

# THE CONSTITUTIONAL FRAMEWORK FOR THE RESTRICTION OF THE EXERCISE OF FUNDAMENTAL RIGHTS AND FREEDOMS IN THE VIEW OF THE CONSTITUTIONAL COURT OF ROMANIA

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**ABSTRACT:** *The issue of exercising and restricting the exercise of fundamental rights and freedoms is, nowadays, more than ever, a topical, exciting, and challenging aspect. Therefore, in this paper, I suggest a review of the issue regarding the restriction of the exercise of fundamental rights and freedoms starting from the constitutional premises in Romania and then passing it through the filter of the jurisprudence of the Romanian constitutional court.*

*The republished Constitution of Romania allows the restriction of the exercise of fundamental rights or freedoms, only as an exceptional measure, only by law, conditionally (only if it is necessary in a democratic society, to be in proportion to the situation that determined it, applied non-discriminatory and without bringing violation to the existence of the rights or freedom), temporarily and only in consideration and achievement of certain objectives expressly provided by the fundamental law. Moreover, the Romanian constitutional text requires that even in the situation of restricting the exercise of certain rights and freedoms, the fundamental principle of equality should be respected by applying the measure of restriction in a non-discriminatory manner.*

*The constitutional regulation is supplemented by normative texts that punctually regulate different aspects of specific application, such as those regarding national security, public order and peace, the state of necessity, calamity and disasters.*

**KEYWORDS:** *fundamental rights and freedoms; restricting the exercise of certain rights and freedoms; republished Constitution of Romania; equality; non-discrimination.*

**JEL Code:** *K00, K10*

According to the Romanian Constitution republished, the basis for the organization and functioning of the Romanian state, as a rule of law and democracy, is embodied by several fundamental principles, principles that govern the organization of the state in terms of political and statism (Vrabie & Balan, 2004) , including the principle of ensuring and guaranteeing the fundamental rights and freedoms.

Fundamental rights and freedoms are subjective rights, characterized as essential (defining for the human personality) and enshrined in separate acts (in international law - conventions, pacts, treaties, protocols - and in domestic law - Constitution, laws, other

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normative acts) (Zlătescu, 1991, pg. 29-30). By regulating these ideas and by transposing them into legal norms under the concept of "fundamental rights and freedoms", the legal means of protecting the citizen as an individual were practically outlined, since, it was argued, even in this individual position that the citizen is most vulnerable in its relations with the state (Etinski, 2008, pg. 3-18). Fundamental rights and freedoms must be seen and regulated as attributes of the personality of individuals considered both as individuals and as members of the community in which they are integrated .

The most important human rights and freedoms, those considered essential, precisely to be better protected, are provided and guaranteed by the text of the Constitution itself. One of the most effective means of protection and guarantee has proven to be constitutional justice. The emergence of the concept of constitutional justice is closely linked to the emergence of the concept "supremacy of the Constitution". Thus, by guaranteeing the supremacy of the Constitution, the guarantee and protection of these rights and freedoms (Valea D. C., 2013, pg. 21-26) is ensured as a result.

In principle, the protection of fundamental human rights and freedoms is achieved through normative and institutional instruments, such as:

- a) international documents (Valea D. , 2014, pg. 66-67);
- b) national normative acts (Constitution, laws, other normative acts) that regulate and guarantee these rights and freedoms;
- c) the establishment of principles with the value of ideals or guiding ideas (they are considered as the general principles of fundamental rights and freedoms) (Muraru & Tănăsescu, *Drept constituțional și instituții politice*, 2005, pg. 159-164).
- d) by express and limitative regulation of the limitation on the exercise of certain fundamental rights and freedoms;
- e) the establishment and organization of a specific institutional framework (European Court of Human Rights and other international jurisdictions (Coman, 2020, pg. 181-186), national common law and constitutional jurisdictions).

Thence, to put into practice, the effective protection, specific means of action are needed. Of these, free access to justice is perhaps the most effective. In the broader context of justice - and then in an even wider context, that of a constitutional system and a democratic regime - a special place is occupied, recently, by the constitutional justice, respectively the instrument of its realization - a constitutional jurisdiction (Valea D. C., 2013).

The Romanian Constitution allows the restriction of the exercise of some fundamental rights or freedoms (Muraru & Tănăsescu, *Constituția României – comentariu pe articole*, 2008) , only as an exceptional measure, if it is necessary in a democratic society and has a temporary character .

