies adopted By-law no. 7/2020²⁰ on the 2nd of April 2020. Their normative substance is almost identical. According to the new provisions of the Standing Orders, in exceptional situations officially established by qualified public authorities²¹, the meetings of the Permanent Bureau, of the Committee of the Leaders of the Parliamentary Groups (hereafter Committee of Leaders²²), of the permanent committees, as well as the meetings of the Plenaries will be managed through electronic devices, following a procedure which will be adopted by decision of the Permanent Bureau. Moreover, some new and highly contested provision of the Standing Orders provide that the Committee of the Leaders can change the procedure of the final vote for the draft laws on the agenda of the Plenary session.

Since the adoption of these changes to the Standing Orders, the two Houses of the Parliament continuously worked using electronic devices for debating and voting drafts laws, both in Plenary sessions and in the internal structures, such as the Permanent Bureau and the permanent committees.

A group of MPs from the opposition parties asked the CCR to judge the constitutionality of Decision no. 16/2020 adopted by the Senat. They considered that procedures dealing with the functioning of Parliament have to be regulated directly by the Standing Orders and not by implementing decisions stemming from the Permanent Bureau. It would be an expression of the constitutional autonomy of Houses of the Parliament which are entitled to decide about their organization and functioning only by the vote in Plenary. The CCR rejected this line of argument and considered that the Decision of the Senate provided a necessary flexible regulation for any type of exceptional situations to come. According to the Court, the regulation of the concrete way in which activities of the Senate should be organized must take into consideration the specificity of the exceptional situation which demands remote debating and voting. Thus, it is for the Senate to decide how it will regulate such procedures, either directly in the Standing Orders or through a decision of the Permanent Bureau.

Another important topic which was easily overpassed by the CCR (except two judges who signed a separate opinion) referred to the fact that the role and importance of the Committee of Leaders gained too much discretionary power, including the power to decide on how the final vote on a bill must be organised. This Committee is neither a leading structure, nor a working structure of the Houses, but a mere political organ that cannot decide on fundamental procedures for the functioning of the Parliament. However, these arguments were rejected by the majority of the CCR, who favored the idea of the autonomy and flexibility of Parliament when deciding how procedures

¹⁹ Published in the Official Gazette no. 252 on 26th of March 2020.

²⁰ Published in the Official Gazette no. 278 on 2nd of April 2020.

²¹ Such as epidemics, pandemics, extreme natural phenomena, earthquakes, acts of terrorism, and other situation which make impossible the physical presence of the MPs in the Senate and in the Chamber of Deputies.

²² The Committee is composed of the leaders of the parliamentary groups, according to the political configuration in each Chamber. The Committee has a massive political influence and its main attribution is to establish the agenda of the Plenary Session of each Chamber.

for debating and voting should be used in exceptional situations.

2.2. Control mechanisms

The power relations between the executive and the legislative branches of government during the state of emergency and the state of alert could be characterized as a mutual gridlock. Either the executive branch adopted by emergency ordinances measures to fight against COVID-19 and Parliament tried to double²³ or completely modify them²⁴, or Parliament adopted laws which, in turn, displeased the executive and prompt parliamentary opposition, Government or the President to contest them in front of the CCR²⁵.

Even though most of the time the political quarrel between the executive and the legislative was high-pitched, compromise has been reached under extreme urgency circumstances. Thus, Parliament adopted in just two days Law no. 55/2020 when existing legislation was not sufficient in order to adopt effective measures to fight against the COVID-19 pandemic (see Section 2.2.). Also, following a Decision of the CCR and after heated negotiations in parliamentary committees, Parliament adopted Law no. 136/2020²⁶ concerning the organization of some measures in the field of public health for epidemiological and biological dangers²⁷.

During the state of emergency and the state of alert, Parliament strongly exercised its classical control mechanisms over Government. No less than 7 simple motions were adopted by the Chamber of Deputies and the Senate from the 11th of May (during the state of emergency) until the 7th of July (during the extraordinary session of the Parliament and the state of alert). Every major members of the Government²⁸ were submitted to simple motions, some of which eventually passed. However, in Romania, the Constitution does not provide for an individual motion of non-confidence, thus, simple motions are not conducive to mandatory dismissal of targeted ministers.

²³ E.g., the Government adopted an EOG prolonging the mandates of the local elected officials and establishing the official date for local elections. The Parliament adopted a law regarding the same object, but with different solutions. This law was declared unconstitutional by the Constitutional Court in *a priori* constitutional control (see Decision no. 242/2020). Also, the Government adopted an EOG providing for economic and fiscal/tax measures. The Parliament adopted a law regarding the same object, but with much more economic and fiscal/tax measures of a quite populist nature. Again, this law was declared unconstitutional by the Constitutional Court in *a priori* judicial review (see Decision no. 154/2020).

²⁴ E.g., the Government adopted an EOG regulating certain facilities for debtors. When approved by the Parliament, the EOG was significantly changed so it would provide much more facilities. The law approving the EOG was submitted to a review of the Constitutional Court and its decision is still expected on the matter.

²⁵ E.g., the Parliament adopted a law providing that the Parliament has the competence to establish the date for parliamentary elections. This law was submitted to a review of the CCR, which decided that the law was constitutional. The decision has not been yet published in the Official Gazette and the law was not yet promulgated by the President who is strongly opposing it.

