

# CONSTITUTIONALITY OF RESTRICTING THE EXERCISE OF CERTAIN RIGHTS AND FREEDOMS IN EXCEPTIONAL SITUATIONS

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## **Abstract**

*The Romanian Constitution uses a simple and efficient procedure for regulating the restriction of the exercise of certain rights and freedoms (common circumstances), through the provisions of a single article. The provisions of Art 53 allow the restriction of the exercise of some fundamental rights and freedoms, but only conditionally. The issue of interpretation and application of the provisions of Art 53 presents a special complexity because the restrictions may concern the exercise of any fundamental right or freedom enshrined and guaranteed by the Constitution, except for those considered to be absolute. The complexity is also due to the diversity of concrete situations that justify the restriction of the exercise of certain rights.*

*The rules established by the provisions of art. 53 have the value of a constitutional principle, because they are applicable to all the fundamental rights and freedoms of the citizens. The Constitutional Court and the courts are the main state institutions that have the competence to guarantee the observance of the exercise of fundamental rights and freedoms of citizens, to verify the conformity of normative acts with the Fundamental Law and to the constitutionality of limits, conditions and restrictions of exercise of rights, power of Parliament and the Government when adopting restrictive measures.*

*In exceptional situations, such as the state of emergency or the state of alert established for a long time on the Romanian territory, the rulers have restricted the exercise of some essential fundamental rights, restrictions that seriously affect the private and social life of the people.*

*In this study we analyse, based on the jurisprudence of the Romanian Constitutional Court, some international courts and other courts, the legitimacy and constitutionality of these restrictive measures.*

**Key Words:** *fundamental rights and freedoms, exceptional situations, restriction on the exercise of certain rights and freedoms, legitimacy and constitutionality of restrictions*

**JEL Classification:** [K38]

## **1. Limitations, restrictions and derogations in the performance of the rights and fundamental freedoms**

A Romanian author emphasized that freedom makes sense only in the conditions of the existence of the limit, because in order to manifest itself it must depend on something, to be circumscribed to certain coordinates. "Human freedom is interpreted in a bunch of limits that are the condition of its exercise" (Liiceanu, 1994: 11).

The statement and guarantee of human rights through national and international regulations does not exclude the possibility of their limitation.

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Moreover, the existence of unconditional rights, in theory, cannot be admitted in a democratic constitutional system. The absence of limits and conditions for exercise, provided by the law, constitutions or international legal instruments can lead to arbitrariness or abuse of law, because it would not allow the differentiation of legal behaviour from illegal one. This idea is being expressed by art. 4 of the French Declaration of the Rights of Man and of the Citizen: the exercise of the natural rights of each man has only those borders which assure other members of the society the fruition of these same rights". Also, the legal doctrine held that in the relations between the holders of rights "the freedom of one stop where the others' begins, because the inherent condition of the person is his relationship with others" (Deleanu, 1998: 269-270).

The order and social stability refer to tolerance and mutual respect between the subjects involved in social relations. The exercise of rights and fundamental freedoms must not contradict the existing order in social life: the coexistence of freedoms and social protection are the two commandments that underlie the limits enacted by positive law" (Rivero, 1973: 106). The difficulty consists in finding the most appropriate solutions to harmonize individual interests with the public interest and to guarantee the rights and fundamental freedoms in situations where their exercise may be limited or restricted.

In the relationship between rights and freedoms, on the one hand, and society on the other, two extreme attitudes have emerged: the sacrifice of rights and freedoms in the interest of the social order, or the preeminence of rights and freedoms, even if thus the interests and social order are sacrificed (Deleanu, 1998: 205). None of these solutions is justified by the imperatives of an authentic democracy and the requirement of social balance and harmony. In order to be efficient, the constitutional regulations must achieve a balance between citizens and public authorities, then between public authorities and of course, citizens. It must also insure protection for the individual against the arbitrary state interferences in the exercise of his rights and freedoms (Muraru, 1999: 16-17). Therefore, the limits imposed on rights and fundamental freedoms must be adequate for a legitimate purpose, which may be the protection of society, the social, economic and political order, the rule of law, or the protection of the rights of others. The limits must not deprive the rights themselves of their content but must guarantee their exercise in such situations.

The existence of limits for the exercise of fundamental rights is justified by the constitutional protection or by the protection by international legal instruments of some important human or state values. However, it is not permissible for state authorities to discretionary and abusively limit the exercise of rights which are in turn constitutionally guaranteed in the name of these values. In this case, democracy could be destroyed under the pretext of defending it.

The principle of proportionality, understood as an appropriate relation between the measures which limit the exercise of human rights and freedoms, the factual situation and the legitimate aim pursued represent a criterion for determining

these limits, the avoidance of the excess of power, but also a guarantee of the constitutionally enshrined rights (Andreescu & Puran, 2016: 132-137).

