

Constitutional and Humanitarian Guarantees of the Patient, Subject to Procedures Assimilated to Detention in the Context of Epidemic Prevention

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ABSTRACT: The aim of this study is to analyze the patient's rights in relation to the epidemiological evolution of the SARS-CoV-2 virus in Romania, balancing the humanitarian principles by which the detention of an individual for health reasons, must be carried out in the least restrictive manner and the legislative evolution that regulates in Romania the action of the invested authorities with taking the indispensable measures to reduce the risk of infection. To this end, the study proposes to debate the protective foundations underlying the rulings of the European Court of Human Rights regarding patients' rights in relation to coercive measures aimed at public health issues, foundations that are supported in the recent jurisprudence of the Romanian Constitutional Court, invested in solving problems regarding the unconstitutionality of the measures adopted by the authorities in reaction to the epidemiological evolution. In this sense, is developed the hypothesis according to which the compulsory hospitalization, considered as a form of detention, must be a last resort solution. In this context, the present study is of increasing importance in relation to the legislative uncertainties found both nationally and in the European regulatory environment, the methods used consisting in conducting qualitative analyzes of the national and international regulatory framework and of the jurisprudence found in constitutional but also humanitarian forums, leading to the prescription according to which democratic states are required to provide protective guarantees to their citizens, who must be protected from interference with the rights to liberty and privacy, when are subject to medical procedures assimilated to detention.

KEYWORDS: patients' rights, compulsory hospitalization, unconstitutionality, freedom restrictions, contagious diseases

Introduction

In view of the restrictive implications on the fundamental rights of individuals, generated by legislative measures taken by national public authorities to limit the epidemiological spread, we find it necessary to analyse the extent to which the state coercive legislative force can exercise its repressive prerogatives on governed citizens.

Thus, is of interest the comparative approach between the way in which the Romanian authorities have implemented the mandatory hospitalization and quarantination in order to prevent the spread of contagious diseases, on the one side, and the protective guarantees stated by international humanitarian treaties and the human rights court, on the other side.

According to the European Court of Human Rights jurisprudence, the application of the compulsory hospitalization and quarantine measure comes as a last resort, which is directly proportional to the level of severity of the contagious disease presented by the person concerned. *Per a contrario*, the moment when the observance of the right for freedom and self-determination of the subject is put in the background, any measure taken by the authorities in this context regarding the prevention of epidemiological spread of the virus comes in contradiction with article 5 paragraph (1) letter e) of the Convention (Radu 2016, 71-72).

The Treaty of the European Union provides that the EU is based on principles of *liberty, democracy, respect for human rights and fundamental freedoms and the rule of law*. The European Court of Justice has the duty to guarantee that these principles are respected by its institutions (McHale Jean 2010, 295).

The emergency measures adopted by the authorities must respect the principles of legality, legal certainty and proportionality but also the need for constant reassessment (European Commission 2020, 2).

Article 5 paragraph (1) letter e) of the European Convention on Human Rights specifies that the prevention of the spread of infectious diseases is one of the reasons why a person may be deprived of his liberty. Before resorting to such measures, States must check the existence of a relevant legal basis and consider whether measures concerning deprivation of liberty are strictly necessary against less stringent alternatives (Council of Europe 2020, 5). However, in the case of Romania, there were compulsory hospitalizations of infected persons, even if they did not show symptoms, both during the state of emergency and during the state of alert (People's Advocate 2020, 2).

During the epidemiological evolution of the virus, the member states of the *International Covenant on Civil and Political Rights* have been forced to take some emergency measures which are seen as limited derogations from the Convention. Therefore, their character must extend over a short period of time, have a well-defined material purpose and be applied over certain geographical areas and the sanctions applied in the light of these derogations must be directly proportional to the nature of the actual infringement of a measure (Human Rights Committee 2020, 2). With regard to the impossibility of obtaining the consent of the person concerned due to an emergency situation (Council of Europe 2020, 2), any type of indispensable medical measure may be carried out immediately, but necessarily aiming at the patient's benefit (Council of Europe 1997, Article 8).

In this context, it is necessary to have mechanisms in place to favor the possibility for persons whose freedom has been restricted to challenge the manner in which they apply and the conditions under which the restrictions are applied. If in a scenario of establishing a state of emergency, it has not been possible to guarantee these rights for extrinsic and intrinsic reasons, the possibility of re-examining and challenging these measures should be feasible without undue delay (World Health Organization 2016, 31).

Protective guarantees established by the European Court of Human Rights

In order to determine the standards imposed by the Strasbourg Court on the states obligation to ensure that their citizens fundamental rights and freedoms are respected, we will examine, on the one hand, the rules on the right to liberty and security, in a generic sense, and on the other hand, human rights of the patient.