According to Article 53 of the republished Constitution of Romania, the restriction can be made only by law, conditionally (only if necessary in a democratic society, to be in proportion to the situation that determined it, applied non-discriminatory and without prejudice to the existence of rights or freedom), temporary and only for the following purposes: defending of national security ; defending the public order, health or morals (Muraru & Tănăsescu, *Drept constituțional și instituții politice*, 2005, p. 7) ; defending the rights and freedoms of citizens; conducting criminal instruction (Big, 2008) ; preventing the consequences of natural disasters, of a particularly serious disaster or sinister .

The exercise restriction of certain rights and freedoms can be imposed only by law, being considered the limited meaning of the term law, respectively only the normative acts bearing this name, issued by the Romanian Parliament as the only legislative authority. Thus, even the delegated normative acts are excluded (issued because of the legislative delegation, respectively the ordinances and emergency ordinances of the Government) (Muraru & Tănăsescu, *Constituția României – comentariu pe articole*, 2008, pg. 535-537) . According to the mentioned denotation, among others, the Romanian constitutional court also ruled, stating uncompromisingly that: "[...] the restriction of the exercise of certain rights or freedoms can be achieved only by law, as a legal act adopted by the Parliament [...]" .

The conditioning of the imposition of such a restriction by its necessity in a democratic society is based on the need to limit the competence of the states to resort to restrictive measures (possibly with an obvious anti-democratic feature) in situations beyond the normal scope, thus ensuring the legitimacy of such a measure (Muraru & Tănăsescu, *Constituția României – comentariu pe articole*, 2008, pg. 537-538).

The temporary nature of such a decision is based on the same condition, the measure needs to be necessary in a democratic society, respectively it should have no other course of action for saving or defending endangered values (Muraru & Tănăsescu, *Constituția României – comentariu pe articole*, 2008, p. 538).

Observing the principle of proportionality in case of applying certain restrictions on the exercise of some rights or freedoms, based on Article 53 of the Constitution, is materialized in a fair and reasonable relationship between the respective measure (and implicitly the means used) and the purpose pursued by taking such a measure (Muraru & Tănăsescu, *Constituția României – comentariu pe articole*, 2008, p. 541).

The constitutional text requires that in the situation of limiting the exercise of certain rights and freedoms, the fundamental principle of equality must be respected, by applying the measure of restriction in a non-discriminatory manner.

In connection with the rights and freedoms placed under the protection of the constitutional regulation in terms of the restriction of their exercise, the Constitutional Court of Romania also intervened and ruled that we must have in view "only fundamental rights and freedoms, the constitutionally enshrined rights and freedoms, and not all rights included in the subject of law". In other words, only the rights and freedoms enshrined in the Constitution are subject to the protection regime enshrined in Article 53 of the Constitution. A contrario, the rights enshrined in infra-constitutional law may be subject to limitations without respecting the constitutional guarantees applicable to the restriction of the exercise of fundamental rights and freedoms." (Popescu, 2020). For example, the reduction of some terms in the electoral contentious (by G.E.O. no. 97/2008) regarding the exercise of the right to contest a candidacy (considered by the Romanian constitutional court an electoral right but not a fundamental one) was not considered an unconstitutional restriction of rights respectively, an unconstitutional intromission of the Government in the scope of electoral rights (with reference to Article 115 paragraph 6 of the Romanian Constitution) .

Restriction of the exercise of certain rights and freedoms can be ruled only by law, given the limited meaning of the term law. Theoretically, even delegated normative acts

(issued because of legislative delegation, respectively ordinances and emergency ordinances of the Government) are excluded. However, both doctrine and especially case law have also another interpretation in view.

According to a recently expressed point of view, Article 56 of the Romanian Constitution can be “interpreted in isolation”, meaning that it would “allow the restriction of the exercise of fundamental rights and freedoms either by law or by another legal act with force equal to the law, meaning by ordinance” (Popescu, 2020).

Indeed, according to the republished Constitution of Romania, other public authorities can also legislate, in this case the Government of Romania, based on the legislative delegation established by the very text of the fundamental law.