In doctrine, legal instruments and jurisprudence, the limits of rights and fundamental freedoms have been differentiated according to several criteria. A first differentiation is that between the limit and the limitation of fundamental rights (Micu, 1998:141). Thus, the limit is an element of content of the right necessary for its exercise. In contrast, the limitation restricts the exercise of a right by measures ordered by the competent state authorities for a legitimate purpose. Another author (Deleanu, 1998:205) considers that there are limits imposed to the rights and fundamental freedoms in order to ease their exercise and on the other hand, limits having as purpose “the protection of society, of its socio-economic and political order, as well as of the rule of law”. The limitations deriving from such a purpose may be *absolute*, imposed by the exigences of social life, in all cases for the protection of the values essential for the state and society, and on the other hand *relative*, those which are not applied in a general and permanent manner, but only to some of the rights and freedoms, or only in a certain time or in a certain situation, or only to certain subjects (Deleanu, 1998: 205; Rivero, 1973:171-175).

In our opinion, we can distinguish between: a) *conditions* for exercising the rights and freedoms that are found in the very legal content and their constitutional definition; b) *limitations, derogations, suspensions, the loss of the right*, which have an exceptional and temporary feature, being measures ordered by state authorities for the protection or achievement of a legitimate purpose. State interference in the exercise of fundamental rights and freedoms can be achieved in principle by restricting and suspending the exercise of certain rights or by derogations. These measures are stated by constitutions and international legal documents. Avoiding any abuse of state authorities and guaranteeing rights and fundamental freedoms in such situations, requires constitutional regulation, but also in international legal instruments of the conditions that justify the application of such measures.

The restriction of the exercise of certain rights or freedoms is regulated by the provisions of art. 53 of the Constitution. These are provisions of principle, which refer to the measures ordered by the state by law or government ordinances, which represent interferences in the exercise of constitutionally guaranteed rights. In order not to infringe the substance of the law, these measures are temporary and also, in order to be constitutional, they must cumulatively respect the conditions provided by the provisions of art. 53. There are also constitutional provisions limiting the exercise of certain rights, with a permanent feature. Restrictions are usually specific to the legal content of the established constitutional law. Thus, the exercise of individual liberty may be restricted by search, detention or arrest (art. 23). The inviolability of the domicile may be restricted under the conditions provided by art. 27, para. 2. The provisions of art. 36, para. 2, prohibit certain categories of persons the right to vote. The provisions of art. 40, para. 3, prohibit certain professional categories the right to be part of political parties.

There are differences between limitations, and on the other hand derogations which may aim the exercise of rights and fundamental freedoms. Limitations are measures considered necessary in a democratic society, applied with the purpose of a public interest or to protect the others' rights and freedoms. In this meaning, art. 18 of the Convention states that "the restrictions ... shall not be applied for any purpose other than those for which they have been prescribed".

With all the particular aspects, resulting from the Constitution or from international legal instruments, common conditions for the legitimacy of restrictions can be identified: to be provided by law, to be necessary in a democratic society, not to be discriminatory, to be appropriate to at least one of the purposes expressly provided by law as well as the situation that justifies them. Compliance with these conditions must be achieved cumulatively. In this way fundamental rights are guaranteed and the arbitrary interference of state authorities in their exercise is removed.

Derogations are wider restrictions on rights and fundamental freedoms and may be ordered by states in exceptional circumstances. Restrictions may, in principle, apply to any fundamental right, as opposed to derogating measures which may concern only certain human rights, guaranteed by international legal instruments. It follows from the relevant international legal instruments that derogations, in order not to be arbitrary, must comply with the following conditions: they must be applied only in exceptional situations; be strictly appropriate to the facts; be compatible with the other obligations of states parties under public international law; not to be discriminatory; states exercising the right of derogation to notify the competent international forums. There are also absolutely guaranteed rights (absolute rights) in the sense that no restrictions or derogations are allowed. Clearly, we are referring to the right to life, the right to not be subjected to torture, to any form of punishment or inhuman or degrading treatment. The principle of proportionality represents a guarantee in all cases in which the exercise of a right or of a fundamental freedom is subjected to a condition, limitation, suspension or derogation. The principle of proportionality, applied in this matter, considers the achievement of a fair balance between individual interests and the public interest or between different private interests corresponding to the fundamental subjective rights, constitutionally enshrined and guaranteed.

Regarding the Romanian constitutional provisions regarding the restriction of the exercise of rights and fundamental freedoms, in the specialized literature a distinction was made between common circumstances restricting the exercise of certain rights that form the object of art. 53 of the Constitution, and on the other hand special circumstances, intrinsic to rights and freedoms. Common circumstances of restriction are of a temporary nature, they are essentially fortuitous, while special circumstances are of a permanent nature (Deleanu, 1998:

123)<sup>1</sup>. The quoted author underlines that these circumstances must be expressly stated “it cannot be the product of conventionalism” (Deleanu, 1998: 123).

Although these circumstances are common, they may justify the restriction taking into account the nature of the right or freedom. Thus, no circumstance can justify the restriction of the exercise of the right to life or the right not to be subjected to torture.