Thus, the right to liberty within the meaning of the European Convention on Human Rights concerns the physical freedom of individuals, resulting in their protection against arbitrariness, as opposed to the restriction of freedom of movement, regulated by article 2 of Protocol no. 4 to the Convention (ECHR 2012, Paragraph 84). The determination of *deprivation of liberty* in the meaning given by the Convention is made by analysing the concrete situation, taking into account the circumstantial set of events, namely the type, duration, effects and manner of execution of the custodial measure (ECHR 1976, Paragraph 59).

Deprivation of liberty refers not only to detention following arrest or conviction, which comes in several forms, given that the distinction between deprivation of liberty and restriction upon liberty consists in the intensity degree of deprivation of liberty, and not in its nature or substance (ECHR 1980, Paragraph 93), the lawfulness of detention being determined by the concordance between national law and the protective purpose of Article 5 of the Convention, against arbitrariness, which establishes an exhaustive list of exceptions for which persons may be

deprived of their liberty (ECHR 2011, Paragraph 232), whose interpretation in accordance with the purpose of the Convention is achieved only in a restrictive and strict manner (ECHR 2003, Paragraph 33).

Considering that the restrictions on freedom may be close to measures ordered by the state authorities that no longer correspond to the standard cliché represented by imprisonment, we note that in a democratic society there may arise situations in which, in order to protect the common good, citizens are required to bail restrictions on personal liberty (ECHR 2012, Paragraph 59), the filtering of the imposed measures in relation to the auspices of Article 5 of the Convention, manifesting itself according to the type and manner of their implementation (ECHR 2012, Paragraph 226).

It was noted in this direction that deprivation of liberty entails, on the one hand, the restriction of the person to a secured area for an extended period of time and, on the other hand, that the person envisaged has not given his consent to his imprisonment (ECHR 2005, Paragraph 74), the deprivation of liberty in this situation, consisting in the person's inability to leave the place of detention, the intensity of supervision and control exercised over the person's movements, the degree of isolation and the possibilities to have contacts (ECHR 2005, Paragraph 91).

In the spirit of the person's right to liberty protection, it cannot be accepted the hypothesis of waiving the guarantees of Article 5 of the Convention when the person subject to the restrictive measure has agreed to be detained (ECHR 2012, Paragraph 119), even the absence of coercive measures, such as handcuffing or incarceration, not constituting a factor excluding the existence of liberty deprivation (ECHR 2013, Paragraph 193), precisely in view of the fact that it may be qualified in the sphere of deprivation of liberty the protective measures or the ones taken in the interest of the subject (ECHR 2016, Paragraph 71), the state being required to take necessary active actions to protect their own citizens against the violation of the right to liberty (ECHR 2012, Paragraph 239).

Guaranteeing the right to liberty of individuals presupposes that the circumstances of the restrictive measures imposition are clearly defined, the applicable regulatory framework is foreseeable (ECHR 2013, Paragraph 125) and that there is a causal and proportional relationship between the reason for deprivation of liberty and the regime of application (ECHR 2012, Paragraph 195).

In the light of these considerations, it should be noted that the right to liberty is covered by a number of legal exceptions, including the exception of the legal detention of *a person liable to transmit a contagious disease, of an alien, of an alcoholic, of an addict or of a vagabond* (Article 5 of the European Convention on Human Rights), the common factor between these categories of persons being medical or social policy considerations (ECHR 2005, Paragraph 43).

The Strasbourg Court holds in its case-law that the deprivation of liberty of an intoxicated person appears justified only if less severe measures have not been sufficient to protect the individual or the public interest, which presupposes that the person concerned be subjected to detention, equivalent to the fact that deprivation of liberty is not sufficient to be guaranteed by national legal provisions, but must also constitute a circumstantial necessity (ECHR 2000, Paragraph 78).

In another case, the Court rules that a person may not be deprived of his liberty on account of his or her mental impairment unless his or her mental disorder involves an increased degree of danger and the deprivation of liberty measure may be ordered only for as long as mental instability persists (ECHR 2000, Paragraph 45), the purpose of deprivation being also to prevent the person concerned from harming himself or others (ECHR 2003, Paragraph 52).

With regard to the detention situation of persons, in order to prevent the spread of infectious diseases, the Court considers that national authorities must clearly establish that epidemiological spread is a danger to public health and safety, and that detention of an infected person is a last resort measure to prevent the spread, following the finding that a less severe measure than deprivation of liberty was found insufficient to protect the public interest (ECHR

2005, Paragraph 44), in all these situations, the common feature being that the extent of the custodial measure should not exceed a reasonable period of time, necessary to achieve the purpose of the measure (ECHR 2008, Paragraph 74).

