

SOME REFLECTIONS ABOUT THE ACTIVATION OF ART 15 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY ROMANIA IN THE CONTEXT OF THE COVID-19 PANDEMIC

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Abstract

In the context of the sanitary crisis generated by the spread of the SARS-CoV-2 virus, the Romanian authorities have considered as necessary to declare a state of emergency, to limit the exercise of certain rights and freedoms with the purpose of preventing the spread of the virus and have decided to derogate from the European Convention of Human Rights. Starting from these realities, the objective of the current article is the analysis of Art 15 of the Convention in relation to the previous jurisprudence of the European Court of Human Rights in this area and proposes a reflection upon the need to activate this article by Romania.

Keywords: Covid-19, human rights, Art 14 of the European Convention on Human Rights, derogation, Romania.

Introduction

The evolution of the international situation determined by the spread of SARS-CoV-2 coronavirus in over 150 countries, the declaration of the “pandemic” by the World Health Organization, the experience of countries severely affected by the evolution of the virus, the imminent massive increase in the number of infected people were the main considerations that formed the basis of the Romanian state's decision to take urgent, exceptional measures in order to limit the infection of the population with the SARS-CoV-2 virus and to protect their right to life and health.

On 16th March 2020, the national authorities declared the state of emergency [1] and have decided the limitation of the exercise of the following rights and freedoms with the purpose of preventing the spread of COVID-19 and to manage the consequences, related to the evolution of the epidemiological situation: free movement; the right to intimate, family and private life; inviolability of the home; the right to education; freedom of assembly; the right of private property; the right to strike; economic freedom.

Also, it was decided the activation of Art 15 of the European Convention on Human Rights (the Convention) which states, under exceptional circumstances, the

possibility to derogate, with limitations and under supervision, from their obligations to insure certain rights and freedoms according to the Convention.

In the context of the Covid-19 crisis, together with Romania, other member states of the Council of Europe, such as Albania, Georgia, Estonia, Moldova, Armenia and Latvia [2] and others have applied Art 15 of the Convention.

For the first time, the system for the protection of human rights created by the Convention faces a true test. Covid-19 represents a real threat for public health in Europe, with the state imposing a series of restrictions and limitations of the exercise of rights and freedoms in their attempt to face the pandemic.

At the level of the national and international legal communities, a wide debate was launched regarding the opportunity to activate or not the Art 15 of the European Convention of Human Rights, outlining different points of view in this regard, so far [3].

From our perspective, a definite and general answer to such a problem cannot be offered because this answer differs depending on several factors such as the nature of the restrictions and/or their duration and, in particular, the *de facto* situation and *de jure* of each state. We will have the answer in time, when the measures taken by today's governments will be analysed in the decisions of the European Court of Human Rights, which is competent to examine *post factum* whether the measures derogating from the obligations of the Convention were strictly appropriate to the facts [4].

The activation of art 15 of the European Convention on Human Rights by Romania

According to Art 15 Para 1 of the Convention, "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law". Also, Para 2 of the same article, states that "No derogation from the right to life (Art 2 of the Convention), from the prohibition of torture, inhuman or degrading treatment or punishment (Art 3 of the Convention), slavery (Art 4 Para 1 of the Convention), the rule of *nulla poena sine lege* (Art 7 of the Convention), the abolition of death penalty (Protocol 6 and 13 of the

Convention) and the rule of *non bis in idem* (Art 4 of Protocol 7 to the Convention) shall be made under this provision”.

Finally, Para 3 states that “Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate, and the provisions of the Convention are again being fully executed”.

From Art 15 it results the fact that for its activation a series of substantive and of form conditions shall cumulatively be met. Regarding the substantive conditions, these are the following: the existence of either a war, or another public danger threatening the life of the nation, the derogation from the obligations provided for in the Convention may take place only to the extent that the situation so requires, the measures taken not being in conflict with other obligations of the state under international law.