The Romanian Constitution uses a simple and efficient procedure for the regulation of the limitation of the exercise of certain rights and freedoms (common circumstances), through the provisions of a single article. Art. 53 allows the limitation of the exercise of certain rights and fundamental freedoms, but only conditionally (Muraru & Tănăsescu, 2003: 174-176; Andreescu & Puran, 2016: 254-268). The issue of interpretation and application of the provisions of art. 53 presents a special complexity because the restrictions may concern the exercise of any fundamental right or freedom enshrined and guaranteed by the Constitution, except for those considered to be absolute. The complexity is also due to the diversity of concrete situations that justify the restriction of the exercise of certain rights.

The rules established by art. 53 have the value of a constitutional principle, because are applicable to all rights and fundamental freedoms of citizens.

The Constitutional Court and the other courts are the main state institutions that have the competence to guarantee the observance of the exercise of the rights and fundamental freedoms of citizens, to verify the conformity of normative acts with the Fundamental Law and to the constitutionality of limits, conditions and to censure the excessive power of Parliament and the Government when adopting restrictive measures.

In our opinion, the intervention of the Constitutional Court but also of the other courts has significantly contributed in the years of our original democracy to temper and stop the discretionary manifestations of the rulers and impose on them the observance of the Constitution and the law enshrining human rights and freedoms.

We do not intend to analyse the jurisprudence of the Constitutional Court in this matter, but only to present some aspects:

Our constitutional court, by interpreting art. 53 in relation to art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms has differentiated between the loss and limitation of a right. The last situation is taken into account by the provisions of art. 53. “The Court finds that the invocation of the provisions of art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms has no effect in this case, because these provisions apply to deprivation of liberty and not to the limitation of liberty”<sup>2</sup>.

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<sup>1</sup> The jurisprudence also enshrines this difference (Decision no. 13/1999 of the Constitutional Court, published in the Official Gazette, no. 178/1999).

<sup>2</sup> Decision no. 239/2001, published in the Official Gazette, no. 838/2001.

At the same time, our constitutional court decided that the restriction of the exercise of a right must have a temporary feature, being instituted only for a period in which the causes that determined it act and which are consecrated limitative to art. 53 para. 1 of the Constitution<sup>3</sup>.

If the restriction of the exercise of a right is ordered for the purpose of defending certain rights of citizens, restrictive measures are legitimate only in consideration of a certain right, since without this restriction that right would have been affected<sup>4</sup>. The restrictions brought to the exercise of a right shall not harm the substance of that right. Thus, the Constitutional Court has established that the law may order certain restrictions on the right to property may be provided by law, but they must not affect the substance of this right. These restrictions may be ordered referring to the right's object or to some of its attributes, for the protection of the rights of other persons or of general social and economic interests<sup>5</sup>.

Restricting the exercise of fundamental rights or freedoms, by law, is an interference of the state in the exercise of these rights and freedoms, justified by the achievement of a legitimate purpose. To avoid arbitrariness and excess of power from state authorities which adopt such measures, it is necessary to have guarantees insured by the state, which are appropriate with the aimed constitutional purpose, that of the protection of the rights and fundamental freedoms, in concrete situations where they could be harmed. Thus, the principle of proportionality is such a constitutional guarantee allowing the sanctioning by the constitutional court of the arbitrary inferences of the Parliament and the Government in the exercise of these rights. Therefore, measures adopted by the state restricting the exercise of rights or fundamental freedoms in order not to be abusive must be not only legal, i.e. ordered by law, or by an equivalent normative act as a legal force of law, but also legitimate, (necessary) in a democratic society, non-discriminatory, proportionate to the situation which determines them and not to affect the substance of the right. The proportionality and necessity in a democratic society are criteria for appreciation, both for the legislator and the judge, of the legitimacy of the limitation of rights or fundamental freedoms.

Our constitutional court has invoked aspects of the jurisprudence of the European Court of Human Rights on the constitutionality of measures restricting the exercise of fundamental rights: restrictive measures are proportionate to the legitimate aim pursued if the national legislative and institutional system has adequate and sufficient guarantees against abuses<sup>6</sup>. There is a difference between facts and valuable judgements. If the materiality of the first ones may be proved, the valuable judgements are not fit to be proved under the aspect of their accuracy<sup>7</sup>.

<sup>3</sup> Decision no. 83/1999, published in C.D.H, 1999, p. 582.

<sup>4</sup> Decision no. 139/1994, published in C.D.H, 1994, p. 84.

<sup>5</sup> Decision no. 19/1993, published in C.D.H, 1992-1993; Decision no. 147/1997, published in C.D.H, 1998.

<sup>6</sup> Application case *Leander v Sweden*, 1999.

<sup>7</sup> Application case *Lingens v Austria*, 2002.

Hence, the compliance with the condition of proportionality of the restrictive measures applied to the freedom of expression is seen differently depending on the nature of the statements. Proportionality may be assessed as a strict adequacy of the restrictive measure to the proposed purpose, or there may be a greater margin of appreciation of the authorities when the legitimate aim pursued is, e.g., the public morality<sup>8</sup>.

