



## Constitutional Requirements regarding the Restriction of the Exercise of Fundamental Rights during the Pandemic

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**Abstract:** Following the official recognition, by the World Health Organization (W.H.O.) of the COVID-19 pandemic, nation states have adopted specific measures to prevent infections and combat the pandemic. The governments of a large number of states have reacted to the pandemic as a matter of national security; some member countries of the Council of Europe - including Romania have resorted to the right of derogation stipulated by the art. 15 of the European Convention on Human Rights.

**Keywords:** World Health Organization; Pandemic; Council of Europe; Romania

### 1. Brief Introductory Considerations

Following the official recognition, by the World Health Organization (W.H.O.)<sup>2</sup> of the COVID-19 pandemic, nation states have adopted specific measures to prevent infections and combat the pandemic. The governments of a large number of states have reacted to the pandemic as a matter of national security; some member countries

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<sup>2</sup> International organization, established on April 7, 1948, with its headquarters in Geneva, with the role - established in its Constitution - of maintaining in the best condition the health of populations all over the world.

of the Council of Europe - including Romania<sup>1</sup>, have resorted to the right of derogation stipulated by the art. 15 of the European Convention on Human Rights.

The activation of article 15 does not allow a state to remove the values of a democratic society, nor does it lead to a temporary cancellation of fundamental rights.

In the Declaration of the High Representative, Josep Borrell, on behalf of the European Union regarding human rights in the circumstances of the coronavirus pandemic<sup>2</sup>, it is emphasized that “In emergency situations, international human rights law allows the states to limit certain human rights only on the condition the taken steps are necessary, proportionate, temporary and non-discriminatory.

The COVID-19 pandemic caused by the coronavirus should not be used as an excuse for restricting democratic and civic space, the compliance with the state of law and international commitments (...)”

On the same line, comes the statement of the Secretary General of the Council of Europe, Marija Pejčinović Burić<sup>3</sup>, made on the occasion of the International Day of Human Rights<sup>4</sup>.

When faced with difficult challenges, it can be tempting for states to consider relaxing human rights protections.

In fact, the opposite should be the case – when times get tough it is when we need to stand up and respect the unique value system we have built over the last 70 years.

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<sup>1</sup> The activation took place based on the provision of Annex no. 1 to Decree no. 195/2020 whereby in art. 48 letter. b) from Chap. VI it was specified that the Ministry of Foreign Affairs will notify the Secretary General of the UN and the Secretary General of the Council of Europe of the measures adopted by the decree establishing the state of emergency which have the effect of limiting the exercise of some fundamental rights and freedoms, in accordance with Romania's international obligations.

<sup>2</sup> Available on the website <https://www.consilium.europa.eu/ro/press/press-releases/2020/05/05/declaration-by-the-high-representative-josep-borrell-on-on-behalf-of-eu-on-human-rights-in-the-times-of-the-coronavirus-pandemic/>.

<sup>3</sup> Statement available at [https://search.coe.int/cm/pages/result\\_details.aspx?objectid=0900001680a4d218](https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a4d218).

<sup>4</sup> The official establishment of December 10 as "International Human Rights Day" took place at the 317th plenary session of the General Assembly, on December 4, 1950, when the General Assembly declared Resolution 423, inviting all member states, as well as any other organizations interested in celebrating this day.

## **2. The Establishment of the State of Emergency and the State of Alert in Romania. The Constitutional and Infraconstitutional Framework**

The Romanian Constitution regulates - in art. 93, as exceptional states: the state of war, the state of siege, the state of emergency and the state of total or partial mobilization of the armed forces.

At the infraconstitutional level, the state of emergency is regulated by O.U.G. no. 1/1999 regarding the regime of the state of siege and the regime of the state of emergency - approved with amendments and additions by Law no. 453/2004.

