

SUSPENSION OF HUMAN RIGHTS UNDER A STATE OF EMERGENCY

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ABSTRACT : *The article analyses whether or not a derogation submitted under article 15 of the European Convention of Human Rights is necessary and justifiable as a state of emergency was imposed due to the Covid-19 Pandemic. It also analyses the effects of the derogation and the implications on the jurisdiction of the European Court of Human Rights.*

KEYWORDS: *Human rights; state of emergency; derogation; the rule of law; necessity*
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1. INTRODUCTION

Exceptional situations call for exceptional measures. In modern society, the general restriction of fundamental rights or the suspension of the application of the European Convention on Human Rights borders the limit of an inconceivable situation. The need to respect the rule of law implies the respect of fundamental human rights and therefore general restrictive measures have been taken in the European space very rarely since the adoption of the European Convention on Human Rights. Such restrictive measures and have been imposed mainly due to terrorist threats.

There have been no events in Europe in the last 30 years that have caused such a severe restriction of fundamental rights as the COVID-19 Pandemic, which was declared by the World Health Organization on 11 March 2020.

European nations that at the declarative level competed in asserting democracy, integration and the need to respect the rule of law – enunciated in most European documents – rushed to adopt measures to restrict the fundamental rights and freedoms of persons, especially freedom of movement and freedom of assembly.

The need for such measures arose from the recommendations of the World Health Organization on social distancing, as the Swedish model that opposed these

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recommendations failed miserably in relation to the number of deaths that increased twice and a half compared to the same period of 2019.

Insufficient means and the inability to manage the health crisis in countries with a strong medical system such as Italy or Spain have only spread unrest throughout Europe and led to a generalization of unprecedented restrictions of human rights.

Romania was no exception, but was noted as one of the 2 member states of the European Union that used the provisions of Article 15. para. (3) of the Convention. On 17 March 2020, it was considered that, in addition to imposing restrictions, it was necessary to issue a notification to the Council of Europe as a result of the declaration of a state of emergency.

The Romanian state was not the first state to impose restrictions on fundamental rights and freedoms. At that time the whole of Italy was under a state of emergency after a similar state had been decreed since February 23 in the northern part of the state, especially in the provinces of Lombardy and Veneto.

Given the fact that in exceptional circumstances anyone can become a delinquent, as Professor Jean Pinatel¹ pointed out, measures and adequate sanctions must be installed to ensure people's compliance.

However, in the last 30 years, only Turkish President Recep Tayyip Erdogan has called for such a suspension in order to remove the army leadership and sanction the 2016 coup attempt.

2. THE ACT OF DEROGATION

On March 17, 2020 the Permanent Representation of Romania to the Council of Europe notifies through note 498, in accordance to art. 15, paragraph 3 of the Convention the declaration of the state of Emergency by Presidential decree no. 195/2020. What is noteworthy is that only Lithuania of all the member states of the European Union has made a similar notification.

In our opinion we appreciate that the notification issued under art. 15 par. 3 of the Convention was not required. The European Convention on Human Rights has devised a structure within which, for justifiable reasons, the fundamental rights and freedoms provided for in the Convention may be amended. Unlike Lithuania, Romania has not expressly indicated which rights it intends to restrict, and the opinion of Bucharest officials was that these rights concern all rights under the Convention except untouchable rights such as the prohibition of torture, inhuman or degrading treatment or the prohibition of slavery. (Chiriță, 2007). These rights constitute the hard core of the Convention and cannot be restricted (Munteanu, Rusu, & Vacarciuc, 2015). In our opinion, the right to life is also an absolute right in respect to its unavailability, although this right may be restricted under certain circumstances, the same way as other fundamental rights of the person may be restricted.

The problem in activating the derogation clause under the provisions of art. 15 paragraph 3 lies not in the fear of a possible violation of fundamental rights, as such a possibility that exists even in the absence of a derogation, but in what we consider to be the elimination of all safeguards against the arbitrary.

¹ Jean Pinatel (1913-1999) renowned criminologist, President of the International Society of Criminology

Thus, as long as the military ordinances issued during the state of emergency cannot be the subject of an administrative appeal, the deprivation of the European Court of Human Rights to exercise its jurisdiction and to subject to post-facto verification the actions of the Contracting State is an unnecessary measure in a democratic society and a means by which the executive branch can exercise its powers at its discretion.

The fact that these powers have not been exercised at the states discretion does not in any way excuse the act of derogation. Without entering into the analysis of the executive's intention, which could even be in agreement with the imperative of the rule of law, the desideratum of the protection of the state authority cannot take the form of eliminating all obligations correlative to fundamental rights.