By several decisions, the Constitutional Court established that it has the competence to verify the observance of the condition of proportionality in case of restriction of the exercise of certain rights. The constitutional court assumes this competence only if the proportionality is a condition for constitutionality of the law stating the limitation of the right. “It is indisputable that the verification of proportionality falls within the jurisdiction of the Court, as long as the proportionality of the restriction with the situation that determined it constitutes a condition of constitutionality of the law that established the restriction of the right”<sup>9</sup>.

This finding of the Constitutional Court is important in several respects such as: the proportionality is considered as a condition for constitutionality which the law stating the restriction of the right shall respect. In this way the principle of proportionality is not only a simple state of affairs, close to opportunity, but it is a condition of law which falls within the jurisdiction of the Court. Also, the Court distinguishes between the general principle of proportionality, the proportionality applied in other branches of the law and the constitutional principle of proportionality applied in the area of the restriction of different rights. The competence of the constitutional court refers only to the constitutional principle of proportionality, stated by art. 53 para. 2. We notice also the interpretation of our constitutional court on the content of the principle of proportionality applied in this area: the adequacy of the restriction to the situation that determined it.

To provide a better protection for the rights and fundamental freedoms stated by the Constitution and to give the possibility for the Constitutional Court and the other courts to censor the discretionary measures representing excess of power of the rulers, art. 53 of the Constitution should state that “*the exercise of the right to life, of freedom of conscience and freedom of religion cannot be restricted. Any restrictive measure shall not affect human dignity*”.

For the same purpose, would be useful that art. 1 of the Constitution to be amended with a new paragraph stating that “*the performance of the state power shall comply with the Christian values and traditions of the Romanian people, human dignity, the principle of proportionality and not be discriminatory*”.

Criminal and misdemeanour sanctions applied, by their nature and purpose, restrict the exercise of certain rights and freedoms. They are necessary to restore the violated social order in order to defend important social values. There are wide

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<sup>8</sup> Application case *Wingrove v United Kingdom*, 2001.

<sup>9</sup> Recital no. 3 of the Decision No 71/1996, published in the Official Gazette no. 131/1996.

theories explaining the nature and finality of the legal sanctions. We do not aim to insist upon this aspect.

## **2. The discretionary power and the excess of power. Exceptional situations**

Antonie Iorgovan stated that an essential issue of the rule of law is to answer the question: “where does discretion end and where does abuse of law begin, where does the legal conduct of the administration, embodied by its right of discretion and where does the violation of a subjective right or legitimate interest of the citizen begin?” (Iorgovan, 2005: 523)

Addressing the same issue, Leon Duguit, in 1900, makes an interesting distinction between “normal and exceptional powers” conferred on the administration by the Constitution and laws, and, on the other hand, the situations in which state authorities act outside the normative framework. These latter situations are divided by the author into 3 categories: 1. Excess of power (when the state authorities exceed the limits of their legal powers); 2. misappropriation of power (when the state authority performs an act under its competence by aiming other purpose than the one stated by the law); 3. Abuse of power (when state authorities act outside their competences, but by acts that are not of a legal nature) (Duguit, 1907: 445).

Therefore, the application and compliance with the principle of legality in the activity of state authorities is a complex problem, because the performance of the state attributions implies the discretionary power entrusted to state authorities, or in other words, the “right of assessment” of the authorities regarding the moment of adoption and the content of the ordered measures. Which must be underlined is the fact that the discretionary power cannot oppose the principle of legality as dimension of the state of law.

In the administrative doctrine, which mainly studies the issue of discretionary power, it was emphasized that the opportunity of administrative acts cannot be opposed to their legality, and the legal conditions can be divided into: general legal conditions and specific legal conditions for reasons of opportunity. Consequently, legality is the corollary of the conditions of validity, and opportunity is a requirement (a dimension) of legality. Still, the right of assessment is not recognized for state authorities in the performance of all their attributions. The difference between the related competence of state authorities that exists when the law imposes on them a certain strict decision-making behaviour, and on the other hand the discretionary competence, a situation in which state authorities can choose the means to achieve a legitimate goal or in general, then when the state body can choose between several decisions, within the limits of the law and its competence. We mention the definition proposed by the legal literature for the discretionary power: “is the margin of freedom left to the free discretion of an authority, so that in order to achieve the purpose indicated by the legislator to be able to resort to any means of action within the limits of its competence”. (Iorgovan, 2005: 225)



Though the issue of the discretionary power is studied by the administrative law, the right to assessment in the performance of certain attributions represent a reality met in the activity of all state authorities. The Parliament, as a supreme representative organ and single legislative authority enjoys the widest limits to manifest its discretionary power, which is identified from the very characterization of the legislative act. Since the interwar period I.V. Gruia emphasized: “The need to legislate in a certain matter, the choice of the moment of legislation, the choice of the moment of implementation of the law, by fixing by the legislator the date of application of the law, the revision of previous legislations, which cannot restrict and oblige the activity of the future Parliament, the restriction of social activities from their free and uncontrolled development and their submission to the norms and sanctions of the law, the content of the legislative act, etc., prove the sovereign and discretionary appreciation of the legislative body”. (Gruia, 1943: 489)

These considerations are valid nowadays, because every Parliament is free to perform its attributions almost unlimited. The legal limit of this freedom is shaped only by the constitutional principles applicable for the legislative activity and the mechanism for controlling the constitutionality of laws.

