

## **The Restriction of Some Rights in Romania in the Context of the Covid-19 Pandemic**

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**Abstract:** When analyzing the exceptions to inalienable nature of human rights, we refer to two categories of rights: absolute rights, which are not to be infringed under any circumstances, and relative rights, the exercise of which may be restricted in certain situations that have been strictly prescribed. The issue that gives rise to legal debates is related to the conditions imposed by Article 53 of the Constitution, which provides that the restriction be prescribed “by law”, be “required in a democratic society” and “proportionate to the situation having caused it.”

**Keywords:** Human rights; pandemic; Covid-19; law; necessity

### **Introduction**

All over the world, since ancient times but even more so nowadays, more attention is paid to the theoretical and especially practical aspects related to the protection and respect of human rights and fundamental freedoms.

Recent events related to the Covid-19 pandemic have had major repercussions on human rights, making them remain at the center of the political, legal, social, religious and ethical-moral life of humankind.<sup>2</sup>

Endless discussions can be had about human rights. In an attempt to define them, the literature provides us with a very wide range of options, but one thing is clear – a precise definition of human rights is difficult to develop, like other fundamental values such as justice, the good, truth, because as Jean F. Renucci put it, “the concept of ‘human rights’ is relatively imprecise.” (Renucci, 2009, p. 1).

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<sup>2</sup>On 1 July 2020 Germany took over the Presidency of the Council of the EU, and in her speech on this occasion, Angela Merkel emphasized, as a first target of her mandate, the respect of human rights, which have been “under threat during the healthcare emergency”, calling the **coronavirus crisis the EU’s greatest challenge**.

During every age, societies have defined, implicitly or explicitly, in legal terms or not, the rights and obligations of their members, particularly acceptable socio-human needs, as well as the restrictions imposed to maintain peace and public order. In this sense, it is very correct to consider that “the history of human rights is confused with the history of people.” (Mbaye, 1991, p. 11).

In analyzing the topic under debate in this article, we will start from the definition of the concept of human rights, from a legal point of view, a definition that also reveals their characteristics, and we will focus later on their inalienable nature. We will thus define human rights as those subjective, inalienable and imprescriptible rights, essential to the existence and development of human beings, provided for and guaranteed by both the domestic law of states and the international law.

### **The Inalienable Nature of Human Rights**

The inalienability of human rights makes it impossible to alienate them in accordance with the law or by virtue of the will of the parties. J. Donnelly said that “in the absence of the capitalization of human rights, one becomes alienated from one’s own nature. Thus human rights are inalienable, not only in the sense that one cannot be denied the satisfaction of these rights but also in the sense that the loss of these rights is morally impossible: one cannot lose these rights and live at the same time as a human being.” (Donnelly, 1989, p. 75)

In conclusion, no one can lose these rights but there are certain rights that may be restricted in some situations and under certain conditions. Such restriction should only operate at the level of exercising the right, however, without prejudice to the substance of its normative content.

Under these circumstances, so as not to give rise to abuse of power, modern constitutions and regional and international treaties aim to establish effective safeguards to defend human beings and their private life, by enshrining their fundamental rights and freedoms. However, there is actually a huge difference between theory and practice, for various reasons.

This is why nowadays we are witnessing a recrudescence of the issue of human rights and fundamental freedoms, while at the same time we are noticing their fragility.

## **Human Rights and the State of Emergency in Romania**

It is known that the coronavirus pandemic<sup>1</sup> is an ongoing pandemic worldwide, caused by the new coronavirus 2019-nCoV (SARS-CoV-2), which causes an infection called COVID-19; this can be asymptomatic, mild, moderate or severe. Severe infection includes a serious atypical pneumonia manifesting clinically as acute respiratory distress symptom and which has caused an alarming number of deaths worldwide.

In other words, understood as an outbreak difficult to control, where a virus spreads internationally, with most people not being immune to it, the pandemic has forced the world states to act by imposing firm public health policy measures so as to contain the threat of this coronavirus.

Our country has not been spared by the effects of the COVID-19 pandemic, so the state authorities had to take measures to prevent mass spreading of the disease among the population. These measures had implications on fundamental rights and freedoms, as the state was unable to act other than by restricting the exercise of some of them.

In Romania, for state authorities to be able to fulfill their missions even in particular situations such as the one we are currently experiencing, without renouncing the legal protection of human rights, however, Art. 53 of the Constitution allows the restriction on the exercise of certain citizens' rights and freedoms, but only by way of exception and conditionally.