In our constitutional system, legislative delegation is regulated as a special form of legislative procedure. It is characterized as a complementary legislative procedure (Vida, 2012, p. 183) or an exceptional substitution procedure (Deleanu, 2003, p. 611). It is justified by the fact that there are situations that emerge in the life of any state, situations in which the legislative assembly is not able to intervene, either due to the fact that it cannot exercise its legislative attributions (for example, during the parliamentary vacation), or the need to take and apply an urgent measure emerged, which would not be possible if the legislative procedures were followed (for example, in extraordinary situations). In such cases, a power other than the legislative one (Deleanu, 2003, p. 612) is competent to issue and apply general rules of social, binding, and impersonal conduct. This role belongs to the Executive, which, thus, within the limits and conditions imposed by the institution of "legislative delegation", participates in the regulatory process.

It is considered that there are two forms of legislative delegation (Constantinescu & Muraru, 2004, p. 202) (Chiriac, 2004, p. 47) (Ionescu, 2013, pg. 320-325) : the first is the one conferred by the enabling law, called parliamentary delegation or pseudo legislative delegation, and the second, the constitutional delegation, conferred directly by the Constitution.

According to Article 108 para. (3) in conjunction with Article 115 of the republished Constitution of Romania, the Government may issue ordinances (in areas not subject to the regulation of organic laws, based on a special law conferring power to the Parliament) and emergency ordinances (only in extraordinary situations whose regulation cannot be postponed).

Ordinances issued based on the special enabling law are also called simple or ordinary ordinances and may intervene, to regulate primarily or secondary, only in areas of the ordinary law jurisdiction. Therefore, they have the legal force of an ordinary law, being able to modify, complete or even repeal such a law. The special enabling law stipulates: the field or domains in which the ordinances will be issued, the enabling term and if there is the preference for the ordinances to be submitted to the subsequent approval of the Parliament, this will also be expressly mentioned.

According to Article 115 para. (5) of the republished Constitution Romania, the emergency ordinances of the Government may be issued only in extraordinary situations, the regulation of which cannot be postponed. The urgency of the measure must be motivated by the Government in the ordinance. The emergency ordinances enter into force only after they are submitted for debate to the Parliamentary Chamber - competent to be the first notified and after publication in the Official Gazette of Romania only then they are submitted for approval to the Parliament in emergency procedure. However, if

the Parliamentary Chambers are not in session they are summoned mandatorily, within 5 days. Emergency ordinances may also intervene in the field of organic law.

Although the Constitution does not define and does not list the exceptional situations, an indeterminate legal concept being thus left to the discretion of the Government (Muraru & Tănăsescu, *Constituția României – comentariu pe articole*, 2008, p. 1096), Article 115 para. (6) limits the issuance of emergency ordinances by establishing restrictions establishing that they cannot be issued: in the field of constitutional laws; they must not affect the regime of the fundamental institutions of the state; they must not affect the rights, freedoms and duties provided for in the Constitution; they must not affect electoral rights; they must not target measures for the forced transfer of some goods in the public property of the state. Indeed, as a guarantor of the supremacy of the Constitution, the Constitutional Court of Romania intervened and established exactly the content of these limitations, respectively of the scope of action of the Government. Thus, by Decision no. 150 of 12 March 2020, the Court ruled that “the Government has no legislative power in the field of constitutional law (“emergency ordinances cannot be adopted in the field of constitutional law”) and in the field of laws aimed at measures of forced transfer of property in public domain (“emergency ordinances may not target measures of forced execution”), these being in the exclusive legislative jurisdiction of Parliament, under all aspects regulated in their normative content. Moreover it has limited legislative jurisdiction in areas that regards the regime of the fundamental institutions of the state, the rights, freedoms and duties provided by the Constitution and electoral rights (“emergency ordinances may not affect”), in respect of which the application of the express constitutional prohibition is conditioned by the adoption of regulations that suppress, prejudice, harm, injure, generally have negative consequences for rights, constitutional freedoms and duties. In the latter case, if the regulations do not produce the mentioned legal consequences, the Government shares the power to legislate with the Parliament, being bound by the obligation to ground in the content of the normative act the existence of an extraordinary situation, whose regulation cannot be postponed, ie. the emergency of the regulation”.

Ordinances issued based on an enabling law (if provided for in the enabling law), as well as all emergency ordinances must be submitted to the Parliament for debate, which will pass judgment on them by law, approving them, approving them with amendments or supplements or rejecting them.