The state of emergency was officially declared for a period of 30 days by the Decree of the President of Romania no. 195 of March 16, 2020, and extended by another 30 days, starting on April 15, 2020, by Decree no. 240/2020. The Decrees of the President of Romania - by which the fundamental rights whose exercise is restricted were also established, were approved by Parliament Decisions no. 3 of March 19, 2020, respectively no. 4 of April 16, 2020.

The institution of the state of alert is an exclusive creation of the legislator (mayor-Parliament or delegate-Government), without coverage in the texts of the Constitution.

The first normative document regulating the state of alert is represented by the Government's Emergency Ordinance no. 21/2004 on the National Emergency Management System, which was amended and supplemented by O.U.G. no. 68/13 May 2020.

On May 15, 2020, the Parliament adopted the Law no. 55 regarding some measures to prevent and combat the effects of the COVID 19 pandemic.”

The aim of adopting the law was to ensure, after the end of the state of emergency, adequate protection against the SARS-CoV-2 coronavirus, by establishing temporary and, as the case may be, gradual steps, in order to protect the rights to life and to physical integrity and health protection, including by restricting the exercise of other fundamental rights and freedoms.

According to art. 4 paragraph. 1 of Law no. 55/2020, the state of alert is instituted by the Government by decision, at the proposal of the Minister of Internal Affairs, and cannot exceed 30 days. The state of alert can be extended, for valid reasons, for a maximum of 30 days, by the decision of the Government, at the proposal of the Minister of Internal Affairs.

According to H.G. no. 394 - starting on May 18, 2020, the state of alert was established throughout the entire country for a duration of 30 days. The state of alert was successively extended by 18 government decisions.

### **3. The Compliance with the Human Rights in the Pandemic – between Utopia and Reality**

In order to be respected and protected, human rights must first be known.

The human rights express the identity of the human being in which three main reference elements are brought together: physical and mental integrity, dignity and freedom.

The specialized doctrine (Popa, 2012, p. 44) emphasized the fact that human rights are established at the global or regional level through international conventions, and at the national level through constitutions and laws-

at the center of the concern of the institutions that assign them are those rights that guarantee the equality of all people, their possibility of unhindered manifestation, on the basis of dignity and freedom, because man, by his nature, is a dignified and free being.

Although the recording of human rights in a legal instrument (international, European or national) is important, without ensuring their effective character, they remain at the stage of simple utopia.

#### **3.1. Reference Documents on the Protection of Human Rights at International, European and National Level**

A foundation stone of international human rights law, the Universal Declaration of Human Rights<sup>1</sup> established, for the first time, the fundamental rights and freedoms of all people.

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<sup>1</sup> Adopted on December 10, 1948, by Resolution 217 A at the third session of the United Nations General Assembly.

The European human rights protection system has its legal source in the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup> as well as in the European Social Charter<sup>2</sup>.

The Charter of Fundamental Rights of the European Union<sup>3</sup> “reconfigures the system of protection of fundamental rights within the European Union” and combines the civil, political, economic and social rights in the benefit of the EU citizens.

The fundamental rights - the legal basis of the set of citizen rights, are subjective rights, stipulated in the text of the Constitution which invests them with special legal guarantees.

The Constitution of Romania from 1991 - revised in 2003, stipulates in article 1 that “Romania is a state of law, democratic and social, in which human dignity, rights and freedoms of citizens (...) are guaranteed.”

There is no formal hierarchy of fundamental rights or freedoms.

In Romania, the authorities appointed to ensure the application and compliance of the fundamental rights are: the Constitutional Court, the judicial authorities and the People's Advocate.

### **3.2. The Restriction of the Exercise of Fundamental Rights - Regulation in European and National Law**

The restriction of the exercise of some fundamental rights is legally enshrined in:

- art. 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>4</sup>;

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<sup>1</sup> The Convention is a catalogue of fundamental rights developed by the Council of Europe, signed on November 4, 1950 in Rome and entered into force on September 3, 1953.

<sup>2</sup> The Charter - drawn up by the Council of Europe, in Turin (Italy), on October 18, 1961 and entered into force on February 26, 1965, stipulates a European regional system of protection for economic and social rights.

