

# Deprivation of Liberty - ‘Medical Punishment’ during the State of Emergency in Romania

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**ABSTRACT:** The state of emergency established in Romania as a result of the epidemiological evolution determined the authorities to take extraordinary measures to limit the pandemic's negative effects, being adopted rules stating that individuals for which self-isolation or quarantine was established who do not comply with these measures will be forcibly placed into quarantine, under guard, being held for criminal liability, and also put to pay the expenses incurred. To these considerations, the present study proposes the thesis that the forced quarantine must be assimilated to placing the person in detention, within the meaning of the criminal law for this, contemplating that the state has violated procedural rights of individuals, as well as the right to free access to justice, the measures imposed by the analyzed rules aiming in fact at the most drastic resort possible, without giving the possibility to establish proportionate measures. The study also shows that the rules exceed the framework of the tactical police measure of leading persons to the headquarters of a judiciary organization, as well as that the misdemeanor or criminal punishment of persons who do not comply with the measure of self-isolation or quarantine, complementary to the measure of forced quarantine and the imputation of the expenses occasioned by this measure, violates the criminal procedural principle *ne bis in idem*, given that the authorities have in fact sought to double sanction individuals targeted by these measures. In order to demonstrate the submitted theses, a qualitative analysis will be made of the concepts captured in the jurisprudence of the constitutional and the supreme courts of Romania, as well as in the cases of interest with which the European Court of Human Rights was invested, not least, pointing the discoveries reported in the criminal doctrine on the elements introduced in this paper.

**KEYWORDS:** emergency state, institutionalized quarantine, deprivation of liberty, *ne bis in idem*, policing

## Introduction: the legislative evolution in Romania

In connection with the measures adopted by the Romanian authorities by establishing exceptional conditions to prevent the spread of the coronavirus infection, we try to highlight the reported violation of human rights that the authorities have implemented.

In this regard, we point out that the Minister of Internal Affairs ruled that *isolated persons at home, who leave their location (...) are led into institutionalized quarantine, and that quarantined persons, who leave their location, are quarantined for a further period of 14 days* (Article 7 paragraph 1 of Military Ordinance no. 2/2020).

Moreover, in view of the accelerated evolution of the virus spread, the Minister of Internal Affairs subsequently establishes that *persons who leave the location of their quarantine, will be sanctioned for misdemeanors (...) and will be obliged to resume the 14-day quarantine cycle, bearing the costs of their quarantine, and that persons who do not comply with the conditions of solitary confinement at home will be sanctioned for the misdemeanor (...) and will be obliged to enter quarantine for 14 days, also bearing the expenses* (Article 3 para. (1) and (2) of Military Ordinance no. 4/2020 - initial form).

## Deprivation of liberty with the most drastic measures

In relation to the way which the Romanian authorities understood to limit the fundamental human rights for the exceptional situation management, the problem arises to the extent that

the deprivation of liberty ordered under the conditions shown above, by military ordinances, satisfies the protective requirements of the European Convention on Human Rights.

Therefore, we emphasize that *everyone has the right to liberty and security and no one shall be deprived of his liberty unless it is a question of the lawful detention of a person liable to transmit a contagious disease* (Article 5 point 1 letter e) and point 4 of ECHR), but we further show that Article 5 of the European Convention on Human Rights guarantees the judicial review applicable to all forms of deprivation of liberty, regardless of the national procedural mechanism in place (Chatzivassiliou 2004, 499).

In this respect, the determination of *deprivation of liberty* must be made on the criteria basis, such as the type, duration, effects and application of the measure in question (ECHR 2012, Paragraph 91), thus allowing an analysis of the context of the restrictions imposed, which in today's society are not limited to the carceral system, but may involve calling on society as a whole to support restrictions on personal liberty in order to protect the common good (ECHR 2012, Paragraph 226), deprivation of liberty being able to take various forms, the place of execution not necessarily being a detention institution, in the classical sense (Romanian Constitutional Court 2014, Paragraph 19).

Also, the difference in comfort existing at a given time between the different places of detention does not constitute a condition in determining whether or not a measure is in fact a deprivation of liberty (ECHR 2003, Paragraph 64), constituting such restrictions also the quarantine of persons in private hotel units put at the disposal of the national authorities, as is the case of Romania, during the state of emergency (Government Decision no. 201/2020).

Deprivation of liberty from an objective point of view consists in restricting the individual in a closed space, without having the possibility to leave, there being an increased control over the person's possibility to have social contacts (ECHR 1980, Paragraph 95), and subjectively, it presupposes that the individual has not validly expressed his consent to his detention (ECHR 2005, Paragraph 74).

It is for the national authorities to interpret and apply domestic law, but in order to comply with the requirement of legality, so as not to run counter to the guarantees generated by Article 5 of the Convention, national law must respect the general principles governing the Convention, namely the rule of law, the principle of legal certainty, the principle of proportionality and the principle of protection against arbitrariness (ECHR 2012, Paragraph 32). Hence, it is important that the conditions of deprivation of liberty under national law be clearly defined and that the law itself be foreseeable in its application, in order to guarantee a sufficiently precise legislative framework to enable the individual to reasonably provide under the circumstances, the consequences that may derive from a certain act (ECHR 2013, Paragraph 125).

