DOI: 10.5281/zenodo.4058763

Limitation of Fundamental Rights and Freedoms in a Pandemic through Administrative Acts Issued by Public Authorities

Adina Georgeta Ponea

Associate Professor, PhD, University of Craiova, Faculty of Law, Romania
adina.ponea@yahoo.com

ABSTRACT: In Romania, the legislator considered to regulate, on a temporary basis, some necessary measures in the field of public health in situations of epidemiological and biological risk, to prevent the introduction and limit the spread of infectious diseases. Measures such as the quarantine or isolation of persons shall be ordered and applied exclusively for the protection of public health, respecting the fundamental rights and freedoms of citizens, meaning that they must be in proportion with the situation which determined them, limited in time to this and applied in a non-discriminatory manner. Public authorities such as the Public Healthcare Direction - for individual cases or the National Committee for Situations of Emergency - for populational groups, have the legal competence to assess and order either the quarantine of persons or the zonal quarantine by reasoned decision which will contain endorsments on the date and the issuer of the act, the name and identification data of the quarantined person, but also the duration of the measure and the remedy provided by the law.

KEYWORDS: pandemic, epidemic, rights of the citizens, quarantine of persons, isolation of persons at home

Introductory considerations

The major health crisis caused by the Covid-19 pandemic forced the responsible authorities to adopt measures with different degrees of restriction of fundamental rights and freedoms of the citizens, measures aimed at preventing the introduction and limiting the spread of infectious diseases in Romania.

The establishment of exceptional measures such as the isolation of individuals at home, their quarantine or zonal quarantine are usually ordered, in the context of declaring a state of emergency, according to the constitutional provisions, or a state of alert, based on the legal provisions.

This study aims, on the one hand, to analyze the constitutional and legal limits within which the state of alert can be declared and, on the other hand, the temporary exceptional measures that the authorities may order and the legal regime of the administrative acts issued for this purpose.

At European level, the created regulatory context was also influenced by the Report of the Venice adopted in Strasbourg on 19th of June 2020, which noted that, in order to combat the pandemic, states have put in place measures of emergency to limit the spread of the virus and ensure health protection. The Venice Commission examined how states have implemented these measures legitimized by an exceptional situation, emphasizing that although danger in this context is imminent, the principles of law must prevail. Thus, point 36 of the Report mentions the competence to declare a state of emergency. According to the Venice Commission, the declaration of a state of emergency can be made by the Parliament or the Government, and in the latter situation, the measure must be submitted to the Parliament for approval. The Venice Commission also states that the state of emergency can be extended, but only under the control of Parliament, so it considers this issue to be constitutional. In view of the state of emergency, certain rights may be limited, and it is for the States and national authorities to regulate these restrictions so as to comply with necessity and proportionality.

The conclusions of the Venice Commission are based on a rich case law of the European court in this area. There must be an effective parliamentary control of the instituted measures, and the adopted acts can be brought before an independent court, respectively before the Constitutional Court.

At the same time, in a study conducted by the Venice Commission, he recalled that "[he] 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 surrender before 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 crucial 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 their supervision over 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 process. The rule of law means that government agencies must operate within the limits of the law and their actions must be subject to control by independent courts. The legal security of individuals must be guaranteed (CDL-AD (2011) 049, Opinion on the draft law on the state of emergency in Armenia, § 44, cited in the recent study Respect for democracy, human rights and the rule of law during states of emergency - reflections, CDL-PI (2020) 005rev, 26 May 2020, cited in the Decision no 457 / 2020 of the Constitutional Court).

Regarding the normative framework in Romania, according to the provisions of the Fundamental Law, the institution of state of siege and the institution of state of emergency have constitutional consecration and express constitutional rules, which configure the specific relations between the Parliament and the President of Romania in connection with their establishment, including that of approval by the Parliament of the measure adopted by the President of Romania by decree. In return, the institution of the state of alert is an exclusive creation of the legislator, based on his prerogatives to issue laws. This institution must comply - pursuant to art. 1 para. (5) of the Romanian Constitution which enshrines the observance of the Constitution and its supremacy - the constitutional framework of reference, respectively the constitutional regime that governs the relations between the Parliament and the Government and their acts. As a result, insofar as the legislator will establish that the state of alert is established by a decision of the Government, it will establish the attributions of the Government in relation to the state of alert and the acts that the Government adopts in the exercise of the mentioned attributions. within the limits of the Constitution(Decision of the Constitutional Court no. 457/25 June 2020 published in the Official Monitor of Romania no. 578/1 July 2020)

In this respect, the Constitutional Court has ruled in principle in its jurisprudence that "no law can establish or remove, by extension or restriction, a competence of an authority, if such action is contrary to the provisions or principles of the Constitution" (Decision no. 127 of March 27, 2003, published in the Official Monitor of Romania, Part I, no. 275 of April 18, 2003).