Given that the activation of Art 15 of the Convention is not novelty for the Court, ruling upon the need of invoking it in the past by other states [5], for instance by Turkey [6], Ireland [7] or Great Britain [8] for the analysis of these conditions we shall relate first of all to its jurisprudence in this area.

We will also take into account the information material prepared by the Council of Europe on respect for democracy, the rule of law and human rights in the context of the situation arising from the spread of COVID-19 [9], as well as the provisions of the Guide of the Council of Europe regarding Art 15 of the European Convention of Human Rights [10].

The condition for the existence either of a war or of another public danger threatening the nation’s life

Thus, with regard to the first formal condition, we note that the classification of a situation within the notion of “public danger threatening the life of the nation” is left by the Court to the assessment of national authorities. But it does not mean that if the Court is notified with a complaint on the violation of a right guaranteed by the Convention, it does not have the possibility to remove such consideration. Definitely, it has this possibility, which is clear from its case law [11].

In the application *Lawless v Ireland*, the Court has defined the notion of “a public emergency threatening the life of the nation” as being “a situation of exceptional and prominent danger or crisis affecting the general public, and constituting a threat to the organised life of the community which composes the State in question” [12].

We consider that the situation in our country generated by the Covid-19 pandemic was within the definition given by the Court, thus the first condition of the existence of a serious threat for public health and affecting the life of the nation has been fulfilled.

The condition that “the derogation from the obligations provided for in the Convention should take place only to the strict extent required by the situation”

Regarding the second condition stated by Art 15 Para 1, the Court has established in its jurisprudence [13] a series of criteria for assessment of its fulfilment, namely: the nature of the affected rights, the circumstances which led to the triggering of the state of emergency, the duration of the state of emergency, if the measures have been used with the purpose for which were granted, if the measure was legal and has been applied in accordance with a procedure stated by the law, if the judicial control for these measures is possible, whether the principle of proportionality has been respected in the taking of measures and whether their application has involved any discrimination.

In the information material, the Council of Europe showed that every state shall evaluate if the adopted measures guarantee a derogation from the Convention, depending on the nature and extent of the limitations applied for the rights and freedoms protected by the Convention. The ability of the states to do such thing is an important feature of the human rights protection system, allowing the continuous application of the Convention and its surveillance equipment even in the most critical periods [14].

The Council draws attention upon the importance of legality and proportionality, remind that in special situations, the compliance with the principles of the state of law is mandatory. Any action of the state must be carried out in compliance with the law in its broadest sense, not only in the sense of the law as an act of national parliaments, but also in the sense of an act of the executive power issued in compliance with constitutional provisions. The Council also stated that the special measures taken

during this period must be capable of achieving the aims pursued and deviate as little as possible from the usual procedures.

Regarding Romania's situation, we consider that the limitations imposed so far over certain rights are justified, having a legal base [15], are strictly necessary, are based on scientific evidences, are proportional with the situation which requested them and have a limited duration. Situations of arbitrary or discriminatory application and situations of violation of human dignity have not been notified until the time of writing this paper [16].

The derogation also proves necessary because in the case in which the emergency measures are conferred by ordinary legal rules there is a risk that the measures taken and, in particular, the extended powers of the authorities will become permanent, even after the end of the state of emergency. The derogative regime mitigates such risks, stating exceptional powers only temporary, for exceptional circumstances [17].

The condition that “the adopted measures are not contradictory with other state's obligations resulting from the international law”

The last requirement of form to be met by states according to Art 15 Para 1 is that the measures taken by them do not conflict with other obligations of the State arising from international law. With regard to this requirement, the case law of the ECHR is rather limited.

In the decision ruled for the application *Lawless v Ireland*, the Court has stated that “no facts have come to the knowledge of the Court which give it cause hold that the measure taken by the Irish Government derogating from the Convention may have conflicted with the said Government's other obligations under international law” [18].

Also, in the application case *Brannigan and McBride v United Kingdom*, the Court has analysed this requirement as referring to Art 4 of the International Covenant on Civil and Political Rights [19] and has concluded that there “is not its role to seek to define authoritatively the meaning of the terms ‘officially proclaimed’ in Article 4 of the Covenant. Nevertheless it must examine whether there is any plausible basis for the applicant's argument in this respect” [20] and that „the public statement made by the

British Government of its intension to derogate from the Convention was well in keeping with the notion of an official proclamation” [21].