With all the guarantees set up, the institution of delegation can easily become an instrument through which the Executive seeks to dominate the legislature. It is thus overlooked the fact that, at least in theory, legislative delegation should only be a way of helping Parliament in its legislative work, seen as a means of mutual control, within the system of "brakes and counterweights" (Drăganu, 1992, p. 9) (Santai, 2005, p. 235) needed for the observance of the principle of separation and balance of powers in the state.

But then the question is, can the exercise of certain rights and freedoms be restricted by other legislative acts than a law? Especially since, Article 53 of the republished Constitution of Romania uses the expression "only by law".

A similar situation exists in connection with another constitutional text, respectively Article 139 ("Taxes, fees and other contributions") para. (1) of the Constitution (Article 138 before the 2003 revision), according to which taxes, fees, and any other revenues of

the state budget and of the state social insurance budget are established "only by law". Only that the parliamentary and political practice has shown that in the field of taxation, the Government intervenes massively, by adopting ordinances. Even the Romanian Constitutional Court has ruled showing that the interpretation is made in the sense that it is all about an "act that has the juridical force of law", "to remove the possibility of proliferation of normative acts of administrative nature in this matter". And that, by using the word "only" it is intended to "bar the possibility" of regulating the matter "by inferior acts to law, as legal force, such as Government decisions, which are issued for the organization of law enforcement", "not by Government ordinances". The constitutional court finally held that: saying that the expression "only" excludes the possibility of adopting ordinances "is equivalent to adding to the Constitution". As the expression "only by law" is the same in Article 53 para. (1) of the Constitution, obviously it means that its interpretation must be the same, so the constitutional norm does not prevent the restriction of the exercise of fundamental rights and freedoms also by government ordinances (Popescu, 2020).

The Decision of the Constitutional Court no. 375 of 6 July 2005 ruled that the restriction of the exercise of certain rights, by law, pursuant to Article 53 of the fundamental law, is not conditioned by the general interest, but by the "defense of national security", as well as by the other causes expressly listed by the fundamental law.

"The defense of national security is one of the reasons included in both Article 53 of the Constitution and Article 8, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms, which may justify an interference with the right to privacy, as long as it is provided by law, it pursues a legitimate aim, it is necessary in a democratic society, there is proportionality between the aim pursued and the means used and sufficient guarantees are established against the arbitrary".

In addition, things have become even more complicated and have generated new challenges for the protection and effective guarantee of human rights and freedoms (Coman, *Le respect des droits fondamentaux de l'homme, principe du droit européen*, 2020), their restriction taking on new dimensions with the outbreak of the COVID-19 virus and the official declaration of the pandemic by the World Health Organization (WHO) on 11 March 2020.

States, including Romania, the European Union and international organizations have mobilized, more or less, for the adoption and implementation of strategies and plans to combat the danger posed by the COVID-19 pandemic, some measures being, inevitably, measures restrictive or punitive measures (Bodea, 2020, p. 70), such as: restrictions on the freedom of movement of individuals, evacuation from the affected area, the right to work, participation in community service, economic freedom and even free access to justice, quarantine of certain areas (localities, regions or the entire territory of a state), restrictions on certain economic activities, compulsory wearing of a mask, limitation of traffic hours, measures to ensure social distance, suspension of the physical activity of certain activities, such as education, culture or sports, publication and transparency of data on infected persons, imposition of sanctions for breach of obligations (Chiriac & Coman, *The legal framework for ensuring international health security. Alert and response in case of epidemic*, 2020, p. 89), state of emergency, alert status.

The reaction of the states also meant outlining, as a matter of course, a regulatory framework to ensure the implementation of specific and effective measures to combat the

epidemic, given that "all existing abstract legal rules at national and international level have proved ineffective, whereas in the absence of a specific action plan, they remain illusory" (Chiriac & Coman, *The legal framework for ensuring international health security. Alert and response in case of epidemic*, 2020, p. 94).

In Romania, the normative framework for action in cases such as the COVID-19 pandemic includes both normative acts that already existed at the time of the onset of the pandemic, and normative acts adopted during this period: the International Health Regulation (implemented by adopting G.D. no. 758/2009, Law no. 55/2020 on some measures to prevent and combat the effects of the Covid-19 pandemic, but also the adoption of presidential decrees (for example, Decree no. 195 of 16 March 2020), decisions of the Parliament (Parliament Decision no. 3 of 19 March 2020 for approving the measure adopted by the President of Romania on the establishment of a state of emergency throughout Romania, Parliament Decision no. 4 of 16 April 2020 on approving the extension of the state of emergency), emergency ordinances, Government decisions or decisions of the National Committee for Emergency Situations, military ordinances.