The discretionary power exists also in the activity of the courts. The judge is compelled to decide only upon notification, within the limit of the notification. Beyond this, there is the *right to a sovereign assessment* of the facts, the right to interpret the law, the right to set a minimum or a maximum penalty, to grant or not mitigating circumstances, to determine the amount of compensation, etc. The exercise of these powers means nothing more than discretion.

Exceeding the limits of discretion means violating the principle of legality or what in law, doctrine and jurisprudence is called “excess of power”. The excess of power in the activity of the state authorities is equivalent to the abuse of power, because it signifies the performance of a legal competence without a reasonable motivation or without an adequate relationship between the measure ordered, the factual situation and the pursued legitimate aim.

The issue of excess of power is mainly the object of the doctrine of legislation and administrative jurisprudence. Thus, the jurisprudence of the administrative contentious courts from other states has delimited the freedom of decision of the administration from the excess of power. The French State Council uses the concept of “error manifested by assessment”, referring to the situations in which the administration exceeds, through the adopted legal acts, its discretionary power. German administrative courts can overturn administrative acts for excess of power or “misuse of power”. In such situations, the legal acts of the administration have the appearance of legality, because they are adopted within the limits of the competence established by law, but the excess of power consists in the fact that the administrative acts are contrary to the purpose of the law.

Law No 554/2004 on administrative litigations uses the concept of “excess of power of the administrative authorities”, which defines as being “the abusive exercise, by public administration bodies, of their latitude in violation of their

jurisdictional limitations as under the law or in violation of citizens' fundamental rights and liberties [art. 3 para. 1 lit. n)]. The Romanian legislator uses and defines for the first time the concept of excess of power and also acknowledges the competence of the administrative contentious courts to sanction the exceeding of the limits of the discretionary power by administrative acts.

Exceptional situations represent a particular case in which the state authorities, and especially the administrative ones, can exercise their discretionary power, there being obviously the danger of excess of power.

In doctrine there is no unanimous opinion on the legal signification of exceptional situations. Thus, in the older French doctrine, the discretionary power is considered to be the freedom of decision of the administration within the framework allowed by law, and the opportunity evokes a *de facto* action of the public administration, in exceptional situations, necessary action (therefore opportune) but against the law. Jean Rivero considers that exceptional situations refer to certain factual circumstances which have a double effect: the suspension of the application of the ordinary legal regime and initiation of the application of a particular legislation to which the judge defines the requirements. Another author identifies three features for exceptional situations: 1. The existence of abnormal and exorbitant situations or serious and unforeseen events; 2. The impossibility or difficulty to act in accordance with the natural regulations; 3. The necessity of a quick intervention for the protection of a considerable interest, under serious threat. (Rivero, 1973: 183)

Excess of power can be manifested in these circumstances by at least three aspects: a) the appreciation of a factual situation as an exceptional case, although it does not have this significance (lack of objective and reasonable motivation); b) the measures ordered by the competent state authorities, by virtue of their discretion, to go beyond what is necessary for the protection of the seriously threatened public interest; c) if these measures unduly, unjustifiably limit the exercise of the constitutionally recognized fundamental rights and freedoms.

The existence of crisis situations – economic, social, political or constitutional – does not justify the excess of power. In this sense, Prof Tudor Drăganu stated: “the idea of the rule of law requires that they (exceptional situations *n.n.*) find appropriate regulations in the text of the constitutions, whenever they have a rigid character. Such a constitutional regulation is necessary to determine only the areas of social relations, in which the transfer of power from Parliament to Government can take place, to emphasize its temporary nature, by setting deadlines for applicability and to specify the purposes for which it is performed” (Drăganu, 1998: 209).

Of course, the excess of power is not a phenomenon manifested only in the practice of executive authorities, being met also in the activity of the Parliament or of the courts.

We consider that the discretionary power recognized to the state authorities is exceeded, and the measures ordered represent an excess of power, whenever the existence of the following situations is found:

1. The principles of the supremacy of the Constitution and of the law, of the rule of law and of the separation of state powers are not respected.
2. The ordered measures do not aim a legitimate purpose.
3. The decisions of public authorities are not appropriate with the factual situation or with the aimed legitimate purpose, in the meaning that they exceed what is necessary for the achievement of this purpose.
4. There is no rational justification for the measures ordered, including in situations where a different legal treatment is established for identical situations, or an identical legal treatment for different situations.
5. By the measures ordered, the state authorities restrict the exercise of fundamental rights and freedoms, without there being a rational justification representing, in particular, the existence of an adequate relationship between these measures, the factual situation and the legitimate aim pursued.