Empowering the Government to issue administrative acts with normative character having as object the establishment of the state of alert. Unconstitutionality

The adoption and entry into force of Law no. 55/2020 regarding some measures to prevent and combat the effects of the COVID-19 pandemic triggered a constitutional control which revealed that empowering the Government to establish by government decision, with the approval of the Parliament, exceptional measures such as the state of alert, is a violation of the

principle of separation and balance of powers in the state, even questioning the violation of the principle of free access to justice by the impossibility of challenging in court such a normative administrative act issued with the approval of the legislative power.

Thus, being notified by the Institution of the People's Advocate with the solution of the exception of unconstitutionality of the provisions of Law no. 55/2020, the Constitutional Court of Romania by Decision no. 457/2020 published in the Official Monitor no. 578/2020 found that part of the legal provisions violates the constitutional norms. The Constitutional Court noted that Law no. 55/2020 was initiated by the Romanian Government and according to the explanatory memorandum, the opportunity for regulation was motivated by the dynamics of the evolution of the national and international epidemiological situation, determined by the spread of SARS-CoV-2 coronavirus, which would call for the adoption of new measures to enable public authorities to intervene effectively and with adequate means for managing the crisis, taking into account the need to continue to ensure, even after the end of the state of emergency, adequate protection against disease. Since, according to art. 53 of the Constitution, the exercise of fundamental rights can be restricted only by law and in compliance with the conditions provided by the same constitutional text, and in the context of the crisis generated by the COVID-19 pandemic, it appeared necessary for the Parliament to adopt, by law, some restrictive measures, with temporary character above all and, where appropriate, in a gradual, proportionate way to its projected or manifested level of severity, for the prevention and removal of imminent threats to the rights to life, physical and mental integrity, it was promoted the draft law, which became, after the debate and adoption by Parliament, Law no. 55/2020. The draft law, with reference to the institution of the "state of alert", established measures in the sense of those shown in the explanatory memorandum, in the field of economy, health, labor and social protection, transport and infrastructure, education and research, youth and sports, culture and cults, insolvency, execution of sentences.

Law no. 55/2020 is the one that defines in art. 2 the concept of state of alert as "the response to an emergency situation of special magnitude and intensity, determined by one or more types of risk, consisting of a set of measures with a temporary character, proportionate to its manifested or predicted level of severity and necessary to prevent and eliminate imminent threats to life, health of citizens, environment, important material and cultural values or property".

According to art. 4 para. (2) of Law no. 55/2020, "The state of alert is established on the entire territory of the country or only on the territory of some administrative-territorial units, as the case may be". For the situation in which the state of alert is established on at least half of the administrative-territorial units of the country, the legislator provided the rule according to which the measure established by the Government decision is subject to the approval of the Parliament, which may approve it in full or with modifications. As, according to the legal definition, the state of alert inherently implies a set of measures, its establishment - by the decision of the Government would imply the establishment of the respective measures, described in art. 2 of Law no. 55/2020. Thus, the "approval in full or with modifications" provided by art. 4 para. (3) and (4) of Law no. 55/2020 implies the intervention of the Parliament over the Government's decision to establish the state of alert.

In the recitals of the decision of the Constitutional Court it was noted that, according to constitutional and legal provisions, Government decisions are normative or individual administrative acts, an expression of the Government's original competence, provided in the Constitution, typical for its role of public authority of the executive power. The organization of the execution of laws by way of decisions is an exclusive attribute of the Government, and cannot be, in any case, an attribute of the Parliament which, in fact, has adopted the main law/normative act. According to its constitutional regime, the Government's decision intervenes when the execution of certain provisions of the law requires the establishment of

subsequent measures or rules. As a result, Government decisions are always adopted on the basis of and in order to enforce laws, pursuing their implementation or enforcement. When a decision of the Government violates the law or adds to the provisions of the law, it may be challenged in the administrative contentious court pursuant to art. 52 and of art. 126 para. (6) of the Romanian Constitution, republished, and of the provisions contained in the special law on the matter, Law no. 554/2004 regarding the administrative contentious, with the subsequent modifications and completions.

