



## ORIGINAL PAPER

# The impact of the state of emergency / alert on the rights of the litigant in the criminal process

Mircea Mugurel Șelea<sup>1)</sup>

### Abstract:

In the case of invoking Article 15 of the ECHR, for a limited period of time, the conventional provisions governing certain obligations on Member States do not apply, but, on the other hand, there is no possibility of suspending the application of constitutional provisions. In this context, the state through the public authorities could not claim that the invocation of Article 15 of the ECHR is sufficient to restrict the rights and freedoms of individuals, without the need for a verification of the conformity of the measures adopted with the Fundamental Law. The fact that a state, pursuant to art. 15 of the ECHR, may adopt certain measures which do not comply with the obligations assumed by the signing of the Convention, does not amount to the absence of any form of liability for the consequences produced by the application of those measures. In this regard, it is important that there is no possibility for the state to take measures that derogate from the provisions of the Fundamental Law, so that the legislature and the executive must adopt acts in accordance with the constitutional provisions.

**Keywords:** *state of emergency / alert; limitation of rights; appeal; litigant.*

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<sup>1)</sup> Postdoctoral researcher at the University of Craiova, Romania, Phone: 0040743026474; Email: selea\_mircea@yahoo.com.

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The rights and freedoms of every person are a fundamental issue in the rule of law, and strict observance of them is a precondition for the existence of a democratic society.

Since the appearance of the pandemic caused by the evolution of SARS - CoV-2 virus, there have been many changes in most countries, including Romania, changes that have had negative consequences in all areas of activity, a special situation existing in the activity of carrying out justice.

In order to prevent the spread of the virus in our country, the executive and the legislature have adopted a series of measures, including those on the conduct of criminal proceedings and those on restricting the right of free movement of persons.

In this context, it can be said that the executive and the legislature had to choose between protecting the health of the population against infection with the contagious virus, and guaranteeing the right to have the trial resolved within a reasonable time, for people who are the main parties or subjects in the criminal proceedings.

By Decree no. 195 of March 16, 2020 issued by the President of Romania, published in the Official Gazette no. 212 of March 16, 2020, the state of emergency was established for 30 days on the territory of our country.

Regarding the reasons that could be the basis for establishing the state of emergency, the doctrine stated that only in circumstances that present "the highest level of danger to the state" (Deaconu Ștefan in Tănăsescu Elena Simina & Muraru Ioan-coord., Crișu Anastasiu, Popescu Sorin, Popescu Ramona, Pop Paul, Dima Bogdan, Ciobanu Viorel Mihai, Vedinaș Verginia, Cioclei Valerian, Deaconu Ștefan, Gherghina Simona, Popescu Andrei, Tomescu Milena, Enache Marian, Dima Luminița, Baias Flavius-Antoniou, Apostol Tofan Dana, Zamșa Cristina, Selejan-Guțan Bianca, Soare Vlad Cristian, 2019: 799) is the state of emergency justified.

The Permanent Representation of Romania to the Council of Europe sent, on March 17, 2020, to the Secretary General of the Council of Europe, the verbal note on Article 15 of the ECHR, which shows that this decree also includes measures that "involve derogations from the obligations provided for in the Convention for the Protection of Human Rights and Fundamental Freedoms "(2020, accessed from <https://rm.coe.int/16809cee30>).

According to art. Article 15 of the ECHR, "in the event of war or other public danger threatening the life of the nation", a State Party may take measures derogating from the obligations under the present Convention, strictly according to the situation and with the condition that these measures should not be in conflict with other obligations under international law "(2020 accessed from [https://www.echr.coe.int/documents/convention\\_ron.pdf](https://www.echr.coe.int/documents/convention_ron.pdf)).

Regarding the possibility of adopting measures that derogate from the obligations assumed by a state in international conventions and treaties, the doctrine has shown that the activation of derogation clauses "replaces normal legality with an exceptional legality adapted to the circumstances" (Sudre, Milano & Surrel, 2019: 228).

The fact that a state, pursuant to art. 15 of the ECHR, may adopt certain measures which do not comply with the obligations assumed by the signing of the Convention, does not amount to the absence of any form of liability for the consequences produced by the application of those measures. In this regard, it is important that there is no possibility for the state to take measures that derogate from the

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provisions of the Fundamental Law, so that the legislature and the executive must adopt acts in accordance with the constitutional provisions.