At first sight, the state authorities have at their disposal a legal solution to act without infringing on the legal regime of guaranteeing the fundamental rights and freedoms.

However, things are more complicated in reality.

According to the Fundamental Law, the exercise of certain rights or freedoms may only be restricted **by law**, and only if necessary, for one of the following **situations**: the defense of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.<sup>2</sup> Furthermore, such restriction can only be ordered if necessary in a democratic

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<sup>1</sup> On 11 March 2020 the World Health Organization officially declared the viral disease COVID-19 a PANDEMIC, which at the time had raged through at least 114 countries and killed over 4,000 people.

<sup>2</sup> Art.53(1) Revised Constitution of Romania, published in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003.

society, and the measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom.<sup>1</sup>

In the context of the “evolution of the international epidemiological situation determined by the spread of the SARS-CoV-2 coronavirus, the declaring of the pandemic by the World Health Organization (...), taking note of the evolution of the epidemiological situation on the territory of Romania and the assessment of the public health risk for the coming period, which indicates a massive increase in the number of persons infected with the SARS-CoV-2 coronavirus”<sup>2</sup>, the President of Romania, with the approval of the Romanian Parliament, decreed the establishment of the state of emergency on the territory of the country by Decree no. 195/2020 and, subsequently, the extension thereof by Decree no. 240/2020<sup>3</sup>.

This is a duty of the President of the state, granted by the Constitution of Romania under Art. 93(1), which states that “the President of Romania shall, according to the law, institute 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.”

Under Art. 1 of GEO 1/1999 relating to the state of siege and state of emergency<sup>4</sup>, we identify the **definition of the state of emergency**, which states that “the state of siege and state of emergency refer to crisis situations that require extraordinary measures to be instituted in cases determined by the occurrence of serious dangers to the defense of the country and national security, to constitutional democracy, or to prevent, contain or remove the consequences of disasters.”<sup>5</sup>

In the same article, we find the **reason** for instituting the state of emergency, in the phrase “to prevent, contain or remove the consequences of disasters”. Furthermore, Article 3(b) complements this by specifying that the state of emergency applies if the authorities find “the imminent occurrence or the occurrence of calamities that

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<sup>1</sup> Art. 53(2) of the Constitution.

<sup>2</sup> Decree no. 195/16.03.2020 on the establishment of the state of emergency on the territory of Romania, source: <http://legislatie.just.ro/Public/DetaliuDocumentAfis/223831>.

<sup>3</sup> Decree no. 240/14.04.2020 on the extension of the state of emergency on the territory of Romania, source: <https://lege5.ro/Gratuit/gm3donjwg4ya/decretul-nr-240-2020-privind-prelungirea-starii-de-urgenta-pe-teritoriul-romaniei>.

<sup>4</sup> Approved and amended by Law 453 of 1 November 2004, published in the Official Gazette no. 1.052 of 12 November 2004.

<sup>5</sup> GEO no. 1/1999 relating to the state of siege and state of emergency, updated, source: <http://legislatie.just.ro/Public/DetaliuDocument/135460>.

make it necessary to prevent, contain or remove, as the case may be, the consequences of disasters”.

At the same time, Article 4 mentions that, in such a situation, “the exercise of some fundamental rights and freedoms may be restricted”, **except for** the right to life, the right not to be subjected to torture or to inhuman or degrading treatment or punishment, the right not to be sentenced for offences not set forth as such in the law, the right to free access to justice, and only if the situation requires it and in compliance with Art.54 of the Constitution of Romania, republished, referred to above.

We note that in the case of the interdiction of restriction, it is about those rights that the case law of the European Court of Human Rights calls “absolute”, those that cannot be affected under any circumstances. Furthermore, in support of this interdiction, both the President’s Decree on the establishment of a state of emergency on the territory of Romania and the decree instituting its extension indicate the rights whose exercise will be restricted during the state of emergency, namely: the right to free movement, the right to intimate, family and private life, the inviolability of the home, the right to education, the freedom of assembly, the right to private property, the right to strike, economic freedom, all of these being in the category of rights qualified as “relative”.

Therefore, we can clearly note which rights are subject to restriction, and the fact that in order for these rights to be restricted in the context of the state of emergency, three conditions must be cumulatively, as follows:

- The interference must be set forth by the law;
- The interference must have a legitimate purpose;
- The interference must be required and proportionate under the rule of law.

While it is clear to us that the measures restricting our fundamental rights and freedoms were taken in order to protect public health and safety and to prevent the health system’s collapse, the requirements regarding the **proportionality** of the measures and the term “**law**” under Art. 53 of the Constitution, as an act by which the restriction shall operate, still create disputes, and not just in legal communities.