Consequently, the Constitutional Court concluded that the constitutional norms do not distinguish, however, regarding the decisions of the Government according to their object. Thus, in the absence of a constitutional regime derogating for the decisions of the Government by which the state of alert is established, such an exceptional regime cannot be conferred, through infra-constitutional acts. As a result, the Government decision establishing the state of alert can only be a normative administrative act, so a secondary regulatory act that implements a primary regulatory act. By the approval of the Parliament of the measures established by the Government decision, a hybrid act is created without any constitutional basis, created only by a confusion of powers over the Parliament and the Government and ignoring the principles governing the relations between these public authorities, and with an uncertain legal regime from the perspective of the incidence of art. 126 para. (6) of the Constitution, likely to raise the issue of their exemption from judicial control.

In Romania, the derogations specific to the state of emergency are regulated at the constitutional level, including in terms of increased powers offered to the executive, namely to the President of Romania, and not to the Government. To "build" a new institution - the “state of alert” by law, with an obviously less restrictive regime 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, the conditions of restriction of the exercise of certain rights and freedoms, contradicts the general requirements of the rule of law, as enshrined in the Romanian Constitution (Decision of the Constitutional Court no. 457/25 June 2020 published in the Official Monitor no. 578/1 July 2020).

Exceptional restrictive measures. The legal regime of the administrative acts by which they can be ordered

Law no. 136/2020 published in the Official Monitor no. 634/ 18 July 2020 on the establishment of measures in the field of public health in situations of epidemiological and biological risk, adopted taking also into consideration the current jurisprudence of the Constitutional Court in the matter, is the normative act that regulates the types of measures required in the field of public health, which are measures with a temporary character, which may be established by central or local public authorities, in situations of epidemiological and biological risk, to prevent the introduction and limit the spread of infectious diseases on the territory of Romania. Because they have the effect of restricting or limiting fundamental rights and freedoms of citizens, these measures are ordered and applied exclusively for protecting the public health, they must be proportionate to the situation that determined them, limited in time and applied in a non-discriminatory manner (Florescu, 2020).

The situations of epidemiological and biological risk, for which the measures provided by law are established, are expressly listed in the provisions of art. 6, respectively:

- Epidemic declared by order of the Minister of Health;
- Public health emergency of international importance, certified by the decision of the National Committee for Emergency Situations, based on the declaration of the World Health Organization;
- Pandemic declared by the World Health Organization and certified by decision of the National Committee for Emergency Situations;

- The case of imminent epidemiological and biological risk identified and ascertained by the structures under the coordination of the Department for Emergency Situations or by the institutions subordinated to the Ministry of Health.

In order to ensure the clarity and transparency of the norm, the legislator defined the most important notions used in the content of the law, among them being the definitions of the administrative measures that can be required in situations of epidemiological risk, as follows:

a) quarantine of persons – "a measure to prevent the spread of infectious diseases, consisting in the physical separation of the persons suspected of being infected or carrying a highly pathogenic agent from other persons, in spaces specially designated by the authorities, at home or at the location declared by the quarantined person, established by a motivated individual decision of the public health directorate, which will contain mentions regarding the date and the issuer of the act, the name and identification data of the quarantined person, the duration of the measure and the appeal provided by the law"; If the persons concerned refuse the measure of quarantine at home or at the place declared by them, and where the persons concerned infringe the measure of quarantine during that period, even if they have previously given their consent to it, the doctor or, where appropriate, the control bodies shall recommend, and the representative of the public health directorate decides to quarantine the person in the special space designated by the authorities, if they find the risk of transmitting an infectious disease with imminent risk of community transmission.

b) zonal quarantine – "a measure to prevent the spread of infectious diseases, which aims at the physical separation of persons and activities, including limiting the traffic in a perimeter affected by an infectious disease from neighbouring perimeters, so as to prevent the spread of infection or contamination outside this perimeter"; The zonal quarantine is established by order of the head of the Department for Emergency Situations or of the person designated by him, based on the decision of the county committee for emergency situations, at the suggestion of the territorial public health directorate and with the approval of the National Institute of Public Health.

