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UNELE REFLECŢII PRIVIND STAREA DE URGENŢĂ ÎN SENSUL ARTICOLULUI 15 AL CONVENŢIEI EUROPENE A DREPTURILOR OMULUI

SOME REFLECTIONS ON THE STATE OF EMERGENCY WITHIN THE MEANING OF ARTICLE 15 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

НЕКОТОРЫЕ РАЗМЫШЛЕНИЯ О ЧРЕЗВЫЧАЙНОМ ПОЛОЖЕНИИ ПО СМЫСЛУ СТАТЬИ 15 ЕВРОПЕЙСКОЙ КОНВЕНЦИИ О ПРАВАХ ЧЕЛОВЕКА

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ABSTRACT:
SOME REFLECTIONS ON THE STATE OF EMERGENCY WITHIN THE MEANING OF ARTICLE 15 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The situation of humanity, emerging from the threats to health and safety caused by the COVID-19 pandemic, has made several states act promptly; moreover, very decisively and sharply, thus governments deciding to declare state of emergency. The legal effects of the declaration of state of emergency are likely to limit certain human rights and fundamental freedoms. In this context, many of the member states of the Council of Europe have declared state of public health emergency, citing the exceptions provided in Article 15 of the European Convention on Human Rights.

The purpose of this scientific approach is to identify the derogation grounds from the obligation to ensure certain rights and freedoms under the Convention as well as the formal and substantive conditions that states must comply with.

***Keywords**: rights, freedoms, European Convention on Human Rights, limitation, derogation, state of emergency, public health.*

JEL Classification:: K33, K19, F55

REZUMAT:
UNELE REFLECŢII PRIVIND STAREA DE URGENŢĂ ÎN SENSUL ARTICOLULUI 15 AL CONVENŢIEI EUROPENE A DREPTURILOR OMULUI

Situaţia în care s-a pomenit omenirea, reieşind din ameninţările la adresa sănătăţii şi securităţii, provocate de pandemia cu COVID-19, a determinat mai multe state să acţioneze prompt, uneori foarte decisiv şi tranşant, astfel încât mai multe guverne au decis declararea stării de urgenţă. Efectele juridice ale declarării stării de

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urgență de către un stat sunt de natură să aducă anumite îngrădiri drepturilor și libertăților fundamentale ale omului. În acest context, multe dintre statele membre ala Consiliului Europei, au declarat stare de urgență de sănătate publică, invocând excepțiile reglementate de articolul 15 al Convenției Europene a Drepturilor Omului.

Prezentul demers științific are drept scop identificarea temeiurilor de derogare de la obligația de a asigura anumite drepturi şi libertăți în temeiul Convenției, condițiile de formă și de fond pe care trebuie să le respecte statele.

***Cuvinte cheie**: drepturi, libertăți, Convenția Europeană a Drepturilor Omului, limitare, derogare, stare de urgență, sănătate publică*

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РЕЗЮМЕ:

НЕКОТОРЫЕ РАЗМЫШЛЕНИЯ О ЧРЕЗВЫЧАЙНОМ ПОЛОЖЕНИИ ПО СМЫСЛУ СТАТЬИ 15 ЕВРОПЕЙСКОЙ КОНВЕНЦИИ О ПРАВАХ ЧЕЛОВЕКА

Положение человечества, возникающее в связи с угрозами здоровью и безопасности, вызванными пандемией COVID-19, заставило несколько государств действовать оперативно; более того, очень решительно и резко, поэтому правительства решили объявить чрезвычайное положение. Правовые последствия объявления чрезвычайного положения, вероятно, ограничат некоторые права человека и основные свободы. В этом контексте многие государства-члены Совета Европы объявили чрезвычайное положение в области общественного здравоохранения, сославшись на исключения, предусмотренные статьей 15 Европейской конвенции о правах человека.

Цель этого научного подхода состоит в том, чтобы определить основания для отступления от обязательства обеспечивать определенные права и свободы в соответствии с Конвенцией, а также формальные и существенные условия, которые государства должны соблюдать.

Ключевые слова: *права, свободы, Европейская конвенция о правах человека, ограничение, отступление, чрезвычайное положение, общественное здравоохранение.*

JEL Classification:: K33, K19, F55
УДК: 341(4/9), 327.009

The European Convention on Human Rights (hereinafter - ECHR) is the basic treaty at European level, which protects human rights and fundamental freedoms. Its importance is even mentioned by the European Court of Human Rights, calling it a *"constitutional instrument of European public policy"* in the field of human rights.[1]

The Republic of Moldova became a member of the Council of Europe in 1995[2], and the Parliament of the Republic of Moldova ratified the European Convention on Human Rights on July 24, 1997[3].