The exceptional state, respectively the state of emergency and subsequently the state of alert established by the rulers on the Romanian territory, similar to the existing situation in other countries of the world, in order to limit the spread of the pandemic created by the Covid-19 virus, generated the adoption of numerous normative acts by which a significant number of fundamental rights and freedoms are restricted and correlatively a significant constitutional jurisprudence on the constitutionality of these measures.

### **3. The unconstitutionality of restricting the exercise of certain rights during the existence of a state of emergency and a state of alert. The excess of power**

In the following, we briefly analyse this jurisprudence but also the legislation in force in order to highlight aspects of the excess of power of state authorities.

The Constitutional Court by two decisions, Decision no. 152/2020 and Decision no. 157/13 May 2020 found the unconstitutionality of some provisions of GEO no. 1/1999 and GEO no. 21/2004 on the National Emergency Management System, regarding the actions and measures ordered during the state of emergency regarding the restriction of the exercise of certain rights.

By Decision no. 152/2020<sup>10</sup>, the Constitutional Court, among others, admitted the exception of unconstitutionality formulated by the People's Advocate and found that the provisions of art. 28 of GEO no. 1/1999 on the state of siege and the state of emergency are unconstitutional. Also, it ascertained that the GEO no. 34/2020 on the modification and amendment of the GEO no. 1/1999 on the state of siege and the state of emergency is unconstitutional, in its ensemble.

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<sup>10</sup> Published in the Official Gazette no. 387/13 May 2020.

In order to pronounce this decision, the Court held that the constitutional prohibitions provided in art. 115 para. 6, not to adopt emergency ordinances that may affect the regime of fundamental state institutions, the rights, freedoms and duties provided by the Constitution, electoral rights, have taken into account the restriction of the Government's competence to legislate in these essential areas instead of Parliament.

Legislating on the legal regime of the state of siege and the state of emergency, GEO no. 1/1999 is the primary regulatory act which restricts the exercise of fundamental rights and freedoms, an act based on which public authorities with competences in crisis management (President of Romania, Parliament of Romania, Ministry of Internal Affairs of Romania, military authorities and public authorities, provided for in the decree establishing the state of siege or emergency) issue normative administrative acts (President's decree establishing the state of siege or state of emergency, military ordinances and orders of other public authorities) implementing the primary rule, identifying, depending on the particularities of the crisis situation, the rights and fundamental freedoms whose exercise is to be restricted.

“However, taking into account all these arguments, the Court notes that, incidentally, the normative act with such an object of regulation affects both rights and fundamental freedoms of citizens and fundamental state institutions, falling within the scope of the prohibition provided by art. 115 para. 6 of the Constitution. Thus, the Court finds that the legal regime of the state of siege and the state of emergency, in the current constitutional framework, can be regulated only by a law, as a formal act of the Parliament, adopted in compliance with the provisions of art. 73 para. 3 lit. g) of the Constitution, in the regime of organic law”.

Regarding the GEO no. 34/2020 for the modification and amendment of the GEO no. 1/1999, the Court has ascertained that it has been adopted with the violation of art. 115 para. 6 of the Constitution.

The normative act modifies the legal regime of the state of siege and of the state of emergency under the aspect of contravention liability in case of non-compliance or immediate non-application of the measures established in GEO no. 1/1999, introducing complementary contravention sanctions, such as the confiscation of goods intended, used or resulting from the contravention and the temporary suspension of the activity.

The Court recalls that the main sanctions and the complementary sanctions are sanctions specific to the contravention law, applicable to the subject of law who violates the legal norm of contravention law by conduct contrary to it. They have a preventive-educational role and represent a form of legal constraint, targeting, in particular, the patrimony of the perpetrator. Therefore, considering the legal nature of the contravention sanctions, their effect on the patrimony of the perpetrator, as well as the jurisprudence of the Court, results that the statement of certain norms in this area implicitly affects the right to property, stated by art. 44 of the Constitution, as well as the economic freedom, provided by art. 45 of the Constitution restricting

the exercise of these rights which violates the prohibition established by art. 115 para. 6 of the Constitution.

At the same time, the normative provision of the inapplicability of the legal norms regarding decisional transparency and social dialogue, in fact their suspension during the state of emergency or siege, affects the fundamental rights in consideration of which these laws were adopted, as well as the regime of a fundamental state institution, so that the emergency ordinance by which such a suspension is operated contravenes the interdiction provided by art. 115 para. (6) of the Constitution.

Given all these arguments, the Court has ascertained that the GEO No. 34/2020 for the modification and amendment of the GEO No. 1/1999 is unconstitutional, in its ensemble, because it has been adopted with the violation of the constitutional statements of art. 115 para. 6 limiting such competences.