²⁶ Published in the Official Gazette no. 884 on 28th of September 2020.

²⁷ This Law regulates measures for quarantine, as well as measures for isolation of people for reasons of public health for epidemiological and biological dangers. It should not be mistaken for Law no. 55/2020 which regulates specific restrictive measures to be taken only in the case of COVID-19 pandemic.

²⁸ The Chamber of Deputies adopted 4 simple motions against four ministers: on the 11.05.2020 against the Minister of Public Finances – Mr. Cițu; on the 25.05.2020 against the Minister of National Education and Research, Ms. Anisie; on the 17.06.2020 against the Minister of Healthcare, Mr. Tătaru; on the 7.07.2020 against the Minister of Public Works, Development and Administration, Mr. Ștefan. The Senate adopted 3 simple motions against three ministers: on the 18.05.2020 against Minister of Agriculture, Mr. Oros; on the 26.05.2020 against the Minister of Domestic Affairs, Mr. Vela; on the 9.06.2020 against Minister of Labour Ms. Alexandru.

Following the political context of political controversies and institutional gridlock between the executive and the legislative, the parliamentary majority initiated a motion on non-confidence against the Government during a one day extraordinary session of Parliament. The motion was registered on the 17th of August, discussed during another extraordinary session of Parliament on the 20th of August and submitted to vote on the 31st of August, i.e. the last day of the second extraordinary session of the Parliament. However, the motion of non-confidence could not be effectively voted by the MPs because the quorum needed for the validity of the joint plenary session of the two Houses was not reached.

Considering that a motion of non-confidence cannot be registered in one extraordinary session of the two Houses of the Parliament and debated in another one, the Prime minister asked the CCR to rule upon a possible constitutional conflict between the Government and the Parliament. On the 14th of September the CCR found that there was no constitutional conflict between the two authorities, thus accepting that a motion of non-confidence can be initiated not only in ordinary sessions of Parliament, but also during extraordinary sessions.

Last but not the least, when the President of Romania declared the state of emergency on the 16th of March 2020 and prolonged it on the 15th of April until the 14th of May, the Romanian Parliament was sitting in an ordinary session. According to the Standing Orders of the two Chambers, there are two ordinary sessions during the year: the first starts in February and Houses go beyond the end of June; the second starts in September and cannot go beyond the end of December. When Parliament ended its ordinary session on the 30th of June 2020, the state of emergency had been replaced by a state of alert declared by the Government. The majority of MPs decided to convene the Senate and the Chamber of Deputies in extraordinary session as long as a state of alert is in place. As a consequence, from the 1st of July until the 31st of August, the two Houses of the Parliament sat in a row of extraordinary sessions. They also used all their prerogatives to control and sometimes blocked decisions adopted by the Government.

3. Conclusions

The power relations between the executive and the legislative during the sanitary crisis reflect a situation of mutual gridlock. On one hand, the President and the Government forced the adoption of restrictive measures which were necessary to temper the social, economic or sanitary effects of the COVID-19 pandemic, using either presidential decrees (during the state of emergency) or emergency ordinances. The parliamentary majority opposed most of the measures taken by the Government. Thus, it duplicated in laws measures adopted through emergency ordinances, significantly changed and rejected some of them. On the other hand, the Government, the President, as well as the opposition parliamentary parties have tried to block or postpone the legislation adopted by the parliamentary majority.

Even though this constant mutual gridlock has been the rule of the game, there were a couple of situations where extreme necessity forced a compromise between the parliamentary majority and

the executive. Two of the most important pieces of legislation aiming to deal with COVID-19 pandemic were adopted after negotiations between the parliamentary majority and the Government: the Law no. 55/2020 regulating the legal regime of the state of alert during COVID-19 pandemic and the measures which might be taken by the Government and the Law no. 136/2020 regulating the procedures for isolation and quarantine in case of SARS-COV-2.

The Romanian Parliament has been extremely active in exercising its legislative and control functions during the state of siege and the state of alert. Moreover, because of a plethora of decisions rendered by the CCR, the competences of the executive power (President & Government) and the legislative power (Parliament) have evolved during the development of the sanitary crisis. The rules of the game were re-written during the game. In the end, during the sanitary crisis the role of Parliament was relatively strengthened while the executive decision-making power was relatively diminished.

As a consequence of the CCR's case-law, the content of the presidential decree declaring the state of emergency has been taken away from the realm of judiciary control and submitted to a direct review of legality and opportunity accomplished by Parliament, as well as to an indirect judicial review by CCR. This logic does not apply to the Government's Decision declaring the state of alert, which remains an administrative act issued by the Government in the execution of the law adopted by Parliament, and as such it can be submitted to a legality review made by regular courts. The logical consequence of the CCR's case-law is that the prerogatives of the President in a state of emergency were limited in favor of those of Parliament, while the prerogatives of the Government in a state of alert were liberated from a stronger and specific parliamentary control.

In the end, after two months of state of emergency and almost five months of state of alert, the Romanian system of government saw a significant boost of its parliamentary nature, an odd exception to the classic rule postulating that in a state of exception the executive reigns supreme, while the legislative remains quit. In Romania, both the executive and the legislative talked at the same time, thus covering and limiting each other.