

Legal Limitations of the Constitutional Rights of Institutionalized Persons Imposed during the SARS-CoV-2 Pandemic

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ABSTRACT: The rapid emergence and evolution of the SARS-COV-2 epidemic in Romania has led national state authorities to adopt a series of measures limiting citizens' constitutional rights. These measures were ordered to limit the spread of the pandemic on national territory and were established by Presidential Decree on March 16, 2020. The Presidential Decree no. 195/2020 - on the establishment of emergency status on Romanian territory, allowed the limitation of certain constitutional rights, including those of institutionalized persons, for 30 days. The main rights affected were the right to free movement, the right to intimate, family and private life, the right to education, and the right to private property. Later, the government decree under which the state of alert was ordered extended some of these legal limitations, to the present day. In Romania, the persons in institutions, including the elderly, persons with disabilities and children, remain among the most vulnerable during the current state of alert. In the present study, we will analyse the effects of limiting the constitutional rights of institutionalized persons during the state of emergency and state of alert, pointing out the main issues raised by the Ombudsman and referencing some legal and practical solutions proposed by NGOs and the EU institutions.

KEYWORDS: human rights, SARS-CoV-2, institutionalized persons, elderly, adults and children with disabilities

Introduction. The evolution of the SARS-COV-2 pandemic in Romania and the chronology of the preventive measures taken

Since the start of the SARS-CoV-2 pandemic on its national territory, Romania has taken exceptional safety measures that involved the massive restriction of citizens' rights and freedoms. From the range of exception states provided for by national legislation, the emergency state was first chosen (Decree No 195/2020, then Decree No 240/2020 of the President of Romania) and then the alert state.

The first measures to limit the spread of the SARS-CoV-2 outbreak were adopted by the National Special Emergency Situations Committee (CNMSS) on March 9, 2020, and aimed at imposing restrictions on traffic to and from States affected by the infection with SARS-CoV-2; prohibition of public or private events, open or closed, with large numbers of participants; prohibition of hospital practice for medicine and pharmacy students, except in situations of voluntary service in support of doctors; banning visits to hospitals for patients' families.

In the CNMSS meeting on March 9, 2020, were also adopted measures to suspend education in preschool, secondary, secondary, post-secondary and vocational schools as from 11 March 2020; Suspension of road passenger and rail transport for all journeys to and from Italy; cessation of student and student students' post-secondary school students' programs of studies such as exchange of experience and internships in hospitals, unless they were started before 9 March 2020; the obligation for food establishments, as well as public and private providers of passenger transport, to disinfect frequent areas, to avoid crowding of people in commercial premises, to disinfect the passenger compartment frequently in means of transport; to enable public and private institutions to carry out their work from home.

The emergency state was established in Romania, starting with March 16, by Decree No 195/2020 (on the establishment of the emergency state on the territory of Romania). The first case of SARS-CoV-2 infection was recorded on 26 February 2020 and at the time of the establishment of the emergency state, 168 cases of persons infected with the SARS-CoV-2 virus were confirmed. The rights restricted by declaring the emergency state were: Freedom of movement; the right to private, family and private life; inviolability of home; the right to education; freedom of assembly; private property; the right to strike; economic freedom (Hegheş 2020, 90). Decree No 195/2020 included a series of measures with immediate implementation and some of them gradually applicable.

The recommendations of central public authorities to reduce the risk of spreading SARS-CoV-2 aimed in particular at limiting the movement of persons and avoiding direct contact between persons. To limit the exposure of employees in public institutions and citizens to the risk of infection, the following measures have been considered: The use of e-mail and teleconferences to reduce physical contacts and business travel if not necessarily necessary; Suspension of the audience program and introduction of alternative measures such as telephone and email requests; reduction of waiting time in the public working hours as far as possible by sending requests by email. In cases where it was not possible to avoid contact between the employees of public institutions with the citizens, public authorities were obliged to provide protective equipment.

The adoption of these measures has led to some controversies in society, with some of the population considering them disproportionate to the extent of the SARS-CoV-2 epidemic at the time of adoption.

At the same time, the situation was aggravated by a political crisis triggered by the accusations of abuse of power by the president and the Prime Minister in the context of the unconstitutionality notification of the Government Ordinance (GO) no. 1/1999 on the state of siege regime and the regime of emergency and implicitly of the acts issued in this context. On the part concerning the fight between the “palaces”, against the background of the pandemic, we note that the President initially established the state of emergency by Decree No 195/2020, which was approved by Parliament decision No 3/2020 (Buta 2020) .