Summarizing the issues presented in relation to the concrete situation considered, namely the response of states to the epidemiological spread of the Sars-Cov-2 virus, we note that restrictions on human rights for public health reasons must be in accordance with the law, necessary and proportionate, and that deprivation of liberty of persons who shows symptoms of infection with a contagious disease must be applied in minimum conditions, based on scientific evidence, seeking to avoid the application of deprivation of liberty arbitrarily and discriminatory, as seen in practice, where the measures hastily imposed by the competent authorities had demonstrated otherwise (Human Rights Watch 2020).

The right to liberty in relation to the derogating measures instituted in Romania

Interference with human rights with regard to freedom must respect the condition of legality that of existence in domestic law through specific legislative regulations, in order to be accessible, predictable and susceptible to guarantees against arbitrariness. For these reasons, derogating measures are exceptional, serious limitations on human rights. Thus, their transparency must be all the more rigorous, strictly meeting the requirements imposed by the European Convention on Human Rights and also by the Romanian Constitution (European Union Agency for Fundamental Rights 2020, 13).

In the progressive application of measures depending on the severity of the case, are incident other precepts designed to guarantee the protection of the right to privacy, family and individual freedom, namely, the express regulation of the conditions and procedure for the establishment and termination of restrictive measures, the competences of each public authority in their execution and the possibility of a gradual judicial amendment of the measures (Romanian Constitutional Court 2020, Paragraph 17).

The terms *compulsory hospitalization* and *quarantine establishment* are seen as being abstract notions, without consistency, lacking predictability, leaving to the discretion of the administrative bodies the burden to decide the manner of implementing these measures (Romanian Constitutional Court 2020, Paragraph 14).

In this context, it is worth mentioning that one of the forms under which the *compulsory hospitalization* operates, that of *involuntary hospitalization*, finds its exhaustive regulation in criminal matters, in the Law on mental health and protection of persons with mental disorders no. 487/2002. However, the incidence of the legislative provisions given by the Minister of Health Decisions regarding the restrictive measures cannot be assimilated to the criminal law not even by the extensive interpretation.

Following the evolution of the normative framework in the matter, we emphasize that, by Ministry of Health Decision no. 414 of 11 March 2020 on the introduction into quarantine for persons found in an international public health emergency caused by COVID-19 infection and the establishment of measures to prevent and limit the effects of the pandemic, it was regulated the measure of compulsory hospitalization, and later, by Ministry of Health Decision no. 622 of 14 April 2020 was instituted the measure of home quarantine, only in the situation where the space allows individual quarantine, including for asymptomatic persons confirmed with COVID-19. Subsequently, through the Ministry of Health Decision no. 629 of 15 April 2020, the category of asymptomatic persons confirmed with coronavirus were excluded from those for which is established the home quarantine.

As a result, the People's Advocate shows that there are incidental restrictions of the individual's right to liberty by the deprivation of liberty measures in the medical spectrum taken by state authorities. What the People's Advocate recommends is that the Minister of Health should

rapidly analyse the need to regulate the situation of asymptomatic people found positive with COVID-19 (People's Advocate 2020, 3).

Thus, Law no. 136 of 18 July 2020 on the establishment of measures in the field of public health in situations of epidemiological and biological risk, seeks to bring the legislative regulation on restrictive measures, in accordance with constitutional and European requirements. However, the People's Advocate raises a new exception of unconstitutionality arguing that *the legislative solution regarding the isolation in a health unit or an alternative location attached to the health unit is constitutional only in the event that this measure is implemented after all other less restrictive ways that could have had the same purpose were taken.*

Therefore, through Ministry of Health Decision no. 1309 of July 21, 2020 issued in application of Law no. 136, the placement in isolation in special designated spaces of the unit or the alternative location of the health unit is made *ope legis*, without providing the possibility for medical staff or representatives of the public health directorate to decide home isolation for persons envisaged, which is a far less severe measure (People's Advocate 2020, 5).

Conclusions

The lacunar regulation of the decrees establishing, respectively prolonging the state of emergency on the entire Romanian territory lead, through contamination, to the illegality of the subsequent inferior administrative acts on the derogating measures regarding the fundamental human rights and freedoms.

Given that deprivation of liberty is a last resort solution that national authorities should apply only in the event that the person concerned represents the most serious social danger, in the context of preventing the epidemiological spread of the virus, international and national forums call for exhaustion of all other slightly restrictive measures, prior to deprivation of liberty.

The current social and economic climate calls for clear legislation that would facilitate more effective quarantines by creating safety nets for those individuals that are not willing comply with the required limitation on personal freedoms, taking into account the building of such a framework based on sound, science-based policies, to the benefit of all and inclusive with the disenfranchised.

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