Leona ROSANDIĆ: Emergency Decrees and Citizens' Rights in the Early 1990s

University of Zagreb, Faculty of Law

DOI 10.21862/siaa.8.12

1. Introduction

In times of emergencies, certain executive bodies are authorized to issue special decrees known as constitutional decrees. This authority arises due to the need for swift action in crises, since executive bodies are typically in constant session, relatively homogeneous, and capable of responding more quickly than legislative bodies.[1] The disruption of jurisdiction between the executive and legislative branches is justified in such situations to ensure an efficient response. Constitutional provisions differ between countries regarding which specific executive body is entrusted with the power to issue these emergency decrees.[2]

In the most favourable instance and in line with the rule of law, the states of emergency should be defined in such a way that all possible situations in which these powers may be exercised are regulated in advance. [3] However, it is hardly ever possible to foresee and regulate all instances in which the mentioned states of emergency occur, especially since the main consequence of the decrees is that the rule of law is temporarily suspended in order to preserve the public order or safety. However, considering historical experience and the application of sound reason, the existence of states of emergency is undeniably clear, in whatever way one defines them. Each country through its own legislation separately faces the issue of choosing the said definition, the scope of rights they can intervene in, and the mechanisms of control on the mentioned exercising of power.

---

[1] BAČIĆ, Arsen: Odredbe o 'stanju nužnosti' u Ustavu Republike Hrvatske iz 1990. godine (rekapitulacija). [Provisions on the 'State of Necessity' in the 1990 Constitution of the Republic of Croatia (Recapitulation)]. *Zbornik radova Pravnog fakulteta u Splitu [Proceedings of the Faculty of Law in Split],* No. 1–2, 1997, p. 39–57, p. 42.

[2] SOKOL, Branko – SMERDEL, Smiljko: Ustavno pravo [Constitutional Law]. Zagreb, *Narodne novine,* 2009, p. 318

[3] OMEJEC, Jasna: Izvanredna stanja u pravnoj teoriji i ustavima pojedinih zemalja. [Restriction on Personal Liberties and Human and Civil Rights in States of Emergency]. *Pravni vjesnik [Journal of Law]*, No. 1–4, 1996, p. 172–196, p. 348.

2. States of emergency and emergency decrees

In addressing the concept of emergency decrees, it is necessary to engage the issue of the disruption of the balance of powers between the legislative and executive branches, which tend to emerge in situations where swift and effective action is required from the authorities.[4] The legislative body, due to its structure and typically slower procedures, is not always able to respond as quickly as necessary.

Ideally, the main purpose of giving the executive body such a power is to ensure a quick and efficient reaction in times of crisis or in other states of emergency. Many authors use the term *modification of constitutionality and legality* [5], thus creating a vacuum, a sort of a bubble in which a special legally regulated order is established, only to dissolve once the conditions for its creation disappear.[6] Supporting this argument is the fact that many Croatian authors, as well as other international legal scholars, address emergency decrees in their research and theoretical work within chapters concerning the principles of constitutionality and legality, rather than those dealing with sources of law themselves.[7]

While these decrees are indeed sources of law in their own essence, this characteristic is secondary in our analysis, as the primary issue involves the disruption of the balance between legislative and executive powers and temporary suspension of rule of law for the purpose of preserving public order, safety or other values which are threatened in states of emergency. *It seems to be a natural phenomenon of the law of a constitutional state that the centre of political balance constantly shifts. It oscillates between the dominance of the legislative and the dominance of the executive power. In normal times, the power of the legislative authority increases on the political scale, while in times of crisis, the power of the executive authority grows.*[8]

[4] SOKOL–SMERDEL, *op. cit., p.* 320.
[5] IVANČEVIĆ, Velimir: *Institucije upravnog prava. [Institutions of Administrative Law].* Zagreb, Pravni fakultet u Zagrebu, 1983, p. 109.
[6] OMEJEC, *op. cit.,* p. 349.
[7] KRBEK, Ivo: *Upravno pravo. [Administrative Law].* Zagreb, Jugoslovenska štampa, 1929, p. 17.
[8] GIRAUD, Emile: *Le pouvoir exécutif dans les démocraties d'Europe et d'Amerique. [The Executive Power in the Democracies of Europe and America].* Bibliothèque de l'Institut International de Droit Public [Library of the International Institute of Public Law, IX.], Paris, 1938, p. 19.