At the same time, the provisions of art. 15 paragraph 3 of the ECHR, which regulate the temporary nature of measures based on the provisions of paragraph 1 of the same article. Moreover, not only the measures must be temporary, but also their effects, which in some cases extend over time, beyond the period in which they derogated from the conventional obligations. For example, in art.43 par. 2 of the decree no. 195 of March 16, 2020 issued by the President of Romania, it was shown that "criminal proceedings pending before the courts, including those pending in the preliminary chamber, are suspended by law during the state of emergency (...) ", and in paragraph 3 of the same article it was specified the way in which the trials are resumed, in the sense that "within 10 days from the end of the state of emergency, the judge or court will take measures to set the trial deadlines and perform the procedural documents". From the end of the state of emergency until the effective resumption of trials another 30 days at least passed, necessary to the accomplishment of the summons procedures with the litigants who are not domiciled in the same locality with that of the court headquarters. Although the limitation period for criminal liability began to run after the date on which the state of emergency ceased, in the immediate future the criminal proceedings could not be settled due to the time required to complete the summons procedure with the trial parties.

In other words, if in the case of invoking Article 15 of the ECHR we can say that, for a limited period of time, the conventional provisions governing certain obligations on Member States do not apply, in the case of constitutional provisions there is no possibility of suspending their application, regardless of reason or period.

In this context, the state through the public authorities could not claim that it is sufficient to invoke Article 15 of the ECHR, without the need for a verification of compliance of the measures adopted with the Fundamental Law, given that according to art. 1 paragraph 5 of the Constitution "In Romania, observance of the Constitution, its supremacy and the laws is mandatory." Regarding this provision, the doctrine showed that "the principle of supremacy of the Constitution is based on its superior position at the top of the legal system pyramid, generating constitutional supralegality, applicable to the whole system, so that the law itself expresses the general will only in compliance with the constitutional norm" (Constantinescu Mihai in Constantinescu Mihai, Iorgovan Antonie, Muraru Ioan, Tănăsescu Elena Simina, 2004: 3). On the other hand, in case of limitations of the persons' rights, the provisions of art. 20 paragraph 2 of the Fundamental Law must be taken into account, in the sense that, in case of discrepancies between domestic laws and international norms within pacts and treaties signed by our country, international regulations apply, unless the Constitution or domestic laws contain more favorable provisions. However, given that the Romanian Constitution does not provide for the possibility of derogating from its provisions, compared to the ECHR, which allows Member States, for a limited period, not to take into account the obligations assumed, in this respect, the Fundamental Law contains more favorable provisions, which is why it should be applied as a matter of priority.

Even if the Romanian Constitution, in article 53 provides for the possibility of restricting certain rights, this article aims to reduce the number of cases of limitation of rights, requiring compliance with several conditions regarding the form of the normative act, the purpose of limitations, necessity and proportionality of intrusive measures.

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The doctrine compared the situations in which the rights are not temporarily applied - the derogations and the case in which there is a restriction of rights - the imperfect application, talking about a difference between those „which may be subject to derogations, but not restrictions (the right to a fair trial, with the exception of the right to publicity of debates; (...); the right to appeal" and those which may be subject to restrictions and derogations such as: the right to liberty and security, the right to dual jurisdiction in criminal matters - specific rights or public policy clause, freedom of expression - general rights (Sudre, 2006: 165).

By Decree no. 195 of March 16, 2020, several measures were taken in the field of justice, among the most important being: the suspension of prescriptions and deadlines, the suspension of criminal cases pending before the courts and in the proceedings of the preliminary chamber, establishing the cases that continued to be on trial. The state of emergency was extended by another 30 days by Decree no. 240 of April 14, 2020 issued by the President of Romania, published by the Official Gazette no. 311 of April 14, 2020, maintaining the measures established by the previous decree, measures that have been adapted in relation to the evolution of the pandemic.

Article 2 of each decree lists the rights whose exercise has been restricted, but among them is not the right provided by art. 20 paragraph 3 of the second sentence of the Romanian Constitution, respectively the settlement of the trial within a reasonable time. In specialistic literature, regarding the reasonable term, it has been shown that "it expresses the reality that justice should not be done with delays that compromise its efficiency and credibility" (Tanasescu in Constantinescu et al., 2004: 34).