The extension of the original decree was made by Decree No 240/2020, and even though the legislation speaks only of a declaration of approval or rejection of the state of emergency, Parliament, by decision No 4/2020, approved the extension decree setting out additional amendments and conditions, with indications in the preamble such as: “Concerned about the way the government acts in medical, health care to prevent the spread of the epidemic, concerned about the lack of rigorous and rapid measures to mitigate the economic effects of the crisis, taking into account the need to resume economic activities and the functioning of central and local authorities' institutions as soon as possible”.

The Ombudsman also published on the institution’s official website the fact that he had made an exception to the provisions of Article 9, Article 14(c1)-f) and Article 28 of the GO no. 1/1999, and of the GO no. 34/2020 by which the first normative act was amended.

By way of exception, the Ombudsman argues that the President had overstepped his powers by arrogating powers of the legislature (Parliament), facilitated by the GO No 1/1999 which would infringe Article 53 of the Constitution by the contested articles.

In short, the Ombudsman says the President (according to the Constitution) has only a formal role in declaring the state of emergency, having the obligation to set by decree only the reasons, duration, and area of the establishment, and that the decree was issued in excess of the legal powers (Ghencea 2020).

Equally, legal professionals filed petitions and claimed violations of the law and constitution, including serious charges for emitters such as “coup” or “high treason”.

All this casts serious doubt on how the measures are taken and the acts issued in the context of the current state of emergency are adopted and whether they are legal or not (Dragnea and Coraci 2020).

We will not focus on this article on the constitutional conflict and will limit ourselves to a brief presentation of the legal regime of the state of emergency and alert state.

The state of emergency and the state of alert. The legal framework for the limitation of certain constitutional rights

The legal regime of the state of emergency (and state of siege) is governed by the GO No 1/1999 on the siege and emergency regime, approved with amendments and additions by Law No 453/2004 to the subsequent amendments and supplements, in reference to Article 93 of the Romanian Constitution, while the alert state is regulated by the GO no 21/2004 on the National Emergency Management System adopted with amendments and supplements by Law no. 15/2005 with amendments and supplements made by the GO no 68/2020 for amending and completing some relevant normative acts emergency management and civil protection.

In accordance with the provisions of Article 3 of the GO No 1999, the State of emergency shall mean “the set of exceptional political, economic and public policy measures applicable throughout the territory of the country or in certain territorial administrative units which are established in the following situations: A) the existence of serious current or imminent threats to national security or the functioning of constitutional democracy; b) the imminent occurrence of disasters necessitated the prevention, limitation or elimination, as appropriate, of the consequences of disasters’, while the rule contained in the GO No 21/2004 - as amended and supplemented by the GO No 68/2020, states that the alert state is “the response to a situation of particular magnitude and intensity, determined by one or more types of risk, consisting of a set of temporary measures, proportionate to the level of seriousness shown or forecast and necessary to prevent and eliminate imminent threats to life, health of persons, the environment, important material and cultural values or property” (article 41).

Among the main elements that characterize and establish the legal regime of the state of emergency, we will present those that have a direct impact on citizens’ rights and freedoms.

The state of emergency is thus limited in time and is therefore only established or maintained to the extent that it is required by the circumstances which determine it (Article 31 of the GO No 1/1999). During the state of emergency, certain rights expressly provided for by law (Article 32 (a) to (d) of the GO No 1/1999), including free access to justice, cannot be limited/restricted, but the exercise of other fundamental rights/freedoms may be restricted, in keeping with the provisions of Article 53 of the Romanian Constitution and only in so far as the situation which led to the establishment of the state of emergency demands it, as well as with the observation of international treaties Romania has committed itself to.

The state of emergency allows, with its establishment, the taking over of civil authorities of the central or local public administration by military authorities. Military orders may be issued during the state of emergency, by the civilian or military authorities.

Unlike the state of emergency, the alert state is not of constitutional rank and is not listed among the exceptional measures covered by Article 93 of the Constitution.

Alert state is the response to a situation of particular magnitude and intensity, determined by one or more types of risk, consisting of a set of temporary measures, proportionate to the level of seriousness shown or forecast and necessary to prevent and remove imminent threats to life, the health of persons, the environment, important material, and cultural values or property. The alert state shall be triggered, as appropriate, at local, county or national level, after identification, recording and assessment of the factors and types of risk and determination of the severity of the emergency which imposes all specific measures, other than the emergency which fulfils the conditions for triggering the emergency (according to Article 93 of the Constitution) and lasts until the risk is removed and the state of normality restored, or, as the case may be, the state of emergency is established or the time limit for which it was established has been reached.