3. Emergency decrees in Croatia

The adoption of the new Croatian Constitution in 1990 sought to create a revised framework for institutional functions and to enumerate a comprehensive set of human rights characteristic of a democratic society. Furthermore, the Constitution was designed to define the operations of institutions and the scope of human rights during states of emergency. As a result, the initial draught proposal of the Constitution included provisions for emergency decrees, specifically those with the status of legislative acts.[9]

The regulation of states of emergency, as prescribed by the Constitution of the Republic of Croatia, was articulated in two specific articles, Article 101 and Article 17. Article 101 stated: *"The President of the Republic has the authority of passing decrees* ***with the force of law*** *and taking emergency measures in the event of a state of war or an immediate danger to the independence and unity of the Republic, or when government bodies are prevented from regularly performing constitutional duties. During the time that the President of the Republic is making use of such powers, the House of Representatives may not be dissolved. The President of the Republic should submit the decrees with the force of law for approval to the Chamber of Representatives as soon as the Parliament is in a position to meet."* [10]

Article 17 outlined the following: *"(1) During a state of war or an immediate danger to the independence and unity of the Republic, or in the event of some natural disaster,* ***individual freedoms and rights guaranteed by the Constitution may be restricted****. This shall be decided by the Croatian Parliament by a two-thirds majority of all representatives or, if the Croatian Parliament is unable to convene, by the President of the Republic.*

(2) The extent of such restrictions must be adequate to the nature of the danger and may not result in the inequality of citizens with respect of race, the colour of the skin, sex, language, religion, national, or social origin.

(3) Not even in the case of immediate danger to the existence of the state may restrictions be imposed on the application of the provisions of this Constitution concerning the right to life,

[9] KOSNICA, Ivan: Uredbe iz nužde predsjednika Republike Hrvatske iz 1991–1992 [Emergency decrees of the Croatian President between 1991 and 1992]. *Zbornik Pravnog fakulteta u Zagrebu [Proceedings of the Faculty of Law in Zagreb]*, Vol. 61, No. 1, 2011, p. 153.
[10] Constitution of the Republic of Croatia, *Narodne novine,* No. 56/90.

prohibition of torture, cruel or unusual treatment or punishment, and on the legal definitions of penal offences and punishments, and on freedom of thought, conscience, and religion." [11]

Although these two articles may appear similar, they differ significantly in substance. One key distinction is that the measures introduced under Article 17 derogate constitutionally protected rights, whereas those within the scope of Article 101 are enacted with the force of law. The two articles are also applicable to distinct circumstances – constitutional rights can be modified in times of war, imminent threat to the independence and unity of the Republic and during major natural disasters, whereas decrees with the force of law can be introduced in the event of a state of war or an immediate danger to the independence and unity of the Republic, or when government bodies are prevented from regularly performing constitutional duties. These differences are critical to consider in the subsequent analysis of the Constitutional Court's decision regarding the decrees in question.

From the end of 1991, President Franjo Tuđman issued thirty-eight emergency decrees on the account of exercising his constitutional authority addressing various issues in the areas of internal affairs, justice, finance and other aspects of public and social life. Some of these decrees, by their very content, provoked a negative public reaction, primarily because they encroached upon rights that, according to Article 17, Section 3, were exempt from restriction even in times of war or imminent threat to the independence and unity of the Republic. Two of more controversial ones in this matter were the Decree on Internal Affairs[12], (which allowed detaining a person as long as there were grounds for it or conducting search of persons or home; all without a judicial order and in cases of security or threats of public order and peace, as well as restricting or prohibiting movement in public places due to extraordinary circumstances), and the Decree on Information Activities[13], which introduced a form of censorship. These decrees, as well as many other ones that were introduced during this period, were breaching some of the fundamental rights granted by the Constitution such as inviolability of the home, the right of public assembly, etc.