In the application file *Hassan v United Kingdom*, the Court had to decide whether, in the absence of a derogation in an international conflict context, the Court could nevertheless re-interpret a Convention provision in accordance with the principles of international (humanitarian) law. The Court has stated in its decision that “although internment was not a permitted ground for the deprivation of liberty under the text of Article 5, the Contracting Party was not required to derogate from its obligations under Article 5 in order to allow for the internment of prisoners of war and civilians posing a threat to security in a conflict context because that Article could be interpreted and applied in accordance with the principles of international humanitarian law (namely the Third and Fourth Geneva Conventions)” [22].

Regarding this requirement, the legal literature has mentioned that when “the Court considered the phrase ‘other obligations under international law’ of Article 15(1), there has been a marked evolution in non-derogable rights beyond the Council of Europe. Internationally, States have gradually accepted that there needs to be judicial guarantees over liberty and fair trial, even in times of emergency, and that no margin of appreciation – no matter how widely construed – would allow for the suspension of rights which may place in jeopardy jus cogens imperatives prohibiting torture or protecting of the right to life” [23].

The rights from which derogations are not allowed

We need to recall that Art 15 Para 2 of the above-mentioned Convention expressly states the rights from which derogations are not allowed, not even in a state of emergency. These rights shall be the right to life (Art 2 of the Convention), the prohibition torture or inhuman or degrading treatments (Art 3 of the Convention), prohibition of slavery (Art 4 Para 1 of the Convention), the rule *nulla poena sine lege* (Art 7 of the Convention), the abolition of death penalty (Protocol 6 and 13 of the Convention) and the rule *non bis in idem* (Art 4 Protocol 7 of the Convention).

Another category of rights is that whose limitation shall be allowed only for states of emergency, namely: the prohibition of forced labor, the right to freedom and safety,

the right to a fair trial and the right to an effective remedy. Finally, a last category refers to those rights in respect of which, even within their regulation, the possibility of derogation is established. Thus, regarding these rights (the right to private and family life, the free speech and religion, the freedom of expression, the right to assemblies and association), their limitation may operate under normal circumstances (to the extent to which are fulfilled the requirements of Para 2 of each of the articles guaranteeing these rights and freedoms), but a supplementary limitation may be established during a state of emergency [24].

Regarding this last category of rights and the fact that it can be limited also under normal circumstances, it has been showed that “under no circumstance this aspect shall lead to the wrong conclusion in the meaning that the activation of Art 15 is useless in this case. The limitation of the rights guaranteed by the Convention may be subjected to the consideration of the Court, and the violation of the fundamental rights may be criticized. Notified with a complaint aiming the violation of a right belonging to this category, the Court shall verify the existence of a violation and, if so, shall establish if this violation is within the limitations stated by Para 2 of the article stating that particular right. Only if the violation of the right shall exceed the limitations of Para 2, the Court shall go further and establish if the derogation fulfils the conditions imposed by Art 15 [25].

The substantive conditions required by Art 15 Para 3 of the Convention

Beyond all these conditions of form, Art 15 Para 3 of the Convention refers to a series of substantive requirements. Thus, it is established the obligation of the States who have invoked this right of derogation to fully inform the General Secretary of the Council of Europe regarding the adopted measures, the motives which determined their adoption, as well as regarding the date on which these measures have ceased to be in force and the provisions of the Convention are applicable again.

Regarding Romania, we consider that the form related conditions have been fulfilled. The Permanent Representation of Romania has notified the General Secretary of the Council of Europe regarding the establishment of the state of emergency throughout the state’s territory for a period of 30 days, as well as regarding its

prolongation. Also, it requested that this verbal Note be considered as a notification in the meaning of Art 15 of the European Convention on Human Rights and has submitted a translated copy of the Decree No 195/16 March 2020 of the Romanian President regarding the establishment of the state of emergency in Romania. Also, the measures of immediate or gradual application, established by the Decree and the fact that they are absolutely necessary to limit the spread of the SARS-CoV-2 virus and to protect public health were indicated.

