

IMPAIRMENT OF FREEDOM OF EXPRESSION THROUGH THE STATE OF EMERGENCY

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ABSTRACT : *The right of exception established during the state of emergency provides for measures aimed at the sphere of manifestation of the right to free expression, such as to affect its full exercise.*

The special state of emergency recently ruled in Romania includes a series of measures in the field, derived from the general obligation of public institutions and authorities, as well as private operators to contribute to the public information campaign on measures adopted and activities carried out on the national level, in connection with the COVID 19 pandemic. In the event of the spread of false information in the media and online on the evolution of COVID-19 and on protection and prevention measures, public institutions and authorities shall take the necessary correctly and objectively the population in this context. For the application of the measures provided in the decree instituting the state of siege or the state of emergency, the military authorities, as well as the other public authorities provided in the decree have a series of attributions, among which to temporarily suspend the publishing or broadcasting of publications or programs. radio or television stations (art. 20 letter k) of the GEO no. 1/1999).

A legal rule must regulate in a unitary, uniform manner, set minimum requirements applicable to all its addressees and not allow arbitrariness or abuse. From this perspective, the content and application of the provisions aimed at removing from the public space fake news about the evolution of COVID-19 and the protection and prevention measures, generated controversy and activated institutional mechanisms to clarify them. The norms in question consequently generate an impermissible margin of appreciation of the competent authorities, in connection with determining elements of the administrative decision, some identified by the Ombudsperson in the context evoked: the notification procedure and the one through which the spreading of fake news is monitored in the context of the COVID-19 crisis; the legal framework (non-existent) comprising the criteria for establishing the "news" content and its "fake" character; the perspective from which the news about which there are suspicions regarding the authenticity, credibility of the sources, but also of those with a scientific basis are analysed; the way of performing the analysis, in relation to the content of the information, their authenticity and accuracy, the credibility of the sites that host the information, the credibility of the sources but also the purpose pursued by publishing that information; the procedure for adopting the decision implementing the measure.

Regardless of their nature and content, the tools meant to combat the phenomenon of fake news will have to pass through the filter of fundamental rights and freedoms, in order to

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avoid the situation of combating tomorrow's misinformation with the legal instruments of the past..

KEYWORDS: *freedom of expression; fake news; law of exception; state of emergency; public information; COVID 19 pandemic; administrative decision; fundamental rights and freedoms.*

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1. GENERAL CONSIDERATIONS ON THE FREEDOM OF EXPRESSION

Art. 19 of the Universal Declaration of Human Rights stipulates that every person has the right to the freedom of opinion and expression. Consecrated in art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as in art. 11 of the Charter of Fundamental Rights of the European Union, freedom of expression is an essential right in European human rights law (C. Gauthier, S. Platon, D. Szymczak., 2017)¹.

The Romanian Constitution, republished, in art. 30 para. (1), enshrines the freedom to express thoughts, opinions or beliefs and the freedom of creations of any kind, orally, in writing, through images, through sounds or through means of public communication.

Democracy and the rule of law “cannot be imagined without satisfying one of the most significant needs of man - in his capacity as a social being - a necessity that resides, on the one hand, in receiving ideas and information, and, on the other , in disseminating in any form their own ideas and concepts” (Predescu, 2019).

The European Court of Human Rights has established in its jurisprudence that “the freedom of expression is one of the essential foundations for the proper functioning of a democratic society, one of the primary conditions for its progress and prosperity for all”.² Freedom of expression has always been the subject of meticulous control by the E.C.H.R. which progressively defined its substance, its matter. Thus, its field of application was determined in a positive way, but also in a negative way (C. Gauthier, S. Platon, D. Szymczak., 2017).

The exercise of the freedom of expression supposes certain "duties and responsibilities", but the state interference must meet certain conditions (it must be provided by law, necessary in a democratic society, for national security, territorial integrity or public safety, defence of public order and crime prevention, protection of the health, morals, reputation or rights of others, to prevent the disclosure of confidential

¹It is shown that although the wording of the two texts is not identical, the substance of the recognized right is essentially the same and the rich jurisprudence of the E.C.H.R. Over the years, it has allowed to outline this freedom, as well as to appreciate the importance and possible restrictions. So, para. 1 of art. 10 of the European Convention, entitled *Freedom of expression*, stipulates that “everyone has the right to the freedom of expression. This right shall include the freedom of opinions and the freedom to receive and impart information and ideas without the interference of public authorities and regardless of frontiers. This Article shall not prevent States from subjecting broadcasting, cinematographic or television undertakings to an authorization regime.” On the other hand, art. 11 of the Charter, entitled *Freedom of expression and information*, provides in a more concise manner that “1. Everyone has the right to the freedom of expression. This right includes freedom to have opinions and to receive and impart information and ideas without interference from the part of the public authority and regardless of frontiers. 2. Freedom and pluralism of the media shall be respected.”