Since the fight against the Covid-19 pandemic inevitably involves interference and restrictions on the exercise of rights and freedoms, some normative measures have inevitably proved that were taken in violation of the fundamental law. For this purpose, the Constitutional Court of Romania was notified and ruled several times.

By the Decision of the Constitutional Court of Romania no. 152 of 6 May 2020, the invoked challenge of constitutionality was admitted, and it was found that G.E.O. no. 34/2020 for the amendment and completion of G.E.O. no. 1/1999 regarding the state of siege and the regime of state of emergency is unconstitutional being adopted in violation of Article 115 para. (6) of the Constitution. Starting from the premise that "by its very hypothesis of incidence - crisis situations that impose exceptional measures that are instituted in cases determined by the emergence of serious dangers to the defense of the state and national security, constitutional democracy or to prevent, limit or eliminate the consequences of certain disasters - restricting the exercise of fundamental rights or freedoms is aimed at". GEO no. 1/1999 aims to "create the legal framework for exceptional measures imposed by crisis management, measures which, in themselves, affect the rights and freedoms of citizens", a restriction which, in the view of the Constitutional Court is "in accordance with the established constitutional imperative in Article 53 paragraph (1)". But given that the G.E.O. no. 34/2020 amended the legal regime of the state of siege and of the state of emergency in terms of liability in case of non-compliance or immediate non-application of the measures established in the G.E.O. no. 1/1999 (by introducing complementary sanctions for contraventions, such as confiscation of goods intended, used or resulting from the contravention and temporary suspension of the activity, was implicitly affected the property right, provided by Article 44 of the Constitution and the economic freedom, provided by Article 45 of the Constitution) and by stating the inapplicability of the provisions of Law no. 52/2003 on decisional transparency in public administration regarding decisional transparency and social dialogue during the state of siege and the state of emergency, the Government act was considered unconstitutional, as a whole, violating the provisions of Article 115 para. (6) of the Constitution, norms that establish the limits of the Government's jurisdiction to issue emergency ordinances.

By Decision of the Constitutional Court of Romania no. 157/13.05.2020 , the constitutionality challenge of the provisions of Article 4 para. 2 of the G.E.O. no. 21/2004 on the National Emergency Management System (which establishes that during the alert state any measures that are necessary to remove the force majeure may be ordered) corroborated with the provisions of Article 4 para. 1 letter c) [evacuation decision] and of Article 4 para. 5 letter d) [activities for the benefit of local communities], whereas in certain cases, based on these legal provisions (of the delegated legislator) the restriction of some fundamental rights and freedoms would be allowed, even in the form of the law approved by the Parliament, in essence, the Constitutional Court sanctioning the possibility that restrictions on the exercise of fundamental rights and freedoms would be imposed by administrative acts.

### CONCLUSIONS

Fundamental rights and freedoms have in fact become one of the most important defining elements not only for a system of law, but even for the state (rule of law), democratic regimes and even “the foundation of any human community” (Article 1 para. 1 of the German Constitution) (Drăghici, 2010, p. 26). The republished Constitution of Romania raises them to the rank of supreme values (Article 1 paragraph 3 of the republished Constitution of Romania) and thus assumes the correlative obligation of the state and public institutions to refrain from any interference in their scope. Therefore, the restriction of the exercise (not the existence) of certain fundamental rights and freedoms under Article 53 of the Romanian Constitution can be ruled exclusively under conditions established by the fundamental law regardless of the causes that would determine such action by the state or public authorities. Unfortunately, too many times and often too easily, the state authorities (in this case, the Romanian Government) invoked the “urgency” state in motivating and substantiating conjunctural measures (this is also the case of the changes undertaken to control the phenomenon of “electoral tourism” , culminating in the issuance of normative acts on measures to prevent and combat the effects of the Covid-19 pandemic). Finally, the care and diligence the legislator should give proof of (primary or secondary) are required, even more so as abuses consisting in the limitation or restriction of certain fundamental rights and freedoms occur and, subsequent to the regulation, in the process of specific application, to particular situations.

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