Given the obligation to fully inform belonging to the state, on 14th April 2020 Romania has notified the General Secretary of the Council of Europe the supplementary measures adopted in the area limiting the spread of the SARS-CoV-2 and its effects throughout Romania, as well as the data until the state of emergency shall be prolonged.

These formal requirements are important because in part, the Court will extract information so as to determine whether a State has indeed fulfilled its substantive obligations under Article 15 Para 1. As it has been shown in the application *Aksoy v Turkey*, the Court is “competent to examine this issue [procedural requirements of Article 15(3)] of its own motion, and in particular whether the Turkish notice of derogation contained sufficient information about the measure in question [...] to satisfy the requirements of Art 15 Para 3” [26].

The importance of these procedural obligations has been emphasized in the subsequent decisions issued in the cases against Turkey [27], in which the Court has underlined that “the legislative decrees which allowed for derogation – but also the notifications to the Council of Europe – were only applicable to the south-east of Turkey”. Therefore, the Court has stated that “would be working against the object and purpose of that provision if, when assessing the territorial scope of the derogation concerned, it was to extend its effects to a part of Turkish territory not explicitly named in the notice of derogation. It follows that the derogation in question is inapplicable *ratione loci* to the facts of the case” [28].

Conclusions

The activation by Romania of the provisions of Art 15 of the European Convention on Human Rights must not be understood as a total removal of the guarantees of the Convention and of any form of control regarding the compliance with the fundamental rights and also it cannot be considered as an evasion from its provisions. Even if they are mitigated by the state of emergency, the guarantees of the rule of law are in no way deactivated. "To derogate" does not mean "to violate", the obligation to respect the democracy, the rule of law, the human rights and fundamental freedoms remaining mandatory. The disproportionate or unjustified nature of a measure may be invoked both in front of the public authorities responsible for the application of the adopted measure, as well as in front of the courts. The derogation from the Convention is temporary and does not mean that Romania shall no longer be liable in front of the Strasbourg Court if the rights of the citizens shall be violated during this period.

Absolutely, the derogation from the obligations regarding the human rights as response to pandemics was and remains controversial, one thing being certain: "human rights shall be a valuable compass for the states drafting emergency measures" [29].

Regarding the situation of Romania, we have expressed a point of view which shall be confirmed or refuted by the future decisions of the European Court of Human Rights in the case in which shall have to analyse if the measure derogating from the obligations of the Convention taken by the Romanian state during this period was grounded or not.

References

- [1] See the Decree No 195/16 March 2020 of the Romanian President on the establishment of the state of emergency in Romania (Official Gazette of Romania, No 212/16 March 2020). For the notion of "state of emergency", see also: Radu, Răzvan Horațiu, *Derogarea de la dispozițiile Convenției pentru apărarea drepturilor omului și libertăților fundamentale în caz de stare de urgență* (<https://www.universuljuridic.ro/derogarea-de-la-dispozitiile-conventiei-pentru-apararea-drepturilor-omului-si-libertatilor-fundamentale-in-caz-de-stare-de-urgenta/2/>)
- [2] <https://www.coe.int/en/web/conventions/notifications>
- [3] For a presentation of these points of view, see also Duminică, Ramona, *Derogarea de la Convenția Europeană a Drepturilor Omului în contextul pandemiei de coronavirus*, in *Universul Juridic Magazine* No 5/2020 (<https://www.universuljuridic.ro/derogare-de-la-conventia-europeana-a-drepturilor-omului-in-contextul-pandemiei-de-coronavirus/2/>)
- [4] ECHR, Decision ruled in the application *A and others v United Kingdom of Great Britain*, 19 February 2009
- [5] For an analysis of the ECHR jurisprudence in this area, see also: Allain, Jean, *Derogation from the European Convention of Human Rights in Light of Other Obligations Under International Law*, *European Human Rights Law Review*, January 2005, pp. 480-498
- [6] ECHR, Decision ruled in the application *Acsoy v Turkey*, 18 December 1996