²E.C.H.R., December 7, 1976, *Handyside vs. UK*, in V. Barbé, *L'essentiel du Droit des libertés fondamentales*, 8^e édition, Gualino, 2017, p. 131.

information or to guarantee the authority and impartiality of the judiciary). (Anon., 2014)³

2. THE NATIONAL LEGAL FRAMEWORK FOR EMERGENCY MEASURES AGAINST THE DISSEMINATION OF FALSE INFORMATION IN CONNECTION WITH THE COVID 19 PANDEMIC.

The law of exception (Duțu, 2020) established during the state of emergency provides for measures aimed at the sphere of manifestation of the right to free expression, likely to affect its full exercise.

Misinformation means a series of verifiably falsely or misleading information, which is created, presented and disseminated in order to obtain an economic gain or to deliberately mislead the public and which may cause public harm. Public harm includes threats related to democratic processes, as well as public goods such as the health, environment or security of the citizens of the European Union.⁴

On January 30, 2020, the World Health Organization (WHO) declared that the epidemic caused by the new coronavirus was "an international public health emergency" and on February 4, 2020 considered the global crisis caused by the new coronavirus to be "the first massive infodemic widespread through social networks", by "infodemia" being understood "an overabundance of information - some correct, some not - which makes it difficult for people to access reliable sources just when they need them most". In this context, some states have identified as a weapon in the fight against *fake news* around the coronavirus the adoption of laws criminalizing fake news, with sanctions ranging from fines to imprisonment, measures deemed to violate international law that protects the law to freedom of expression and the right to "seek, receive and transmit information and ideas".⁵

The special state of emergency regime recently established in Romania⁶ includes a series of measures in the field, derived from the general obligation of public institutions and authorities, as well as of private operators, to contribute to the public information campaign on the measures adopted and the activities carried out on the national level in connection with the COVID 19 pandemic. By disseminating false information in the media and online about the evolution of COVID-19 and about the protection and prevention measures, the public institutions and authorities are taking the necessary

³The European Convention on Human Rights, Hamangiu Publishing House, Bucharest, 2014, p. 11.

⁴ Definition contained in "Comunicarea comună către Parlamentul European, Consiliul European, Consiliul, Comitetul Economic și Social European și Comitetul Regiunilor" [Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions]. Plan de acțiune împotriva dezinformării [Action plan against misinformation], December 5, 2018", available at <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A52018JC0036>, accessed on June 20, 2020.

⁵ Tatiana Puiu, *Combaterea știrilor false de către stat, între cenzură și respectarea drepturilor omului* [Combating false news by the state, between censorship and observance of human rights], published on Realitatea.md, available at https://www.realitatea.md/combateretirilor-false-de-catre-stat-intre-cenzura-i-respectarea-drepturilor-omului_107468.html, accessed on June 26, 2020;

⁶ By the Decree of the President of Romania no. 195/2020 on the establishment of the state of emergency on the Romanian territory, published in the Official Gazette, Part I, no. 212 of March 16, 2020.

measures to correctly and objectively inform the population in this context (Coman, 2019).

Article 54 para. (3), (4) and (5) of Decree no. 195/2020 stipulates the obligation of hosting service providers and content providers that, at the motivated decision of the National Authority for Administration and Regulation in Communications, to immediately interrupt, with the users' information, the transmission in an electronic communications network or the storage of the content, by its elimination at the source, if the respective content promotes fake news about the evolution of COVID-19 and the protection and prevention measures.

If the removal of the aforementioned content at the source is not feasible, the providers of electronic communications networks intended for the public are obliged, at the reasoned decision of the National Authority for Administration and Regulation in Communications, to immediately block access to that content and to inform users.

At the motivated decision of the National Authority for Administration and Regulation in Communications, the providers of electronic communications networks intended for the public have the obligation to immediately block the access of Romanian users to content that promotes false news regarding the evolution of COVID-19 and protection measures. prevention and is transmitted in an electronic communications network by hosting service providers and content providers that are not under the jurisdiction of national law.