The state of emergency lasted until May 15, 2020, inclusive, the date on which it was published in the Official Gazette no. 396, Law no. 55 which regulated the notion of the state of alert, establishing the restrictive measures of rights that may be disposed of during this period, as well as the procedure for establishing the state of alert.

In the conditions in which in Law no 55 / 2020 a subsequent date of entry into force was not provided, according to art.12 of Law no. 24/2000 republished in the Official Gazette no. 260/21 April 2010, the law entered into force 3 days from the date of publication in the Official Gazette, respectively on May 18, 2020. On the same date, it was published in the Official Gazette no. 410, Government Decision no. 394 on declaring the state of lock down and the measures applied during it to prevent and combat the effects of the COVID-19 pandemic, a decision that entered into force on the date of publication, as it results from the provisions of art. 12 paragraph 3 of Law no 24/2000. It is noted that from the date of cessation of the state of emergency -15 May 2020, until the date of entry into force of G.D. no. 394 / 18. 05.2020, through which the state of alert was established, three days have passed. What happened to the restrictive measures during this period? By the decision no. 24/2020 of National Committee for Emergency Situations published in the Official Gazette no. 395 of May 15, 2020, the state of emergency was declared at national level for a period of 30 days, providing "measures for prevention and control of infections applicable during the state of alert." However, after three days, the applicability of this decision ceased, according to art. 1 paragraph 2 of G.D. no 394 / 2020. The discussion regarding the competence to order restrictive measures of rights appears, starting from the normative act based on which NCES adopted the decision 24/2020, respectively GEO 21/2004 amended by GEO 68/14 May 2020. In this sense, significant is paragraph no. 87 of the CCR Decision no. 157 of 13 May 2020 stating that "having regard to the legal acts issued by the structures empowered in the management of emergency situations, respectively administrative acts

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organizing the execution and implementation, in relation to the existing factual situation, of the primary regulatory provisions which decides on the legal regime of the state of alert, it appears obvious that these acts cannot affect fundamental rights and freedoms". It was also shown that such acts are subsequent to the law, "concretely establishing the measures to be taken in order to manage the state of emergency", so that, "they can only transpose the legal norms". In paragraph 89 of the same decision, the CCR found that "the delegated legislator cannot in turn delegate to an administrative authority / entity what he himself does not have under competence" and that the limitation of fundamental rights or freedoms can only be achieved by law, as a formal act of the Parliament".

In this context, considering the fact that the decision no. 24/2020 of NCES was not issued on the basis of a law, in the sense given by the CCR - "formal act of the Parliament", we can say that this decision had no legal basis to order measures to limit the fundamental rights and freedoms of people. In doctrine, a distinction has been made between the delegation of forms of power and the delegation of matters, showing that "the delegation of forms of power is impossible, but the delegation of matters is not so, provided that the power to which a matter is delegated to, regulates it by its own will" (Hauriou, 1929: 265). In fact, in our view, that was the reason why that judgment ceased to apply after only three days, by the entry into force of G.D. no. 394/2020, adopted based on Law no 55 / 2020, which provided in art. 4 par. 1 that the state of alert can be established only by a decision given by the Government.

Law no. 55/2020 established several measures regarding the criminal trial, most of the measures regarding the execution of punishments and educational measures. However, art. 62 regulated the manner of hearing persons deprived of liberty, a measure that influences the procedure in which the criminal process takes place.

Unlike the decree no. 195 of March 16, 2020 issued by the President of Romania, which in art.43 par. 6 imperatively established that the hearing of persons deprived of their liberty is done by "videoconference at the place of detention or in appropriate spaces from a sanitary point of view, without the need for consent of the person deprived of liberty", Law no 55 / 2020 gave the possibility to the judicial body to establish whether, by hearing the persons deprived of liberty through videoconference is or is not a "prejudice to the good development of the trial or to the rights and interests of the parties".

To highlight the importance of this measure, we emphasize that the phrase "persons deprived of liberty" refers not only to persons who have the capacity of defendant in criminal proceedings, but also to persons who have the capacity of injured parties, civil parties, responsible parties civilly, witnesses. It must be borne in mind that litigants in criminal proceedings have opposing interests, each exercising their rights according to the purpose pursued by resolving the criminal proceedings. On the other hand, the judiciary must take into account both the context of the pandemic and the specifics of each case, because "a basic freedom can only be limited or denied to protect one or more other basic freedoms", and limitation will "never intervene (...) in the name of the public good or perfectionist value" (Rawls, 2007: 351).