Protection against arbitrariness implies a relationship of proportionality between deprivation of liberty and the detention in question, the assessment of such proportionality requiring an analysis of the type of restriction imposed. Thus, the deprivation of liberty of a person intoxicated with alcohol appears to be justified only if *other less severe measures have been found to be insufficient* to protect the interests of the individual concerned or of the general public (ECHR 2000, Paragraph 78). The Strasbourg Court considers that an individual cannot be deprived of liberty on grounds of alienation unless the mental disorder has a high degree of compulsory hospitalization and continued hospitalization is caused by the persistence of the disorder of the same intensity (ECHR 2000, Paragraph 45).

With regard to the detention of a person *in order to prevent the spread of infectious diseases*, it will be necessary to determine whether the disease in question is dangerous to public health and safety, and whether the detention of the infected person is a last resort to prevent the spread, other solutions of lesser severity being classified as ineffective (ECHR 2005, Paragraph 44), being imperative to strike a balance between the importance of the

individual's right to liberty and proof of an exceptional and unpredictable situation on the authorities part (ECHR 2013, Paragraph 194).

Thus, regarding the restrictive legal framework stated above, the institutionalized quarantine of persons who did not comply with certain measures imposed by the emergency situation, together with their prosecution under the aspect of committing an illegal act, supplemented by the expenses incurred with their quarantine, does not meet the imperative and cumulative criteria referred to in Article 5 point 1 letter e) of the Convention, persons against whom the authorities have taken repressive and punitive measures under the conditions set out not being subject to prior medical testing to determine the extent to which deprivation of liberty by quarantine is necessary or if the person concerned is infected and his detention as a measure of increased intensity would be the most appropriate solution to protect the public interest.

Moreover, the Romanian Constitutional Court, invested with resolving an exception of unconstitutionality for the situation of quarantining persons during the state of alert, so after the interval in which the provisions of the military ordinances we referred to applied, shows that, although the state is bound to take vigorous, prompt and appropriate action, the severe effects on the rights and freedoms of the person imposed by the restrictive measures must be accompanied by clear and effective safeguards against any abuse or discretionary and illegal action (Romanian Constitutional Court 2020, Paragraph 73).

In other words, deprivation of liberty without a legal justification and without the possibility of challenging the decision of the authorities is limited to violating the rights of the individual in relation to Article 5 of the Convention, and it is imperative that in such situations the person should have the possibility of appealing to a procedural system of safeguards to control the measures taken, to determine whether they are appropriate and to provide a mechanism for their recusal (Troke 2012, 57).

### **The *ne bis in idem* principle infringement**

Article 4 point 1 of Protocol no. 7 of the Convention settles the *ne bis in idem* procedural-criminal principle, consisting in the fact that individuals *have the right not to be tried or punished twice*, showing that *No one can be prosecuted or punished criminally by the jurisdictions of the same state for committing the offense for which he has already been acquitted or convicted by a final judgment in accordance with the law and criminal procedure of that State*, thus restricting the possibility for a person to be repeatedly accused and convicted on the basis of the same acts or facts (Bockel 2016, 13), with the aim of guaranteeing the right to a fair trial and at the same time guaranteeing the legitimacy of state power (ECHR 2004, Paragraph 57).

In this respect, compared to the Romanian authorities' implementation manner of the repressive measures, as we have previously pointed out, we gauge that the three conditions are cumulatively fulfilled (Neagu and Damaschin 2015, 77) for the finding of the triple punishment for a single individual, in relation to the same perpetration.

For this, we show that there is *uniformity of person and of object*, against the same individual being taken several measures whose real purpose is to punish the person for committing a single act that falls within the sphere of wrongdoing in connection with the state of medical emergency instituted on the Romanian territory, and last but not least, there is a decision *to convict* the person, supplementing other sanctioning measures that were taken, related to the same wrongful act consisting in non-compliance with quarantine or self-isolation measures.

From this perspective, we show that despite the fact that the contraventional domain is positioned in the external sphere of the penal system (Civil sentence no. 3983/09.06.2020 of the Iași Court), the purpose of the contravention fine is not that of pecuniary compensation for

damages, but of a preventive punishment of recidivism (Civil sentence no. 3626/27.11.2018 of the Suceava Court), the reduced severity of the contraventional sanction, as well as the lack of its important consequences in relation to the culprit, not being able to deprive the contravention of its *inherent criminal feature* (Civil sentence no. 828/13.03.2020 of the Satu Mare Court), reaching to an unanimously accepted position by the Romanian courts, to which, the deeds characterized in the Romanian legislative system as contraventions enjoy an undifferentiated treatment in relation to crimes (ECHR 2007, Paragraph 67), provided that the contravention sanctioning has an accentuated punitive nature (Civil sentence no. 311/14.02.2020 of the Sfântu Gheorghe Court).