From the point of view of limiting citizens' rights and freedoms, the exercise of fundamental rights and freedoms may be curtailed *de jure* during the state of emergency (as well as during the state of siege), except for the rights and freedoms expressly provided for by law, the exercise of which cannot be restricted (Article 32 of the GO No 1/1999), while during the alert state certain rights/freedoms, depending on the type of risk produced, may be affected *de facto* due to the specific intervention involved in the presence of force majeure, so the rules governing the alert state do not provide, it does not regulate the possibility of restricting the exercise of any fundamental right/freedom as a form of expression of state will.

Due to the exceptional nature of the state of emergency, during this period, some deviations from legal normality are permitted, such as, for example, in the case of legal arrangements for establishing and sanctioning conduct contrary to the rules and special measures introduced, employing administrative acts not covered by the common legislation (for example the military orders, orders covered by the GO No 1/1999), while during the alert state, which is not an exceptional state, the common legislation is fully applicable.

Specific measures applied in the social assistance system and the limitation of constitutional rights of institutionalized persons.

In this section, we will present the social assistance measures implemented by the state during the spread of the SARS-CoV-2 pandemic. We will also look at the extent to which these measures have restricted the constitutional rights of institutionalized adults and children.

In early March 2020, the National Authority for the Rights of persons with disabilities, children, and adoption (ANDPDCA) have sent to the county General Directorates for Social assistance and Child Protection (DGASPCs) a set of general methodological norms and several recommendations for the provision of social services to prevent the spread of SARS-CoV-2 outbreaks in social centers. These recommendations regarded (ANDPDCA 2020): The provision of disinfectants and/or protective masks to residential staff and beneficiaries; Training of staff and beneficiaries in the application and enforcement of protection measures; Repeated disinfection of surfaces in the common areas of social centers; Suspension of recreational activities organized for beneficiaries involving a group of participants or their contact with congested areas; Suspension of the reception of visitors to social services; Suspension of family invocations/visits of beneficiaries; Regular consultation of the beneficiaries of special protection services by the family doctor; Developing plans to ensure continuity in residential social services where the employees are isolated at home or in quarantine;

Also, in order to make social service provision more efficient and to limit the spread of the virus, ANDPDCA issued several recommendations for public and private social services and a set of measures to prevent and manage the situation generated by the SARS-COV-2 pandemic, regarding the relationship with the beneficiaries in the community (communication with them, flexibilization of procedures, organization/management of inputs and outputs, internal control) and residential services (organization, management of entries and exits from the residential service, support of beneficiaries, prevention measures for the beneficiary, internal control, steps in case of suspect cases, use of disinfectants) (ANDPDCA 2020).

In early April 2020 Military Ordinance No 8/9.04.2020 established a set of measures for the organization and functioning of social services of a residential type, during the SARS-CoV-2 pandemic: Prohibition of cessation or suspension of the activity of public and private social services such as residential care and assistance centers for older people, residential care facilities for children and adults, with and without disabilities, and other vulnerable groups; Preventive isolation for 14 days, at the workplace or in special dedicated areas where no outside persons have access for staff employed in public or private residential centers. The period of preventive isolation at the workplace or especially dedicated areas is cyclically followed by a period of preventive isolation at home, also for 14 days. This ensures that staff is present in the centers in

shifts/shifts. During preventive isolation at work, local public administration authorities are obliged to provide daily food for staff; the institutions' obligation to provide the staff of these centers with the necessary hygienic and protective equipment; Prohibition of access to residential centers by visitors/owners/supporters/legal representatives of social services beneficiaries.

The Ministry of Labor and Social Protection (MMPS) and ANDPDCA have made a series of recommendations for implementing the provisions of the Military Ordinance No. 8 to help the DGASPCs (ANDPDCA 2020).

In addition to general recommendations on hygiene, self-protection of staff and residents, the ANDPDCA methodological norms also provide for some measures that impact on the constitutional rights of institutionalized persons: Suspension of leisure activities organized for beneficiaries involving groups of participants or their contact with congested areas (shopping mall, camps, cinemas, event halls, shows, etc.); suspension of the reception of visitors to the premises of the social services under their control; Suspension of family meetings/visits of beneficiaries, in particular in cases where their families originate from areas where suspected cases of contamination with SARS-CoV-2 virus have already been identified.

These general rules were subsequently supplemented by ANDPDCA in March with several recommendations to suspension of activities between the child and the adoptive family and suspension of field activities concerning the monitoring of circumstances which have been the basis for taking a special protection measure, except in certain emergencies which may arise (ANDPDCA 2020).

The measure of suspension of family meetings/visits of beneficiaries was subsequently reiterated in other addresses of the ANDPDCA while recommending that the child/adult be maintained in personal relations with the parents or other persons to whom he has developed attachment relationships using alternative means of communication.