With respect to the meaning of the term “law”, the case law of the Constitutional Court has outlined two theories, according to the distinction between the formal/organic and the material criteria. According to the formal/organic criterion, the “law” is simply an act of the Parliament, the legislative body.

Some law specialists consider such an interpretation, in the extraordinary situation of establishing the state of emergency, to be “excessively formalist”, as it does not take into account the purpose of the Constitution or the finality sought by the Constitutional Court in its case law with respect to the way emergency ordinances affect citizens’ constitutional rights and freedoms. Considering that one of the purposes sought by the temporary application of the measures to restrict the exercise of certain rights and freedoms in the situation of the state of emergency is the future safeguarding of the full exercise of such rights and freedoms, it is required that, only during the state of emergency, it should be logical and necessary that the restrictive measures can be imposed not just by law, an act of the Parliament, but also by emergency ordinances, certainly, only to the extent that the conditions set forth under Art.53 of the Constitution are fulfilled.

On the other hand, we consider that the reason to force the Parliament, by Art. 93(2) of the Constitution, to be in session throughout the state of siege or emergency is to give it the possibility to legislate in any area, including that of restricting the exercise of some rights and freedoms, in compliance with Art. 53 of the Constitution.

The material criterion, on the other hand, refers to the content of the legal act, the object of the norm, and the regulated social relations, respectively. Taking this criterion into account, even the much-disputed Government emergency ordinances have the force of law.

However, the more recent case law of the Constitutional Court takes into consideration some constitutional limits with respect to the content of the emergency ordinances, meaning that they cannot negatively affect the rights and freedoms guaranteed by the Constitution.

The Court’s opinion is that to affect negatively means “to suppress”, “to undermine”, “to prejudice”, “to hurt”, “to injure” or “to trigger negative consequences”. Therefore, a provision that restricts the exercise of a right or a freedom enshrined in the Constitution is evidently a case of negatively affecting such right or freedom. (Dima).

Such is the case of the Government Emergency Ordinance no. 34/2020 amending and supplementing GEO no. 1/1999 relating to the state of siege and state of emergency, an ordinance that the Constitutional Court considered to be unconstitutional in its entirety by Decision 152/2020<sup>1</sup>; **consequently, failure to**

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<sup>1</sup> <http://www.monitoruljuridic.ro/monitorul-oficial/387/2020-05-13/>.

**comply with any obligations set forth under** GEO 1/1999 or the specific legislation related to the state of emergency or siege does not trigger the application of any sanctions.

Approximately the same was the case of Government Emergency Ordinance no. 11/2020 on emergency medical stocks, as well as some measures related to the establishment of quarantine, declared unconstitutional by Decision of the Romanian Constitutional Court no. 458 of 25.06.2020 published in the Official Gazette, part I, no. 581 of 02.07.2020.<sup>1</sup> This time, the RCC decided that isolation, quarantine and compulsory hospitalization cannot be imposed by ministerial order, as set forth under Art. 8(1) of GEO 11/2020<sup>2</sup>, because some fundamental rights and freedoms are affected, such as those provided by Art. 23(1), Art. 25 and Art. 26 of the Constitution, without respecting the constitutional conditions regarding the restriction of the exercise of certain fundamental rights or freedoms. Therefore, the measure of home isolation and institutionalized quarantine is temporarily suspended for all persons until the legislative framework is changed.

Unfortunately, in both cases a legislative void was created, the consequences of which were reflected in the increase in the number of reported Covid cases. Nevertheless, whatever the consequences, in a situation as delicate as the protection of fundamental rights and freedoms, there can be no compromise with regard to the legal conditions imposed for their restriction.

Today's growing concern for the respect of human rights has also eventually led to us having a "quarantine law"<sup>3</sup>, which, albeit not perfect, is at least much better than previous regulations.

Thus, from the draft law initially submitted by the Government to the Parliament to the final text of the law, there was a real battle from which human rights, although slightly injured, have managed to come out with their heads held high.

It is very important to underline that in the debates on the text of the draft law, during three weeks, emphasis was placed on the observance of domestic and international

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<sup>1</sup><http://www.monitoruljuridic.ro/monitorul-oficial/458/2020-06-25/>.