On the other hand, it is necessary to make a comparison between the consequences of the rights of litigants by listening to persons deprived of their liberty by videoconference and the possible consequences on the health of those persons by transporting them from the place of detention to the judiciary headquarters to be heard directly.

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Art. 62 of Law no 55 / 2020 regulates the situation in which the person deprived of liberty does not agree to be heard by videoconference, but the judicial body considers that the proper conduct of the criminal proceedings is not influenced and the rights or interests of the parties are not affected. However, it is possible that during the criminal trial, the judicial body, ex officio or at the request of a party, may assess the need for the immediate presence of the person deprived of liberty, but this person refuses, citing issues regarding the risk of infection with SARS - CoV -2 during transport to the judicial bodyheadquarters. In our opinion, in such cases, the judiciary must take all necessary steps to be able to determine whether transport conditions are ensured which eliminate the risk of infection with the virus in question. Only if all risk of infection is eliminated, it can be ordered to bring the person deprived of liberty, even without his consent, before the judicial body. Otherwise, it would be recommended that the hearing take place by videoconference, and if the presence of the detainee before the court is essential for solving the process, the time may be postponed until there is no risk of infection.

Another aspect that we discuss concerns the meaning of the words “heard by videoconference” used in art. 62 of Law no 55 / 2020. It is very important that the recipient of the rule understands the meaning of the words, although "a certain inaccuracy is inevitable, even if it is due to the desire to avoid excessive rigidity that would prevent adaptation to changes in the situation", to avoid difficulties in interpreting law, “a balance must be sought between what is desirable and what is possible” (Renucci, 2009: 310).

Thus, in the case of the main subjects and parties, their role in a trial is not limited to their hearing only, but involves effective participation in the whole procedure, each having the opportunity to make requests, invoke exceptions, ask questions. In this context, in our opinion, the article can be interpreted as meaning that persons deprived of their liberty participate in the criminal proceedings by videoconference at the place of detention.

In doctrine, opinions differed on the meaning of the terms "hearing" and "listening." Some authors have argued that they are "acte of distinct legal value", pointing out that the *hearing* is a complex evidentiary procedure "by which the statement is obtained as a means of proof", a procedure in which the person's personal data are known, is informed of his rights and obligations, the person freely relates what he wants to declare, answers the questions asked by the other participants, the statements are recorded, but also the questions asked. *Listening* “is, at the hearing, only the segment in which the person actually communicates in sentences a free speech or the answers to the questions” or in cases concerning proposals or requests for preventive measures, “is the point of view expressed personally by the defendant in relation to that preventive measure ”(Gheorghe Teodor-Viorel in Volonciu Nicolae, Uzlaşu Andreea Simona, Moroșanu Raluca, Văduva Victor, Atasiei Daniel, Ghigheci Cristinel, Voicu Corina, Tudor Georgiana, Gheorghe Teodor-Viorel, Chitiță Cătălin Mihai, 2015: 271).

Another point of view was expressed by other authors in the sense that "there are no differences between the two evidentiary activities, *hearing* and *listening*, both involving the free speech regarding the facts" by the suspect or defendant, "and the formulation of questions by the judicial bodies or by the main procedural subjects or the parties present at the hearing (in the trial phase)” (Neagu & Damaschin, 2014: 442).

In other words, Law no 55 / 2020 does not regulate the possibility of participation in the criminal proceedings by videoconference of persons in respect of

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whom the preventive measure of house arrest or judicial control has been ordered, or of free persons who are not subject to any preventive measure.

In our opinion, given that the risk of infection with the SARS-CoV-2 virus has increased, in order to protect the health of these people, it was appropriate to provide for such a possibility. In this respect, if the persons live in other localities than the one where the judicial body headquarters is located, they could go to the judicial body (court, prosecutor's office, police station) which has the nearest headquarters to the person's home, where they will be heard by videoconference by the judicial body judging the criminal case. This requires sufficient technical means and qualified personnel, but it is the obligation of the state to purchase them, given that it is not known how long the restrictions imposed by the pandemic will last, but the judicial authorities must adapt to each situation in order to resolve criminal cases within reasonable time, respecting the rights and freedoms of all participants.