The primary regulation regarding the special regime of the state of emergency, the Government Emergency Ordinance no. 1/1999⁷, establishes that *during the state of siege or the state of emergency, the exercise of fundamental rights and freedoms may be restricted, except as expressly provided⁸, only insofar as the situation requires it and in compliance with art. 53 of the Romanian Constitution, republished.*

For the application of the measures provided in the decree establishing the state of siege or the state of emergency, the military authorities, as well as the other public authorities provided in the decree have a series of attributions, among which to temporarily suspend the appearance or broadcasting of publications or programs. radio or television stations [art.20 letter k) of the Government Emergency Ordinance no. 1/1999].

For our endeavour it is necessary to specify that, by the Decision no. 152/2020, the Constitutional Court found the exercise with excess of power, by the President of Romania, of the constitutional attribution regarding the regulation of the state of emergency (paragraphs 92-106), achieved by issuing Decree no. 195/2020 on the establishment of the state of emergency on the Romanian territory, by reference to its content. It was noted, in this respect, that the decree identifies the measures of first urgency, provided by law, but which are adapted to the concrete situation that generated the state of emergency, as well as those fundamental rights and freedoms whose exercise is to be restricted during state of emergency.

⁷ Published in the Official Gazette, Part I, no. 22 of January 21, 1999, with subsequent amendments and completions.

⁸ *The exceptions include: restriction of the right to life, except in cases where the death is the result of lawful war, torture and inhuman or degrading treatment or punishment, conviction for unforeseen offenses as such, under national or international law, restriction of free access to justice.*

The nature of the administrative act⁹ of the decree issued for the organization of the application of the provisions of the Emergency Ordinance no. 1/1999 regarding the state of siege and the regime of state of emergency, approved by Law no. 453/2004, will allow the administrative contentious courts to verify its legality under aspects that may include the norms in question, which aim at exercising the right to free expression.

The Romanian Constitutional Court has consistently affirmed quality standards of national legal norms, with accessibility and predictability requirements taking a central place¹⁰. The jurisprudence of the Constitutional Court regarding art. 1 para. (5) of the Constitution establishes that one of the requirements of the principle of observance of laws concerns the quality of normative acts and that, in principle, any normative act must meet certain qualitative conditions, including predictability, which presupposes that it must be sufficiently clear and precise so that it can be applied, and the addressees of the norm - who can call, if necessary, on the advice of a specialist - to foresee to a reasonable extent, in the circumstances of the case, the consequences that may result from a certain act. A subject of law cannot be required to comply with a law that is not clear, precise and predictable, because he or she cannot adapt his or her conduct according to the normative hypothesis of the law, so that the legislator has the obligation that, in the act of legislation, regardless in the field in which it exercises this constitutional competence, to show increased attention in compliance with the principle of clarity and predictability of the law.¹¹

A legal rule must regulate in a unitary, uniform manner, establish minimum requirements applicable to all its addressees and not allow arbitrariness or abuse. In the same vein, the European Court of Human Rights has ruled that the law, in order to satisfy the requirement of predictability, must specify with sufficient clarity the scope and modalities of exercising the discretion of the authorities in that field, taking into account the legitimate aim pursued, provide the person with adequate protection against arbitrariness (Coman, 2014).¹²

From this perspective, the content and application of the provisions of the Decree of the President of Romania no. 195/2020, regarding the public information on the measures adopted and the activities carried out on the national level in the context of the crisis generated by the COVID 19 pandemic, the removal from public space of fake news regarding the evolution of COVID-19 and the protection and prevention measures (art. 54) generated controversy and activated institutional mechanisms meant to clarify them.

⁹ The Decision of the Constitutional Court of Romania no. 152/2020, published in the Official Gazette, Part I, no. 387 of May 13, 2020, para. 86-89. See B. Dima, *Care este natura juridică a decretelor Președintelui României emise pentru instituirea și prelungirea stării de urgență?* [What is the legal nature of the decrees of the President of Romania issued for the establishment and extension of the state of emergency?], published on Juridice.ro on April 17, 2020, available at <https://www.universuljuridic.ro/care-este-natura-juridica-a-decretelor-presedintelui-romaniei-emise-pentru-instituirea-si-prelungirea-starii-de-urgenta/>

¹⁰ See the Decisions of the Constitutional Court of Romania no. 1 of January 11, 2012 (Official Gazette no. 53 of January 23, 2012), no. 494 of May 10, 2012 (Official Gazette no. 407 of June 19, 2012), no. 196 of April 4, 2013 (Official Gazette no. 231 of April 22, 2013), no. 430 of October 24, 2013 (Official Gazette no. 50 of January 21, 2014), no. 447 of October 29, 2013 (Official Gazette no. 674 of November 1, 2013).