The jurisprudence of The European Court shows that in case of exceptional events, measures to limit human rights may be taken. As an example, referring to the most important right - the right to life - in the McCann case, the Court ruled that limiting this right may be justified in situations where the lives of others are endangered (*McCann and Others vs. UK*, 1995). The Court's analysis does not relate strictly to interference, but to the fulfillment of the conditions regarding its legitimacy, including its proportionality and necessity in a democratic society.

However, to consider in abstract that all measures are proportionate and necessary means to argue that the executive cannot be wrong, which is obviously untrue. Made up of people, the executive branch is subject to wrongdoing in the same way that it can be subject to authoritarian tendencies or slippage from the rule of law. If we accept that simple errors of judgment relating to the gravity of a certain situation or other momentary reactions may be overlooked, widespread slippage is inadmissible. Therefore an absolute derogation from the provisions of the Convention is, in our opinion disproportionate. A legitimate question nevertheless arises: when could such derogation operate? The pandemic situation was exceptional, being probably one of the worst situations affecting freedom of movement in Europe in the last half century.

Although we admit that the effects of the pandemic on the Romanian citizens were difficult to appreciate, it is debatable to what extent a general derogation was a necessary act. Situations that may justify derogation are of significant gravity, but they only allow particular derogation in relation to individual obligations imposed on States through the Convention. (Harris & O'Boyle, 2018).

However, the derogatory act cannot be confused with the acts of authority by which limitations on fundamental rights are introduced. Regarding the restrictions imposed by Romanian authorities in the exercise of rights and freedoms, we consider them to be proportional to the situation that generated them and necessary in a democratic society. But restricting these rights could have been legitimate even in the absence of a derogatory act. In imposing certain restrictions, the Romanian State acted in compliance with the principles of the rule of law and taking these decisions in a parliamentary procedure is an expression of democracy. The Romanian Parliament unreservedly adopted the executive acts, confirming without political bias their validity.

3. THE EFFECTS OF THE DEROGATION AND SUSPENSION OF THE EXERCISE OF FUNDAMENTAL RIGHTS

Romanian doctrine has considered that Article 15 allows the temporary suspension of the exercise of the rights and freedoms protected by the Convention. (Bîrsan, 2010). In our opinion we find this conclusion to be inappropriate. As we have shown states may take measures to derogate from the obligations under the Convention, but we do not believe that it could be argued that this would imply an effective suspension of the provisions of the Convention.

We argue that these rights will continue to be applicable and not suspended, and such a derogatory act will only institute a presumption of the viability of the state of emergency and the proportionality of the measures taken by the authorities. As long as the text of the Convention does not use the notion of suspension of rights, we do not believe that the derogation can be equated with the ineffectiveness in respect to the protection of fundamental rights.

Article 15 contains a derogation clause which gives Contracting States, in exceptional circumstances, the possibility to derogate, in a limited and supervised manner, from their obligations to ensure respect for certain rights and freedoms under the Convention. We think that these rights are not suspended as they continue to exist and are subject to the protection offered by the Convention.

As the Court states the making of a derogation need not be a concession that the State will not be able to guarantee the rights contained in the Convention. Indeed, the practice when lodging a derogation has been for the Contracting State to state that the measures it is taking “may” involve a derogation from the Convention. For this reason, in any case where an applicant complains that his or her Convention rights were violated during a period of derogation, the Court will first examine whether the measures taken can be justified under the substantive articles of the Convention; it is only if it cannot be so justified that the Court will go on to determine whether the derogation was valid (Guide on Article 15 of the Convention – Derogation in time of emergency, 2020).

Moreover, we consider that this derogation may be the subject of the Court's analysis in the light of the application of a text of the Convention, Article 15 being an integral part of the international instrument. In interpreting and applying the Convention, the Court can analyze the violation of any right protected by the provisions of the Convention, including the manner in which Contracting States have violated their general obligation prescribed under Article 1 to respect fundamental human rights.

The assessment of a breach of this general obligation can also refer to the act of derogation issued under Article 15 of the Convention and in that case the Court could find violation of the provisions of Article 1 of the Convention in respect to the provisions of Article 15, as the derogatory act of itself constitutes an act of the Contracting State, subject to The European Court's scrutiny.

4. CONCLUSIONS

Article 15 contains a derogation clause which gives Contracting States, in exceptional circumstances, the possibility to derogate, in a limited and supervised manner, from their obligations to ensure the respect of certain rights and freedoms under the Convention.

This does not, however, imply a suspension of the exercise of these rights as they are still protected by the Convention.

In our opinion the derogatory act will institute a presumption of the viability of the state of emergency and of the necessity and proportionality of the measures taken by the authorities. Such measures and the act itself may subsequently be assessed by the European Court.

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