In the conditions in which by the decrees given by the President of Romania, by which the state of emergency was declared, and, subsequently, by the decisions of the Romanian Government, the state of alert was established and then extended, by which the rights of litigants in criminal proceedings were limited, the issue of the procedure for challenging these measures is raised.

Considering art. 93 paragraph 1 of the Constitution and art. 14 of the G.E.O. no 1/1999, CCR, in paragraph 88 of Decision no. 152 of 6 May 2020, stated that "since it regulates a series of generally binding rules, the state authorities being in charge of carrying out the measures adopted, and the natural and legal persons having the obligation to comply with the provisions of the act, it follows that, from the perspective of the content, the President's decree is an administrative act with a normative character." In paragraphs 90-92 of the same decision, the CCR stressed that the President of Romania does not regulate the restriction of the exercise of fundamental rights and freedoms, but the law adopted by Parliament, the law whose exercise is organized by decree of the President. After the President establishes the state of emergency, the Parliament, by a decision in the joint sitting of the Senate and the Chamber of Deputies, verifies whether the conditions provided by law are met, approving or not the respective measure.

In this context, the CCR, in paragraph 93 of the above-mentioned decision, ruled that the decree by which the President established the state of emergency, although an administrative act, is exempted from judicial review by administrative litigation, carried out on the basis of Law n. 544/2001, because it concerns a report with the Parliament and falls under the provisions of art. 126 paragraph 6 of the Constitution. On the other hand, this decree may be subject to the constitutionality control carried out by the CCR through the decision of the Parliament, given according to art. 93 paragraph 1 of the Fundamental Law, which approves or does not approve the establishment of the state of emergency.

Specifically, CCR mentioned that through the sole article of Decision no. 3 of March 19, 2020, for approving the measure ordered by the President of Romania regarding the declaration of a state of emergency, the Parliament did not verify whether the conditions provided by the Constitution and the law were observed, but only approved the measure. At the same time, it showed that by Decision no. 4 of April 16, 2020 regarding the Decree no. 240/2020 regarding the extension of the state of emergency, annex no. 1 of this decree by which measures were adopted containing

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derogations from the legislation in force (paragraphs 105,106 of Decision no. 152 of 6 May 2020).

Regarding this aspect, the doctrine showed that "The Decree makes an abusive exercise of the legislative function and restricts the exercise of certain rights, other than provided by Article 53 of the Constitution", so that "ordinary courts have the power to assess the validity of rules, but this does not mean the control by administrative litigation of an act restricting the exercise of rights issued without jurisdiction, but the finding by the ordinary court of the non-existence of the Decree. But the jurisdiction of ordinary courts does not eliminate the jurisdiction of the Constitutional Court" (Dănișor, 2020: 33).

The court of constitutional contentious, in paragraph 116 of Decision 152/2020, found that only by organic law adopted by the Parliament, the legal regime of the state of emergency can be regulated, in the current constitutional framework. In the next paragraph of the decision, the CCR stated that the G.E.O. no. 1/1999 entered into force before the amendment of the Romanian Constitution of 2003, context in which, at the date of adoption, the ordinance complied with the constitutional norms in force at that time, norms that did not limit the legislative prerogative of the Government not to affect the rights and freedoms provided by The fundamental law.

Although by Decision no. 152/2020 the court of constitutional contention found that G.E.O. no 1/1999 on the state of siege and the state of emergency, as a whole is constitutional in relation to the criticisms made by the People's Advocate, the reasons for the decision show the need for the adoption in the near future by the Parliament of a law to regulate legal regime during the state of emergency.

The necessary nature of such a law is also justified by the rapid increase in the rate of infection with the SARS - CoV-2 virus, with the possibility of re-establishing the state of emergency to limit the spread of this virus, but the legislature and the executive must account of the considerations of Decision no. 152/2020 of the CCR, in order to avoid the risk of pronouncing a decision by which a possible exception of unconstitutionality will be admitted.

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- Abbreviations:
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|--|---|
| Art. - article;  | G.E.O. - Government Emergency ordinance;            |
| CCR - Constitutional Court of Romania;   | L. - Law;   |
| Coord. - coordinator;  | NCES - National Committee for Emergency Situations; |
| ECHR - Convention for the Protection of Human Rights and Fundamental Freedoms; | No. - number;                                       |
| G.D. - Government decision;  | O.G. - Official Gazette;                            |
|  | Par. - paragraph;                                   |

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