---

[11] *Ibid*.

[12] Uredba o unutarnjim poslovima za vrijeme ratnog stanja ili neposredne ugroženosti neovisnosti i jedinstvenosti Republike Hrvatske [Decree on Internal Affairs During a State of War or Immediate Threat to the Independence and Unity of the Republic of Croatia]. *Narodne novine*, No. 55/1991.

[13] Uredba o informativnoj djelatnosti za vrijeme ratnog stanja ili u slučaju neposredne ugroženosti neovisnosti i jedinstvenosti Republike Hrvatske [Decree on Information Activities during a State of War or in Case of Immediate Threat to the Independence and Unity of the Republic of Croatia]. *Narodne novine,* No. 57/1991.

In addition to the controversies regarding the substance of the decrees, the legitimacy of the President's authority to promulgate such decrees at the given time was also subject to criticism. According to some scholars[14], the prerequisites themselves for their issuance were initially not met. To validate these arguments, this necessitates an examination of the three conditions stipulated in Article 101. They are not to be interpreted cumulatively. Thus, the presence of any one of the three conditions on its own (state of war, immediate danger to the independence and unity of the Republic, or the government bodies being prevented from regularly performing constitutional duties) is sufficient for the President to lawfully issue emergency decrees.

According to Article 100, Paragraph 3 of the Constitution of the Republic of Croatia of 1990, the President of the Republic, based on a decision of the Croatian Parliament, declares war and concludes peace. This declaration is exclusively of a declaratory nature and occurs only if a decision by the Parliament is made. Therefore, the factual state of war that was undeniably present in the country at the time couldn't be classified under this condition, as the formal prerequisites for establishing such a state had not been met.

Government bodies being prevented from regularly performing their constitutional duties is a condition that is slightly more open to interpretation than the previous one. The main reason is the need to define which are the governmental bodies established in the constitution and to ascertain the scope of specific potential situations that may inhibit them from exercising their constitutional powers. In mid-September, the Presidency of the Parliament considered convening a plenary session and decided that due to the domestic situation and international circumstances, the session would not take place before October 8. This decision supports the argument that the Parliament was genuinely unable to meet during that time. However, following this and throughout the remainder of the year and into 1992, the Parliament met regularly, either monthly or more frequently and ratified the President's decrees issued in the interim. Given that the Parliament met relatively frequently and on a regular basis during this period, it would be illogical to justify the decrees passed during that time under the argument of the Parliament being unable to perform its constitutional duties when it did just that.

[14] OMEJEC, *op. cit.*, p. 257.

The condition of immediate danger to the independence and unity of the Republic is probably the most interesting one, since it is also the one that was touched on by the Constitutional Court itself in its ruling of a proposal for the assessment of the constitutionality of the emergency decrees, which will be thoroughly analysed in the following part.

4. The decision of the Constitutional court of the Republic of Croatia

On August 4, 1992, the Constitutional Court ruled on a proposal for the assessment of the constitutionality of decrees issued by the President of the Republic Franjo Tuđman. This proposal was submitted by the Croatian Party of Rights, then-Member of the Parliament G. Grbić, attorney D. Večerina, and Sando Todorovski.

The proposals are essentially based on the claim that the cited decrees of the President of the Republic are inconsistent with the Constitution of the Republic of Croatia because their issuance by the President should have been preceded by a prior declaration of a state of war or a state of immediate threat to the independence and unity of the Republic of Croatia. The proposals also warned about irregularities regarding their entry into force, as most of them took effect on the days of their adoption rather than on the day of their publication in the Official Bulletin. The procedure for assessing the constitutionality of some of those decrees was suspended because they had already ceased to exist at that time. The other proposals were declined for various reasons, the first one being that *"the right granted by the Constitution of the Republic of Croatia to the President of the Republic to issue decrees with the force of law in extraordinary circumstances is unlimited, and in this regard the President has the constitutional authority to issue decrees in all areas of legislative competence of the Croatian Parliament."* [15]

Article 101 of the Constitution of the Republic of Croatia indicates that the President of the Republic independently decides whether circumstances indicating an immediate threat to the independence and unity of the Republic of Croatia have arisen. The Constitution does not require that the occurrence of such extraordinary circumstances be previously established by a special decision.