c) isolation – "a measure consisting in the physical separation of the persons affected by an infectious disease or of the persons carrying the highly pathogenic agent even if they do not show suggestive signs and symptoms, at home, at the location declared by the isolated person, in a health unit or at an alternative location attached to the health unit, in order to monitor the health condition and apply a treatment, as the case may be, a measure instituted in order to cure and reduce the degree of contagion based on the consent of the persons or, failing that, by the individual reasoned decision of the public health directorate, which will have mentions regarding the date and issuer of the act, the name and identification data of the isolated person, the duration of the measure and the appeal provided by the law".

Such measures shall apply to population groups which are likely to present an epidemiological and biological risk for the public health, by the National Committee for Emergency Situations by order and, in individual cases, by reasoned decision of the Public Health Directorate, which shall contain mentions regarding the date and issuer of the act, the name and identification data of the quarantined person, the duration of the measure and the appeal provided by the law. The measures and population groups are established by the National Committee for Emergency Situations, based on the suggestion of the Technical-Scientific Support Group on the management of highly contagious diseases on the territory of Romania.

Therefore, whether the decisions are issued by the public health directorates or the orders are issued by the National Committee for Emergency Situations, their nature is that of administrative acts of an individual or normative nature, in relation to the category of subjects to whom they are addressed to. At the same time, in relation to this distinction, the legislator regulated differently the manner of contesting and the competent court for such types of

litigations. It is found that Law no. 136/2020 contains norms derogating from the procedural norms before the administrative contentious court provided by Law no. 554/2004 on administrative contentious - the latter being the common law in matters of administrative contentious litigations, but also by those of the Code of Civil Procedure.

Thus, regarding the administrative acts with individual character by which the measures provided by Law no. 136/2020 are ordered, they can be contested by any person who considers himself injured in his right or in a legitimate interest to the competent court, respectively an action to the First Instance Court in the district where he resides or at the district where the health unit in which he is quarantined or, as the case may be, isolated is located. The object of the action is either the annulment of the contested act, the revision or termination of the measure (Bogasiu 2018, 36; Trăilescu 2018, 58; Săraru 2018, 87).

Or, by derogation from the common law on contentious matter according to which the administrative contentious court is represented by the Administrative and Fiscal Contentious Section of the High Court of Cassation and Justice, but also by the administrative contentious sections of the courts of appeal and tribunals, Law no. 136/2020 established that disputes in this matter are resolved even by the first instance court. Of course, this situation must be seen strictly as an exception. At the same time, it should not be ignored that in such cases the judge has to decide in an administrative dispute and not in a civil one because the disputed legal relationship concerns an individual, on the one hand and state authorities on the other hand and which, in regime of public power, issue administrative acts that have as object and produce restrictions of rights and freedoms, matters specific to a litigation of public right.

In this context, it appears somewhat foreseeable that there will be a conflict of competence regarding the resolution of the challenge against the judgment rendered in the appeal, which is declared against the decision given by the first instance court, namely between the civil section and the administrative and fiscal contentious section of the tribunal (Gadi and Cristea, 2020; Puiu, 2020).

As for administrative acts of a normative nature regarding the establishment, modification or termination of the measures provided by this law, they can be challenged by any person who considers himself harmed in his right or in a legitimate interest to the competent court, with an action for annulment, both for reasons of illegality and unfoundedness, within 5 days from the publication of the administrative act in the Official Monitor of Romania or from the date of taking note of the content of the act in case of its non-publication. The action for annulment is formulated in writing and is submitted to the competent court. The court competent to resolve the action for annulment filed against the administrative acts is the court of appeal, the administrative and fiscal contentious section, in whose territorial area the headquarters of the issuing authority is located.

Not even in this situation, however, we are not talking about a typical litigation of administrative contentious, subject to the provisions of Law no. 554/2004 on administrative contentious, because on the one hand, the obligation to go through the preliminary procedure is removed and on the other hand, the panel of judges which resolve such cases in their essence do not consist of only one judge as foreseen in the rules applicable to administrative disputes, but a number of 3 judges and the appeal of the recourse is resolved by the High Court of Cassation and Justice in a panel consisting of 5 judges and not 3 judges.