The notion of “law” by which the legal regime of exceptional states can be established is interpreted in a narrow sense, respectively as a normative act of the Parliament, excluding the normative acts of the Government with express reference to the executive ordinances. At the same time, a necessary interpretation of the interdiction provided by art. 115 para. 6 of the Constitution in the sense that by emergency ordinances, including those issued in exceptional situations, the Government may not establish primary regulations regarding the restriction of the exercise of certain rights. Such measures may be instituted primarily by law only, as a legal act of Parliament.

It is obvious that the normatively materialized intention of the Government to restrict the exercise of certain rights and fundamental freedoms with the violation of its legislative competence in this area and the non-compliance with the constitutional interdictions, represent an excess of power which the Constitutional Court has ascertained and removed.

By the same decision, the Court found that the provisions of art. 28 para. 1 corroborated with art. 9 para. 1 of GEO no. 1/1999 does not indicate clearly and unequivocally, within the legal norm, the acts, facts or omissions that constitute contraventions nor do they allow their identification easily, by referring to the normative acts with which the incriminating text is in connection.

We reproduce an excerpt from the motivation of our constitutional court: “The provisions of art. 28 of GEO no. 1/1999 not only does not concretely foresee the facts that attract the contravention liability, but establishes indiscriminately for all these deeds, regardless of their nature or gravity, the same main contravention sanction. As regards the complementary sanctions, although the law provides that they are applied according to the nature and gravity of the offence, as long as the offence is not circumscribed, it is obvious that neither its nature nor its gravity can be determined to establish the complementary applicable sanction.

In conclusion, the Court finds that, since the provisions of the law subject to constitutional review impose a general obligation to comply with an indefinite number of rules, with identifiable difficulty, and establish sanctions for minor

offenses, they violate the principles of legality and proportionality governing the contravention law.

Thus, the Court finds that the provisions of art. 28 of GEO no. 1/1999, characterized by a deficient legislative technique, do not meet the requirements of clarity, precision and predictability and are thus incompatible with the fundamental principle of respect for the Constitution, its supremacy and the laws, provided by art. 1 para. 5 of the Constitution, as well as with the principle of proportional restriction of rights and fundamental freedoms, provided by art. 53 para. 2 of the Constitution. For the same arguments, the Court states that the imprecision of the legal text subjected to constitutionality control also affects the constitutional guarantees characterizing the right to a fair trial, stated by art. 21 para. 3 of the Constitution, including its component on the right to defense, fundamental right stated by art. 24 of the Constitution.

By Decision No 157/2020<sup>11</sup>, the Constitutional Court, among others, has accepted the exception for unconstitutionality stated by the People's Advocate and ascertained that art. 4 of the GEO no. 21/2004 on the National Emergency Management System is constitutional to the extent to which the actions and measures ordered during the state of alert does not aim the restriction of the exercise of certain rights and fundamental freedoms.

The Court ascertained that the actions and measures ordered during the state of alert, based on the GEO no. 21/2004 cannot aim rights and fundamental freedoms. The Court also notes that the delegated legislator cannot in turn delegate to an administrative authority/entity what he himself does not have in jurisdiction. "As the Court has constantly stated, from the corroboration of the constitutional norms stated by art. 53 para. 1 and art. 115 para. 6 it follows that the impairment/restriction of rights or fundamental freedoms can only be achieved by law, as a formal act of Parliament".

The arguments of the Constitutional Court, as well as the solutions given to these constitutional disputes are important guarantees for respecting the rights and freedoms of citizens especially in exceptional situations when increases the danger that the executive will take discretionary measures that are in fact excess of power.

Our Constitutional Court noted that "It is indisputable that the legislation providing for the legal regime of crisis situations requiring exceptional measures presupposes a greater degree of generality than the legislation applicable during the normal period, precisely because the peculiarities of the crisis situation are the deviation from normal (exceptionality) and the unpredictability of the serious danger affecting both society as a whole and each individual. However, the generality of the primary norm cannot be attenuated by infralegal acts that complement the existing normative framework. Therefore, the measures that organize the execution of legal provisions and customize and adapt those provisions to the existing factual situation, to the areas of activity essential for managing the

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<sup>11</sup> Published in the Official Gazette no. 397/15 May 2020.

situation that generated the establishment of the state of alert cannot deviate (by amendments or completions) from the framework circumscribed by the norms with the force of law, so they cannot target rights and fundamental freedoms”.

By Decision no. 457/2020<sup>12</sup>, the Constitutional Court admitted the exception of unconstitutionality raised by the People’s Advocate and found that the provisions of art. 4 para. 3 and 4, as well as of art. 65 lit. s) and ș), of art. 66 lit. a), b) and c) regarding the references to art. 65 lit. s), ș) and t) and of art. 67 para. 2 lit. b) regarding the references to art. 65 lit. s), ș) and t) of Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic are unconstitutional.

The Court notes that the Parliament’s approval of the measures adopted by the Government’s decision to establish the state of alert creates a confusing legal regime for the Government’s decisions.