<sup>2</sup>Art. 8 "(1) In case of epidemics/pandemics or international public health emergencies declared by the World Health Organization, if there is an imminent risk to public health, in compliance with the International Health Regulations (2005), at the proposal of the Technical Group of Experts of the Ministry of Health, **the Minister of Health establishes the quarantine** for the persons entering the territory of Romania from the affected areas, as a measure of prevention and limitation of diseases". - <https://lege5.ro/>.

<sup>3</sup>LAW no. 136 of 18 July 2020 on the establishment of public health measures in situations of epidemiological and biological risk – Official Gazette dated 18.07.2020.

human rights provisions, and this was insisted on. Thus, from the initial text which set forth the forced hospitalization of asymptomatic patients, i.e. people who do not need treatment, taking the children of infected people, destroying some property owned by those infected and forcibly transferring doctors – these are just some of the provisions that grossly violated the legal regime of protection of fundamental rights and freedoms –, an honorable text of law has been reached. Nor could it have been otherwise, in a society that claims to be democratic, it could not have been overlooked that we were and would have remained the only country in the civilized world that has taken the abusive and illegal measure of forced hospitalization of all coronavirus carriers, even without symptoms, ever since the beginning of the pandemic.

In these conditions, LAW no. 136 of 18 July 2020 on the establishment of public health measures in situations of epidemiological and biological risk contains a series of provisions, reasonable from the point of view of human rights, the most important of which are:

- The isolation of persons who are sick or carriers of the virus but who do not present with symptoms can be done for a maximum of 48 hours. The physician may recommend the extension of this measure;
- Patients shall stay in quarantine at their home, in another home chosen by themselves, or in a special venue offered by the authorities, upon request;
- All those who arrive from areas with a high epidemiological risk based on data sent nationwide or internationally by the competent authorities may be placed in quarantine;
- If someone refuses quarantine or violates the measure of quarantine, although they initially consented to it, the physician or the controlling body shall recommend, and the public health directorate shall decide within a maximum of 8 hours placing that person in institutionalized quarantine if it finds the risk of transmission of an infectious-contagious disease;
- Any person can challenge before the courts any administrative acts issued pursuant to the new law;
- The National Institute of Public Health must now communicate every day, since the effective date of the law, the number of tests performed on persons not tested before, separately from the retesting of persons already infected or cured;



- All references to the quarantine of property suspected of being contaminated with a highly pathogenic agent were removed from the law;
- In the case of minor children whose parents were isolated or placed in quarantine, who do not have close relatives who may care for them, their parents, the physician or the Public Health Directorate will notify the social work service that will monitor the situation and, if necessary, measures will be taken for those children to be cared for temporarily.

## **Conclusions**

Let us not omit the fact that Law 136 will not only be effective during the Covid 19 pandemic but also in any other similar situation in the future. The argument that “Romanians do not comply with the measure of isolation at home” only induces the presumption of guilt. The ECtHR jurisprudence guide on Art. 5 of the European Convention on Human Rights clearly states that the duty not to commit a criminal offence cannot be the grounds for the deprivation of liberty of a person if they have not already violated another milder measure.<sup>1</sup>The ECtHR Guide on the application of Article 5 of the Convention also clarifies what “arbitrary” means and how the law has the obligation to exclude any such manifestation– moreover, European law prevails in any situation when a national law is wrong from this point of view.<sup>2</sup>

According to the ECtHR, when there is no **proportionality** between the reason for detention and the detention itself, we are encountering an arbitrary measure. It seems that this was present in the regulations prior to Law 136, with respect to the subject analyzed herein, and we should not be surprised if in the future, our country reappears as a defendant before the European Court of Human Rights in a significant number of cases based on this reason. It is clear that in this special situation in which we find ourselves, in the context of the Covid 19 pandemic, which democratic Romania has never faced before, the efforts to safeguard and respect human rights and fundamental freedoms have been put to the test. What is important is that decision

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<sup>1</sup> Guide on Article 5 of the European Convention on Human Rights – 74 ... “The duty not to commit a criminal offence in the imminent future cannot be considered sufficiently concrete and specific, as long as no specific measures have been ordered which have not been complied with (S., V. and A. v. Denmark [GC], § 83)” - [https://www.echr.coe.int/Documents/Guide\\_Art\\_5\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf).

<sup>2</sup> Art. 40 “The notion of ‘arbitrariness’ in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (Creangă v. Romania, § 84; A. and Others v. the United Kingdom [GC], § 164)”- [https://www.echr.coe.int/Documents/Guide\\_Art\\_5\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf).

makers and the authorities involved in the management of this crisis never forget that “rule of law” is the phrase that defines a society in which respect for human rights and the supremacy of law prevail.

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