¹¹ Decision of the Constitutional Court of Romania no. 49 of February 4, 2020, published in the Official Gazette, Part I, no. 385 of May 13, 2020, para. 49-50.

¹² See: E.C.H.R., judgment of 4 May, 2000, ruled in the case *Rotaru vs. Romania*, para. 52; E.C.H.R., judgment of January, 25 2007, ruled in the case *Sissanis vs. Romania*, para. 66.

In this context, the Ombudsperson requested explanations from the Strategic Communication Group on the closure of several sites.¹³ In his statement of reasons, she called on the Organization for Security and Co-operation in Europe to be concerned about the state of emergency regime established at national level, in terms of the importance of the free movement of information at national level and the right of the press to report on the pandemic and government policies.

A first aspect refers to the fact that neither Decree no. 195/2020 establishing the state of emergency nor the one regarding its extension (Decree no. 240/2020) mentions the freedom of expression between the rights whose exercise is to be restricted during this period, in contradiction with the primary regulatory norm according to which *the decree establishing the state of siege or the state of emergency must provide the fundamental rights and freedoms whose exercise is restricted [art. 14 letter d) of the Government Emergency Ordinance no. 1/1999]*.

The legal nature of the measures established by art. 54 of the Decree no. 195/2020 is also equivocal. The notion of sanction usually evokes the idea of punishment applied to a guilty individual. (Ion Dogaru, Nicolae Popa, Dan Claudiu Dănișor, Sevastian Cercel, 2008). Specific to the punishment is his personal character (Constantin Stătescu, Corneliu Barsan, 1997) and the connection with one of the classical forms of liability. It should be mentioned that the criminal offense includes the crime called “Communication of false information” (art. 404 of the Penal Code), which sanctions “Communication or dissemination, by any means, of fake news, data or information or falsified documents, knowing their false nature, if this endangers national security.”

The measures consisting in interrupting the transmission in an electronic communications network or content storing, by eliminating it at the source or blocking users' access to the content move away from the concept of sanction, and may rather be included in the category of administrative police measures. They have a preventive purpose in connection with the non-affectation of the social order, being able to be included also in the category of activities destined to maintain a pre-existing state of peace and internal security, circumscribed to the idea of national security.¹⁴ Easily identifiable, the purpose of this category of measures refers to the prevention of the creation of dangerous, harmful social conditions and behaviors, generated by fake news about the evolution of COVID-19 and the protection and prevention measures.

As shown above, the clarity and predictability of the rule constitute a guarantee against the arbitrariness of the authorities, which limits the discretion of the authorities.

From this perspective, the rules in question generate ambiguities and, consequently, an impermissible margin of appreciation of the competent authorities, in connection with determining elements of the administrative decision, some identified by the Ombudsperson in the context evoked: the referral procedure and the one by which the emergence of fake news in the context of the COVID-19 crisis is being monitored; the legal framework (non-existent) comprising the criteria for establishing the “news” content and its “fake” character; the perspective from which the news about which there are suspicions regarding the authenticity, credibility of the sources, but also of those with

¹³ The request is available at <http://www.avpoporului.ro/rec/doc20.pdf>.

¹⁴ Decision of the Romanian Constitutional Court no. 91 of February 28, 2018, published in the Official Gazette, Part I, no. 348 of April 20, 2018, para. 53.

a scientific basis are analysed; the manner of conducting the analysis, in relation to the content of the information, their authenticity and accuracy, the credibility of the sites hosting the information, the credibility of the sources, but also the purpose pursued by the publication of that information; the procedure for adopting the decision implementing the measure.

The competence of the body issuing the administrative act, a category which includes the decisions of the National Authority for Administration and Regulation in Communications mentioned in art. 54 of the Decree no. 195/2020, is a general condition of legality, the violation of which is sanctioned with the non-existence of the act if it emanates from another body than the competent one. In the event of issuance by the competent body, exceeding the limits of power, we are in the presence of excess power, punishable by the courts. (Vedinaş, 2019)

In the matter under analysis, the text of the primary regulation (*Government Emergency Ordinance no. 1/1999*), regulating a somewhat different measure in content and scope, namely the temporary suspension of the dissemination or broadcast of publications or radio or television broadcasts, refers to the military and other public authorities provided in the *infralegal normative act* (Decree no. 195/2020), the latter providing for the exclusive competence of the National Authority for Administration and Regulation in Communications.