ANDPDCA representatives also recommended that in cases where some children had been permitted family visits/events to be isolated when returning to the social center, for 14 days.

Following the submission of these methodological norms by ANDPDCA, the local DGASPCs developed their own measures plans taking into account the specific activities, number of residents, and other factors. Most of the centers banned travelling by residents, meeting with families, and NGO actions, with beneficiaries, actually being isolated at the centers.

After leaving the emergency state and entering the alert state ANDPDCA drawn up a protocol for social service providers (both public and private) with methodological norms and recommendations for resuming activities. Despite the absence of a legal framework similar to the state of emergency, the recommendations also provide for many limitations to the rights of institutionalized people – whose application is left to the appreciation of the social service provider.

The measures aim to gradually resume visits by parents, family, or people to whom beneficiaries have developed attachment relations. Visits to the head office of the head office are permitted following the health rules laid down by the authorities responsible for the matter, in premises specially equipped for keeping a minimum distance of 1,5 meters, and with use of protective equipment. Where space permits, visits may be organized outside the social service building, while maintaining prevention measures and reducing the risk of illness, as mentioned above (ANDPDCA 2020).

Beneficiaries are permitted to exit the centers, but only for justified reasons such as travel to work, carrying out physical activities, shopping, or other justified activity and not incurring delays. Except for travel to the workplace, the other exits will be preceded by written information to the beneficiary of the public safety recommendations issued by the INSP and the establishment of a clear route of travel outside the center. The written information shall not apply to children under 16 years of age who may leave the social service only supervised by staff members.

We, therefore, note that the rules indirectly limit the movement of institutionalized persons, who are obliged to justify their travel, and that this opportunity remains at the discretion

of the social service provider. For minors under 16 years of age, but also adults, the prohibition of family visits/invitations is maintained de facto, being limited to meetings at the premises of the residential center, in so far as it has available facilities.

The impact of the SARS-COV-2 pandemic on institutionalized people and prospects for overcoming the damaging effects. Conclusions

The provision of social services was affected by the SARS-CoV-2 crisis as a result of measures taken by authorities to limit the transmission of the virus. Sometimes, the pre-existing problems in the system have been compounded by the new conditions, a good example being the lack of staff in residential centers or specialized primary services, increased by fear of illness (UNICEF 2020, 10). At the same time, the activity of day centers has been reduced or even suspended, which has affected children from vulnerable families.

In other cases, specific problems emerged, such as limiting the mobility of social workers (social workers, community nurses, social workers) in the territory, especially given the lack of adequate protection materials (CRJ 2020).

According to some studies (UNICEF 2020, 21), only two of the seven respondents working in residential centers consider that one of the vulnerable groups most affected by the SARS-CoV-2 pandemic is the institutionalized children. The main problems mentioned by those working in the residential centers included in the study are lack of hygiene and health materials for both young people/children living in residential centers and for the staff of the centers; lack of integrated services for institutionalized children/young people. On the other hand, there were also problems with understanding by adolescents/young people about the importance of limiting travel.

Access to health services for institutionalized children has been significantly reduced due to the limitation of direct consultation of doctors in the centers and the use of mostly online or telephone services and the closure of the dental practice. Difficulties were also mentioned in purchasing medicines for chronic diseases, auto-immune diseases. The measures proposed by the center's staff to overcome these barriers are aimed at opening up medical offices, as their deployment to hospital emergencies is much riskier in terms of contamination risk, as well as the reopening of dental cabinets for emergencies and the introduction of work procedures in emergencies.

Access to education services has been made difficult for teenagers and young people in the end years (8th or 12th grade), who have to take exams this year. At the same time, the school's vocational advice has been suspended, which may have effects in the future.

The main barriers to access to education services are related to insufficient provision of tablets, phones adapted to the educational needs of children, and the reduced digital skills of teachers. For this reason, it is necessary to purchase its devices by authorities to be offered to institutionalized children.

The development of the institutional capacity of the public sector to provide social services is, in summary, a step to be taken to overcome this crisis in the best possible way. This is a multi-dimensional measure, which includes: Staff complement, professionalization (vocational training, employment of qualified staff) and adequate equipment; establishment of functional collaboration between the institutions relevant for the provision of social assistance services at county and local level (DGASPC, DSP, DAS, local authorities); digitization, where possible and where this would help to continue the activity, by providing access to the necessary infrastructure, both for direct service providers and beneficiaries (CRJ 2020).

Partnership with civil society organizations should also be strengthened at the local level to better respond to the social problems identified in crisis conditions.

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