[15] Decision of the Constitutional Court of the Republic of Croatia, U-I-179/1991, No. 49/1992.

The last reason was related to the retroactivity, touching on the argument that was mentioned in the proposals regarding the entry of force of the aforementioned decrees. The prohibition on retroactive changes applies exclusively to decrees issued by the Government of the Republic of Croatia, while the corresponding provisions regarding the prohibition of retroactive application of decrees issued by the President of the Republic are not included in the Constitution of the Republic of Croatia. Given the exceptional circumstances under which these decrees are issued, it was possible to stipulate that they take effect on the day of their adoption by the President of the Republic.

The decision of the Constitutional Court of the Republic of Croatia was faced with severe criticism by legal scholars on multiple grounds[16], mainly regarding the insufficiently reasoned explanation provided by the Court. Some claimed that the *"politically unacceptable and poorly reasoned decisions of the Constitutional Court, such as the one from June 24, 1992, likely harm the reputation of both the President of the Republic and the Republic itself more than decisions in which the Court demonstrates that it "has teeth.""* [17] The erroneous decision of the Constitutional Court is attributed to the possibility of judges' protecting of the President of the Republic, either due to patriotism or obedience. The critic warned that although the authors of the Croatian Constitution referred to the French Constitution as a model upon which the Croatian Constitution is based, it appears to follow actually the Weimar Constitution. He considered this dangerous, as it opened the possibility of a path toward dictatorship, as was seen previously in Italy and Germany.[18] Rigorous comparisons of the exercise of power of the Croatian president with previously established dictatorships reflect some of the public's response to the issuance and implementation of emergency decrees in Croatia.

5. Conclusion

[16] MATULOVIĆ, Miomir: Ljudska prava: uvod u teoriju ljudskih prava [Summary: Human Rights]. Zagreb, *Hrvatsko filozofsko društvo [The Croatian Philosophical Society], 1996, p. 336.*

[17] PAĐEN, Ivan: Uredbe iz nužde hrvatskog predsjednika: mjerodavnost francuskog javnog prava [Emergency Decrees of Croatian President: The Authority of French Public Law]. *Politička misao [Croatian Political Science Review]*, No. 1, 1996, p. 149–165, p. 152.

[18] PAĐEN, *op. cit.*, p. 164.

The creators of the Constitution in 1990 anticipated that the semi-presidential system would strike a balance between democratic principles and the effective organisation of state authority, grounded in the separation of powers. However, this expectation was not fulfilled.

The presidentialization of the constitutionally established semi-presidential system, or its transformation into a *de facto* imperial presidency, was primarily influenced by the wartime conditions that initially endangered the survival and later the territorial integrity of the Republic of Croatia.[19] The process of presidentialization in the Croatian political system was also shaped and strengthened – facilitated institutionally and otherwise – by the fact that the President of the Republic simultaneously held the presidency position and, from its inception, remained the undisputed leader of the Croatian Democratic Union (HDZ). This political party independently secured majority in the parliamentary elections of 1990, 1992 and 1995, particularly in the decisive Chamber of Representatives. Thus, throughout the period from 1990 to 1999, the President of the Republic, based on the outcomes of both parliamentary and presidential elections, served both as the political leader of the parliamentary majority in the Chamber of Representatives and as the holder of executive authority, to whom the Government was politically accountable and subordinate.[20]

As a result of these factors, transitioning from a semi-presidential to a parliamentary system became one of the core elements of the political programmes of the opposition coalition. The constitutional changes that followed in the subsequent years also impacted the President's authority to issue emergency decrees, which cannot be issued longer independently but now require a proposal from the Government and the countersignature of the Prime Minister.

[19] SOKOL–SMERDEL, *op. cit.*, p. 376.
[20] SOKOL–SMERDEL, *op. cit.*, p. 377.