In addition, it is given the interpretation that a sanction considered administrative in national law can be qualified as a criminal punishment, being kept under the guarantees given by the purpose of the *ne bis in idem* principle (Neagu 2012, 960), compliance to the right to a defense in any procedure which may lead to the application of sanctions, in particular fines or penalties, forming an integral part of the fundamental principles of law (CJEU 2007, Paragraph 68).

Admitting into forced quarantine, viewed as the application of a punishment has the attribute of causing the offender to suffer, consisting in removing him from his home and family, subjecting him to a strict regime of supervision, the doctrine stating that any approach to the punishment of a person, whether for the purpose of rehabilitation, education, prevention or defense, are equally likely to be acquired by causing suffering to the persons involved (Zaibert 2018, 8).

Moreover, with regard to the person's deprivation of liberty, the international forums have ruled in the sense that arbitrariness does not automatically imply non-compliance with the law, but, in a broad sense, includes elements consisting of inadvertences, injustices, lack of predictability and of an adequate judicial procedure (Human Rights Committee 2005, Paragraph 5.1), being compulsory that the retaining of an individual in state custody be necessary in any circumstances (Human Rights Committee 1990, Paragraph 5.8) and proportionate to the purpose of the taken measure (Human Rights Committee 1993, Paragraph 9.2), substituting to arbitrariness any form of detention which is not the subject of a periodic reassessment such as to justify the continuation of the custodial measures (Human Rights Committee 2006, Paragraph 7.2).

But this was not the approach of the Romanian legislator, which introduced the obligation to quarantine those who do not comply with traffic restrictions, regardless of whether or not they are carriers of a communicable disease, not considering that the purpose of placing individuals in quarantine is to isolate from the rest of society citizens who pose a danger to others, only the actual existence of a contagious disease being the sole basis for this danger (Schoeman 1979, 30).

To the fact that the Romanian authorities have chosen to quarantine persons who commit an illegal act related to the state of emergency, we point out that such a restrictive measure can be ordered only against persons who have actually been exposed to a communicable disease (Heymann 2004, 621), the goal being that healthy members of society can avoid sick people or those perceived as sick (Fidler, Gostin, and Markel 2007, 619).

Even considering the fact that society must have the right to protect itself from dangerous sick people, in the case of quarantine, the detention of individuals on a legitimate basis (Frankel 1968, 255), on the one hand, there must be a fairly strict justification to avoid the punishment of the innocent, and on the other hand, it is required a justification for the punishment of an unlawful act which has not yet been committed, deprivation of liberty being the only way not to perpetrate it, the thesis according to which quarantine can have a retributive effect not being sustainable (Corrado 1996, 4).

In relation to the issues raised, as well as regarding the general principle of law according to which *a norm must be interpreted in its positive sense, generating legal effects,*

*the legal ways of interpreting a legal rule taking into account not only the letter but also the spirit of the law* (Romanian Constitutional Court 2014, Paragraph 31), seen as the norms intentional nature, perceived amongst society (Garcia, Chen, and Gordon 2014, 480), we notice that the finality pursued by the legislator is without a doubt that of tripartite sanctioning of individuals for committing a single illicit deed.

We thus come to the hypothesis that the national authorities have in fact pursued, in addition to the misdemeanor sanctioning of the perpetrator, a procedure which, within the meaning of the European interpretation, enjoys the protective guarantees offered to a genuine *criminal charge* (ECHR 2007, Paragraph 67), also the concealing behind a medical procedure, that of quarantination, with the real purpose of punishing the person by depriving him of liberty, supplemented by the expenses incurred by this kind of detention, individuals subjected to such a measure not having the necessary leverage to challenge in an accelerated procedure the measure imposed on themselves, as is the case of criminal detention, an express judicial review of legality constituting a guarantee against ill-treatment (ECHR 2003, Paragraph 256).

Last but not least, the imputation of expenses incurred for persons who were obliged to such a detention appears as innovative for the carceral system, being able to be distinguished as a precedent for establishing similar measures to individuals who are legally in detention following a final judicial decision stated in criminal matters.

## Conclusions

Focusing on the restrictive legal framework used by Romanian authorities during the state of emergency, consisting in quarantining persons who did not comply with certain measures, sanctioning them, as well as imposing the expenses of forced quarantine, we find that persons against whom the authorities have taken repressive and punitive measures have not undergone prior medical examination in order to determine the extent to which deprivation of liberty by quarantine is necessary, the persons concerned having their procedural rights of free access to justice violated.

The study also supports the thesis according to which, considering the fact that the contraventional sanctioning of the perpetrator has an inherently criminal nature, as well as recalling the legal norm of forced quarantine, *interpreted in its spirit*, indicates the real intent pursued by the legislator, that of tripartite sanctioning of individuals for committing a single illicit deed, the principle *ne bis in idem* being infringed.

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