<sup>3</sup> Solemnly proclaimed on December 7, 2000, at the European Council in Nice, the CFDEU is structured in six main chapters: Dignity, Freedoms, Equality, Solidarity, Citizenship and Justice.

<sup>4</sup> Article 15. Exemption in case of emergency

"1. In case of war or other public danger that threatens the life of the nation, any High Contracting Party may take measures deriving from the obligations provided for in this Convention, to the strict extent that the situation requires and provided that these measures are not in contradiction with other obligations arising from international law.

2. The preceding provision does not permit any derogation neither from Article 2, excepting the case of death resulting from lawful acts of war, nor from Articles 3, 4 (paragraph 1) and 7.

- art. 52 of the Charter of Fundamental Rights of the European Union<sup>1</sup>;
- art. 53 of the Romanian Constitution.

The constitutional norm - with the marginal name “Restriction of the exercise of certain rights or freedoms” provides:

- 1) The exercise of certain rights or freedoms can be restricted only by law and only if required, as the case may be, for: the defense of national security, order, health or public morals, the rights and freedoms of citizens; carrying out the criminal investigation; preventing the consequences of a natural calamity, a disaster or a particularly serious accident.
- 2) The restraint can only be ordered if it is absolutely necessary in a democratic society. The step must be proportional to the situation that determined it, to be applied in a non-discriminatory manner and without prejudice to the existence of the right or freedom.

The constitutional text repeats the provisions of the texts of the European Convention of Human Rights and CFDUE, in the interpretation of which the European Contencious Court established the conditions that an interference in the exercise of a right must meet in order to be considered as being in accordance with the Convention, respectively: a) the interference must be provided by law; b) the interference must pursue a legitimate purpose; c) the interference must be necessary in a democratic society.

Regarding art. 53 of the Constitution, in the specialized literature (Pivniceru & Benke, 2015, p. 64) it is appreciated that “its scope covers the hypothesis in which a violation of the fundamental right/freedom was found, a violation due to exceptional conditions arising in the life of the state that, in this case, the legislative measure violated the right, but without it having annihilated/negated it, since, in this case, not even the art. 53 of the Constitution can no longer constitute a constitutional justification for the intervention on the fundamental right/freedom. This right could

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3. Any High Contracting Party that exercises this right of derogation fully informs the Secretary General of the Council of Europe about the measures taken and the reasons that determined them. It must also inform the Secretary General of the Council of Europe on the date on which these measures ceased to be in force and the provisions of the Convention become fully applicable again.

<sup>1</sup> Art 52 CFDUE: “Any restriction of the exercise of the rights and freedoms recognized by this charter must be provided by law and respect the substance of these rights and freedoms. By observing the principle of proportionality, restrictions may be imposed only if they are necessary and only if they effectively respond to the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others”.

still be exercised, but not in its fullness (...) the legislator being compelled to, after the end of the situation that determined such a measure, to return to the exercise of the respective fundamental right/freedom, in the fullness of its content.”

If some rights are absolute, which means that they cannot be affected under any circumstances (the right to life, the right not to be subjected to torture and ill-treatment), the other constitutionally stipulated rights are relative rights and can be restricted.

### **3.3. The Warnings of the People's Advocate on the Need to Respect Human Rights during the Pandemic Crisis**

Regarding the human rights situation, the People's Advocate, taking note of the establishment of the state of emergency and the state of alert on the territory of Romania, carefully monitored the application of these measures.