The Court notes that the criticisms formulated by the People’s Advocate are grounded, with the consequence of the unconstitutionality of art. 4 para. 3 and 4 of Law no. 55/2020, since, through these texts of law, the Parliament cumulates the legislative and executive functions, a situation incompatible with the principle of separation and balance of powers in the state, enshrined in art. 1 para. 4 of the Constitution; the legal regime of Government decisions is distorted, as acts of law enforcement, enshrined in art. 108 of the Constitution; a confusing legal regime of Government decisions is created, such as to raise the issue of their exemption from judicial control under the conditions of art. 126 para. 6 of the Constitution, with the consequence of violating the provisions of art. 21 and art. 52 of the Constitution, which enshrines free access to justice and the right of the injured person by a public authority.

In relation to art. 65 lit. s)-ș), art. 66 lit. a), b) and c) and art. 67 para. 2 lit. b) of Law no. 55/2020, criticized for unconstitutionality, the Constitutional Court has noted that the compliance of the law is mandatory, but it cannot pretend to a subject of law to comply with a law that is unclear, imprecise and unpredictable, because he cannot adjust his behaviour depending on the normative hypothesis of the law”. This is why the legislator must show special attention when adopting a normative act (Decision no. 1 of January 10, 2014, published in the Official Gazette of Romania, Part I, no. 123 of February 19, 2014). A legal provision must be precise, unequivocal, to establish clear, predictable and accessible norms whose application does not allow arbitrariness or abuse (Decision no. 637 of October 13, 2015, published in the Official Gazette of Romania, Part I, no. 906 of December 8, 2015).

Legislative acts with the force of law and administrative acts of a normative nature by which contraventions are established and sanctioned must meet all the quality conditions of the norm: accessibility, clarity, precision and predictability. The determination of the facts whose commission constitutes contraventions must be made in compliance with these requirements, and not left, arbitrarily, at the

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<sup>12</sup> Published in the Official Gazette no. 578/1 July 2020.

discretion of the ascertaining agent, without the legislator having established the necessary criteria and conditions, the operations of ascertaining and sanctioning contraventions. Also, in the absence of a clear representation of the elements constituting the contravention, the judge himself does not have the necessary benchmarks in the application and interpretation of the law, when solving the complaint on the record of finding and sanctioning the contravention. Based on these considerations, our constitutional court found the unconstitutionality of these texts of law. In Romania, derogations specific to the state of emergency are regulated at the constitutional level, including in terms of increased powers offered to the executive, i.e. the President of Romania, and not the Government. To “build” by law a new institution – the “state of alert”, with an obvious regime less restrictive than the state of emergency regulated by the constituent legislator – but allowing the circumvention of the constitutional framework governing legality, separation of powers in the state, conditions of restriction the exercise of certain rights and freedoms, contradicts the general requirements of the rule of law, as enshrined in the Romanian Constitution.

The aspects that formed the object of the constitutionality control of the Constitutional Court with reference to the exceptional state established on the Romanian territory are not the only abusive and unconstitutional measures of the state authorities ordered and applied during this period.

In our opinion, human dignity and fundamental rights have been seriously violated, such as: the right to life, the right to family and private life, the right to health care, access to culture, the right to education, the right to a decent standard of living and especially the freedom of conscience, the autonomy of religious cults, their freedom and especially of the Orthodox cult and the autonomy of the Orthodox Church, majoritarian in Romania.

The space does not allow us to develop these aspects, but we emphasize that the restrictive measures imposed by law and applied by excess of power by state authorities, do not respect the principles of supremacy of the Constitution and the law and the requirements of art. 53 of the Constitution and especially the principle of proportionality, because they are not suitable for different specific situations, (for example the religious communion of Orthodox believers participating in a service in the Church cannot be considered a simple civil meeting) and far exceed what is necessary respectively combating and preventing the spread of the pandemic.

### **Conclusions**

Respect for the supremacy of the Constitution and the law, guaranteeing the rights and fundamental freedoms of citizens, elimination of manifestations of excess of power by the rulers during the existence of exceptional situations are clearly expressed by the Constitutional Court in the following considerations of Decision no. 457/2020: The Venice Commission recalled that “the concept of a state of emergency” is based on the assumption that in certain political, military and



economic emergencies, the system of limitations imposed by the constitutional order must yield in the face of the increased power of the executive.

*However, even in a state of public emergency, the fundamental principle of the rule of law must prevail.* The rule of law consists of several issues that are all of paramount importance and must be fully maintained. These elements are the principle of legality, separation of powers, division of powers, human rights, state monopoly on force, public and independent administration of justice, protection of privacy, right to vote, freedom of access to political power, democratic participation of citizens and supervision by these of the decision-making process, decision-making, transparency of government, freedom of expression, association and assembly, the rights of minorities, as well as the rule of the majority in political decision-making. The rule of law means that government agencies must operate within the law and their actions must be subject to control by independent courts. The legal security of persons must be guaranteed”.

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