Conclusions

In conclusion, Law no. 136/2020 on the establishment of measures in the field of public health in situations of epidemiological and biological risk not only regulates justified situations of epidemiological and biological risk, exceptional administrative measures, with temporary nature, which limits the exercise of certain rights and fundamental freedoms of the citizens, but establishes an atypical legal regime regarding the administrative acts issued by

the authorities of the state through which such measures are instituted, a legal regime that is able to raise in judicial practice problems of interpretation and application of the provisions of the law.

Perhaps the Romanian legislator should take into account when enacting legal norms imposed by the pandemic worldwide situation of the fact that, although we are in an exceptional period, or perhaps precisely for this reason, both the legislative technique and the quality of the legal provisions must not be of the same exceptional nature, all the more so as fundamental rights and freedoms of citizens are affected. It is also worth noting the position of the French Superior Council of Magistracy, the guarantor of the independence of the judiciary, which deplored in a statement on 12 May the fact that "the state of emergency has largely upset the normal course of justice" and was concerned about "the important adaptations, both in terms of procedure and working methods", which can sometimes lead to "a deterioration of the conditions of access to justice or an alteration in the quality of the judicial debate" (Duțu 2020).

References

Bogasiu, Gabriela. 2018. *Legea Contenciosului Administrativ. Comentată și Adnotată. (Law on Administrative Litigation. Commented and Annotated)*. 4th edition. Bucharest: Universul Juridic Publishing House.

Duțu, Mircea. 2020. *Justice and University in the post-Covid-19 world*, July 30, 2020, https://www.juridice.ro/essentials/4132/justitia-si-universitatea-in-lumea-post-covid-19.

Florescu, Cristina. 2020. Note la Legea nr. 136/2020 privind instituirea unor măsuri în domeniul sănătății publice în situații de risc epidemiologic și biologic: *procedura de judecată şi efectele hotărârii judecătoreşti cu privire la actele administrative având ca obiect carantina persoanelor şi izolarea* (Notes to the Law no. 136/2020 on the establishment of measures in the field of public health in situations of epidemiological and biological risk: the court procedure and the effects of the court decision regarding the administrative acts having as object the quarantine and the isolation of persons), July 7, 2020, https://www.juridice.ro/692582/note-la-legea-nr-136-2020-privind-instituirea-unor-masuri-in-domeniul-sanatatii-publice-in-situatii-de-risc-epidemiologic-si-biologic-procedura-de-judecata-si-efectele-hotararii-judecatoresti-cu-pri.html.

Gadi, Linda Iulia and Bogdan Cristea. 2020. *Competența materială procesuală de soluționare a apelului reglementat de art. 17 din Legea nr. 136/2020, vizând carantina persoanei și prelungirea izolării (The procedural material competence for resolving the appeal regulated by art. 17 of Law no. 136/2020, aiming at the person's quarantine and the extension of the isolation),* July 30, 2020 https://www.juridice.ro/691907/competenta-materiala-procesuala-de-solutionare-a-apelului-reglementat-de-art-17-din-legea-nr-136-2020-vizand-carantina-persoanei-si-prelungirea-izolarii.html.

Puiu, Ana-Maria. 2020. *Tot despre competenţa materială procesuală de soluţionare a apelului reglementat de art. 17 din Legea nr. 136/2020, vizând carantina persoanei şi prelungirea izolării (Also about the material procedural competence for solving the appeal regulated by art. 17 of Law no. 136/2020, aiming at quarantine and extension of isolation),* July 31, 2020, https://www.juridice.ro/691998/tot-despre-competenta-materiala-procesuala-de-solutionare-a-apelului-reglementat-de-art-17-din-legea-nr-136-2020-vizand-carantina-persoanei-si-prelungirea-izolarii.html.

Săraru, Cătalin-Silviu. 2015. *Legea contenciosului administrativ nr. 554/2004: examen critic al Deciziilor Curții Constituționale (Law on administrative litigation no. 554/2004. Critical examination of the Decisions of the Constitutional Court)*. Bucharest: C.H. Beck Publishing House.

Trăilescu, Anton and Trăilescu, Alin. 2018. *Legea contenciosului administrativ. Comentarii și explicații (Law of administrative litigation. Comments and explanations)*. 4th edition. Bucharest: C.H. Beck Publishing House.