In the Report “Respecting human rights and the exceptional measures ordered during the state of emergency and the state of alert” (March 16-September 10, 2020)<sup>1</sup>, the People's Advocate reports that:

Although Romania did not have during the state of emergency a number of victims comparable to the countries that were hit hard by the pandemic - the United Kingdom, Spain, Italy, France and Germany - and no significant number of people hospitalized at the Emergency wards of hospitals ,it is the only country in the European Union where:

- the most harsh steps were taken to restrict certain rights and freedoms; some of these measures were beneficial, in the sense that the community spread of the COVID-19 virus was prevented;
- the most number of fines were registered, 310,000, their amount being 120 million Euros, taking into account that the average income is 3,189 lei;
- all infected persons were forced to be hospitalized during the state of emergency and during the state of alert, even if they did not present symptoms, this situation has been maintained even now.
- this situation generated the fact that some asymptomatic people were hospitalized for 40-50 days and even up to 63-65 days, until the negative

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<sup>1</sup> Report available on the website [https://avp.ro/wp-content/uploads/2020/09/raport\\_special\\_2020\\_3-1.pdf](https://avp.ro/wp-content/uploads/2020/09/raport_special_2020_3-1.pdf).

results of 2 PCR tests, while many patients with serious chronic diseases did not receive the necessary medical assistance for specific pathologies(...).

The People's Advocate notified the Constitutional Court with several exceptions of unconstitutionality through which it aimed to clarify, improve and strengthen the legal framework in the matter of establishing states of emergency, alert, quarantine and isolation measures, so that they are compatible with the constitutional requirements of the obligation to restrict some fundamental rights and freedoms by law, as a formal act of the Parliament.

#### **4. Constitutional Requirements regarding the Restriction of the exercise of Fundamental Rights**

The decisions of the C.C.R. are part of the normative legal order, because “although its decision is not identified with the norm/legislative act, its effects are similar to it, so that, through them, the decision establishes rules of conduct that must be followed.”

Through a constant jurisprudence, the constitutional contentious court ruled that “fundamental rights - which are not absolute by nature, can be subject to reasonable limitations through a state regulation”, but only in compliance with art. 53 of the Constitution.

The Contentious Constitutional Court reiterated - in the consideration of Decision no. 157/2020, the aspects retained by Decision no. 152/2020, ruling that “the normative document by which fundamental rights/freedoms of citizens are restricted can only be a law, as a formal document of the Parliament”. Accepting that the legislation that provides for the legal regime of crisis situations that require taking of exceptional measures assumes a greater degree of generality compared to the legislation applicable in the period of normality, precisely because the particularities of the crisis situation are the deviation from the normal (exceptionality) and the unpredictability of the serious danger aimed at both society as a whole and each individual, the Court emphasizes that the generality of the primary norm cannot be diminished by illegal acts that complete the existing normative framework.

Notified by the People's Advocate with the resolution of the exception of unconstitutionality of the provisions of art. 25 paragraph. (2) from Law no. 95/2006 regarding the reform in the field of health and of art. 8 of OUG no. 11/2020 on medical emergency stocks, as well as some steps related to the establishment of



quarantine, the Court did not analyze the criticisms regarding the appropriateness of compulsory hospitalization steps, stating that “ its task is not to verify whether the putting into practice of certain steps by the administrative authorities was necessary or appropriate to a situation, but only to analyze whether the normative documents on the basis of which the administrative authorities - in this case, the Minister of Health - acted are in accordance with the provisions of the fundamental Law”.

The Court recognizes that, in exceptional situations, such as the one generated by the spread of the infection with the COVID-19 virus, the establishment of energetic, prompt and appropriate steps to the gravity of the situation is, in reality, a response of the authorities to the obligation provided for in art. 34 paragraph (2) of the Constitution, according to which “The State is compelled to take steps to ensure hygiene and public health”, and notes that both compulsory hospitalization in order to prevent the spread of contagious diseases, and the putting into practice of quarantine are restrictions on the exercise of certain fundamental rights and freedoms that can be justified under the circumstances in which reasons related to the need to ensure safety and public health impose them.

However, the Court emphasizes that in exceptional circumstances “the mentioned steps have severe effects on the rights and freedoms of the person and therefore the relevant regulations must strictly meet all the constitutional conditions.

The exceptional, unpredictable nature of a situation cannot justify the violation of the legal order, legal and constitutional provisions regarding the ability of public authorities or those regarding the circumstances under which restrictions can be imposed on the exercise of fundamental rights and freedoms (...).