Unlike this legal framework regarding the competence to apply the measures provided by art. 54 of the Decree no. 195/2020, the Ministry of Internal Affairs informed that the analysis regarding the publications that systematically and deliberately disseminate false information is performed at the level of the Strategic Communication Group. Based on this analysis, the Minister of Internal Affairs issues the provision regarding the possible deactivation of the online publication, implemented by decision of the National Authority for Administration and Regulation in Communications.¹⁵

If the Ministry of Internal Affairs is the authority that coordinates the application of the measures ordered by the decree establishing the state of emergency [*art. 18 para. (1) of the Government Emergency Ordinance no. 1/1999*], the presence of the Strategic Communication Group in this procedure is provided neither the Decree no. 195/2020 nor in any other normative act. This entity has a difficult legal status to establish, compared to the content of the founding norm, art. 6 of Decision no. 2 of the Special Emergency Situations Committee, which refers to the "*Establishment of a strategic communication group under the coordination of DSU with representatives from all institutions involved*", but, in particular, the lack of regulations on its organization and functioning, which is important, given that the tasks, responsibilities, competence and legal capacity define the proper status of a public authority. (Santai, 2014) quoted in (Tofan, 2018)

The competence in applying the measures provided by art. 54 of the Decree no. 195/2020 also creates a conflict of interests in general terms, because the authorities that propose / take the decision to remove fake publications / content from the public space, are part of the category of those with responsibilities for protection and prevention measures related to the evolution of COVID-19 , being with predilection the subject of these materials.

¹⁵ The Communication of the Ministry of Internal Affairs is available at <https://www.mai.gov.ro/precizare-23/> , accessed on June 28. 2020.

A solution that offers substantial guarantees of impartial application of these exceptional measures, subject to analysis in other states¹⁶, may be its inclusion in the jurisdiction of the courts, which can ensure both the independence and speed of the adoption and enforcement procedure.

3. CONCLUSIONS

Undoubtedly, we are in the stage of identifying solutions to optimally address the fake news phenomenon. Regardless of their nature and content, they will have to be filtered through fundamental rights and freedoms, in order to avoid the situation of fighting tomorrow's misinformation with the legal instruments of the past.¹⁷

The fears about the use of legal instruments by the authorities meant to limit freedom of expression, prevent the existence of a favour for the adoption of laws aimed at combating misinformation, laws that could not keep the pace with innovations in online misinformation. In this context, measures such as those contained in the Action Plan against Disinformation proposed by the European Commission are supported¹⁸ : to improve the capacity of the European Union institutions to detect, analyse and report misinformation; strengthening coordinated and joint actions to combat misinformation; mobilizing the private sector to combat misinformation; informing citizens and improving resilience in society.¹⁹

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¹⁶ The French National Assembly has considered a law draft (no. 799/2018, available at http://www.assemblee-nationale.fr/dyn/15/textes/115b0799_proposition-loi , accessed on June 28. 2020) on the fight against false information, which provided for the possibility for courts to intervene to remove them. Rejected in 2018 by the Senate, the project returned, following some revisions, in the debate of the French legislature.

¹⁷Financial Market, "Fake news : Putem identifica o soluție juridică pentru o problemă societală?" [Can we identify a legal solution to a societal problem?], available at <https://www.financialmarket.ro/opinii/fake-news-putem-identifica-o-solutie-juridica-pentru-o-problema-societala/> , accessed on June 28, 2020.

¹⁸ *Comunicarea comună către Parlamentul European, Consiliul European, Consiliu, Comitetul Economic și Social European și Comitetul Regiunilor [Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions]*. Plan de acțiune împotriva dezinformării [Action plan against misinformation], December 5. 2018, available at <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A52018JC0036> , accessed on June 20, 2020.

¹⁹ Monica Cercelescu, *Dezinformarea în epoca post-adevăr. Poate fi reglementată lupta împotriva dezinformării?* [Disinformation in the post-truth era. Can the fight against misinformation be regulated?], published on February 21, 2019 on Juridice.ro, available at <https://www.juridice.ro/628769/dezinformarea-in-epoca-post-adevar-poate-fi-reglementata-lupta-impotriva-dezinformarii.html> , accessed on June 20, 2020.

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