- [7] ECHR, Decision ruled in the application *Lawless v Ireland*, 1 July 1961
- [8] ECHR, Decision ruled in the application *A and others v United Kingdom of Great Britain*, 19 February 2009
- [9] <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>
- [10] Council of Europe, Guide on Article 15 of the European Convention on Human Rights (https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf)
- [11] ECHR, Decision ruled in the application *Denmark, Norway, Sweden and Holland v Greece*, 5 November 1969
- [12] ECHR, Decision ruled in the application *Lawless v Ireland*, 1 July 1961
- [13] See also the decisions ruled in the application: *Brannigan and McBride v United Kingdom*, 25 May 1993; *A and others v United Kingdom*, 19 February 2009; *Mehmet Hasan Altan v Turkey*, 20 March 2018
- [14] <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>
- [15] Regarding this condition, it has been shown that “in Romania, this mention of the Council could rise certain issues, for as long as according to the Constitution and the GEO No 1/1991 the delegation of the attributions for legislation from the Parliament to the governmental organs took place based on a presidential decree and not based on a decision of the Parliament” (Ștefan-Nicolae Alexandru, Mihnea-Andrei Novac)
- [16] Report concluded by the Agency for Fundamental Rights of the European Union (https://fra.europa.eu/sites/default/files/fra_uploads/romania-report-covid-19-april-2020_en.pdf)
- [17] Greene, Alan, *States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic*, (<https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/>); Duminiță, Ramona, *Derogarea de la Convenția Europeană a Drepturilor Omului în contextul pandemiei de coronavirus*, in *Universul Juridic Magazine* No 5/2020 (<https://www.universuljuridic.ro/derogare-de-la-conventia-europeana-a-drepturilor-omului-in-contextul-pandemiei-de-coronavirus/2/>)
- [18] ECHR, Decision ruled in the application *Lawless v Ireland*, 1 July 1961
- [19] Art 4 states: “1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision. 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation”.
- [20] ECHR, Decision ruled in the application *Brannigan and McBride v United Kingdom*, 25 May 1993
- [21] ECHR, Decision ruled in the application *Brannigan and McBride v United Kingdom*, 25 May 1993
- [22] ECHR, Decision ruled in the application *Hassan v United Kingdom*, 16 September 2014
- [23] Allain, Jean, *Derogation from the European Convention of Human Rights in Light of Other Obligations Under International Law*, *European Human Rights Law Review*, January 2005, p. 498
- [24] Bogdan, Dragoș and Teodorescu, Ana Maria Mihaela, *Starea de urgență, România și CEDO* (<https://www.universuljuridic.ro/starea-de-urgenta-romania-si-cedo/>)
- [25] Bogdan, Dragoș and Teodorescu, Ana Maria Mihaela, *Starea de urgență, România și CEDO* (<https://www.universuljuridic.ro/starea-de-urgenta-romania-si-cedo/>)
- [26] ECHR, Decision ruled in the application *Aksoy v Turkey*, (2002) 34 *European Human Rights Reports* 57, para. 86
- [27] ECHR, *Sadak v Turkey*, 8 April 2004, para. 56; *Yurttas v Turkey*, 27 May 2004 para. 58; and *Abdülsamet Yaman v Turkey*, 2 November 2004 para. 69
- [28] ECHR, Decision ruled in the application *Sakik and others v Turkey* (1998) 26 *European Human Rights Reports* 662, para. 39. See also *Sadak v Turkey*, 8 April 2004, para. 56; *Yurttas v Turkey*, 27 May 2004 para. 58; and *Abdülsamet Yaman v Turkey*, 2 November 2004 para. 69

[29] Coghlan, Niall, *Rights in a time of quarantine – an extended look*, available on <https://ukhumanrightsblog.com/2020/03/17/rights-in-a-time-of-quarantine-niall-c>