Taking into account that the crisis situation generated by a pandemic represents the inevitable premise of such restrictions, the national legislation must be accompanied by clear and effective guarantees against any abuses or discretionary and illegal actions” (Decision no. 458/2020, par. 73).

Regarding the analysis of the proportionality of the interference, the Court held that the principle of proportionality, as regulated in the particular hypothesis of art. 53 of the Constitution, presumes the exceptional nature of restrictions on the exercise of fundamental rights or freedoms, which necessarily implies their temporary nature.

Since the public authorities can resort to restricting the exercise of certain rights in the absence of other solutions, in order to safeguard the values of the democratic state, it is logical that this serious step ceases as soon as the cause that caused it ceases (...) Decision no. 416/2021, paragraph 42)

## 5. Instead of Conclusions

In Romania, the COVID-19 pandemic was doubled by the ‘epidemic of disputes’ regarding the constitutionality of the legislation on the basis of which the steps that were put into practice lead to the restriction of the fundamental rights and freedoms of citizens.

By means of a lot of number of decisions<sup>1</sup>, the contentious constitutional court sanctioned the noncompliance with the Constitution of some provisions of the special legislation governing the state of emergency and the state of alert.

By means of several court rulings<sup>2</sup>, GDs by which the state of alert was extended were repealed on the basis that “the indefinite extension of an exceptional state is contrary to the prov. of Art. 53 paragraph 1 of the Romanian Constitution, not being necessary in a democratic society, because after more than one and a half year since the adoption of the state of emergency and alert, the Government and the medical system had to deal with the pandemic situation, and the steps according to the law had to be proportionate to the situation that determined it.”

We dare to hope that “social distancing” - recommended as a measure to help prevent the spread of the COVID-19 virus, will no longer be doubled, as many times before, by “the legal distancing of political and administrative decision-makers from the provisions of .art .53 of the Constitution”.

And, equally, we hope that the main political and institutional actors understand that the place of the COVID-19 pandemic must not be taken by the “pandemic of authoritarianism.” Because the state of emergency and the state of alert - by their

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<sup>1</sup> Decision no. 152 of May 6, 2020 - published in Official Monitor no. 387 of May 13, 2020; Decision no. 157 of May 13, 2020 - published in Of. M. no. 397 of May 15, 2020; Decision 457 of June 25, 2020 - published in Of. M.no. 578 of July 1, 2020; Decision no. 392 of June 8, 2021 - published in Of. M. no. 688 of July 12, 2021; Decision no. 672 of October 20, 2021 - published in Of. M. no. 1030 of October 28, 2021.

<sup>2</sup> By civil verdict no. 236 of 28.09.2021, pronounced by the Cluj Court of Appeal, available on the website <http://www.rolii.ro/hotarari/6157be23e49009e80f000039>, HG 826/5 August 2021, HG 932/9 September were cancelled 2021 and HG 990/17 September 2021; by civ. verdict no. 1465 of October 21, 2021 pronounced by the Bucharest Court of Appeal, available on the website [https://www.luju.ro/static/files/2021/octombrie/28/Sentinta\\_fond\\_CASD\\_ER.pdf](https://www.luju.ro/static/files/2021/octombrie/28/Sentinta_fond_CASD_ER.pdf), it was ordered to annul HG no. 636 /2021, HG no. 678/2021 and HG no. 730/2021; By civ. verdict no. 1796 of December 3, 2021 pronounced by the Bucharest Court of Appeal, Section IX Administrative and Fiscal Litigation was partly cancelled HG no. 1183/2021, Minuta / the in brief sentence of the decision available on the website [http://portal.just.ro /2/SitePages/Dosar.aspx?id\\_dosar=200000000401610&id\\_inst=2](http://portal.just.ro /2/SitePages/Dosar.aspx?id_dosar=200000000401610&id_inst=2).

temporary nature, cannot and must not lead to the abolition of the rule of law - whose keystone is and must remain the guarantee of fundamental rights and freedoms.

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