The European Convention on Human Rights (hereinafter - ECHR), regulates in Article 15 the manner of derogation from the obligations provided for by the Convention, in case of a state of emergency. Thus, the clause in Article 15 replaces "ordinary conventionality" with "exceptional conventionality" and authorizes the State party, in exceptional circumstances, to derogate from its obligations, which it has assumed, by temporarily suspending of the exercise of certain guaranteed rights.

[1] The Case of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, §156 (Online: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-69565%22]}, accessed on 04.04.2021)

[2] Council of Europe (Online: https://www.coe.int/en/web/portal/republic-of-moldova, accessed on 10.04.2021)

[3] Parliament Decision no. 1298 of 24-07-1997 regarding the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as of some additional protocols to it // Published in the Official Gazette no. 24-25 of 21.08.1997

According to Article 15 of the ECHR, "In time of war or other public emergency threatening the life of the nation any High Contracting

Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with itsother obligations under international law. "[1]

The text of Article 15 of the ECHR grants the governments of States parties, in exceptional circumstances, the possibility to derogate, temporarily, in a limited and controlled manner, from the obligation to ensure certain rights and freedoms under the Convention. In this connection, the application of Article 15 par. (1) shall be made in compliance with the following procedural and substantive conditions:

- the right to derogate can be invoked only in time of war or in other situations of public danger that threaten the life of the nation;
- a State may take measures derogating from its obligations under the Convention only to the extent that the situation so requires;
- thederogations can't be in contradiction with other obligations under international law.

Hereinafter we intend to analyze in detail the conditions provided for in paragraph (1) of Article 15 ECHR. The emergency derogation may be invoked in time of war. The European Court of Human Rights does not give its own explanation or definition of the term "war" or the term "other public danger that threatens the life of the nation", this assessment remaining at the discretion of the state invoking the application of Article 15 of the ECHR. Also, the European Court of Human Rights was not referred to interpret the term "war", stating that a situation of serious disruption or violence that does not constitute a state of war, is likely to represent "another public danger that threatens the life of the nation "within the meaning of the second part of Article 15 (1).[2]

We consider that the term "war" is to be interpreted in the sense of the notions of "armed conflict" in the context of the Geneva Conventions and the Additional Protocols; in particular we argue this position on the content of article of the ECHR, which makes express reference to the provisions of international law. We support the opinion of the author Gioia A., who states that, if a state invokes art. 15 of the ECHR, under the "war case", the European Court of Human Rights will have to express itself on the legal nature of "war" within the meaning of the Geneva Conventions, applying international humanitarian law, or refer to other obligations under international law.[3] The European Court of Human Rights mentioned in the case of Hassan v. United Kingdom that, international human rights law and international humanitarian law can be applied simultaneously.[4] When we compare the rules of international human rights law with international humanitarian law, it becomes clear that the latter protect only certain human rights and only insofar as they are particularly endangered by armed conflict and are not, as such, incompatible with the existence itself of an armed conflict. It is undeniable that the right to social security, the right to free choice, freedom of thought, the right to assembly and association, equality between spouses are not governed by international humanitarian law, and in a number of situations its rules may be within the limits of with which it deals, more adapted to the specific problems that arise in armed conflicts. International humanitarian law is traditionally formulated in terms of objective rules of conduct for states and armed groups, while international human rights law is expressed in terms of the subjective rights of the individual in relation to the state and developed as part of constitutional law of individual states. Furthermore, while the rules of international humanitarian law concerning the treatment of persons in enemy power may be understood as the implementation of human rights, taking into account the military necessity and particularities of armed conflicts, certain rules on the conduct of hostilities are not addressed by the

[1]European Convention on HumanRights (Online: https://www.echr.coe.int/Documents/Convention_RON.pdf, accessed on 24.03.2021)

[2]European Court of HumanRights, Guide on Article 15 of the European Convention on HumanRights, p. 6; (Online: https://www.echr.coe.int/Documents/Guide_Art_15_FRA.pdf, accessed on 18.03.2021)

[3]Andrea Gioia., International Humanitarian Law and International Human Rights Law, No Gods, Oxford University Press, New York, 2011, pp. 220

[4]The case of Hassan K.R. v United Kingdom, Online https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-118182%22]}, accessed on 28.03.2021

international law of human rights, therefore, the two concepts complement each other and should be interpreted in relation to each other.

In addition to the above mentioned idea, we also refer to the advisory opinion of the International Court of Justice from 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, in which the Court considers that the protection afforded by human rights conventions does not stop an armed conflict. In the relationship between international humanitarian law and human rights, three situations may arise: certain rights may be included exclusively within the scope of international humanitarian law; others may be included exclusively into human rights; others, finally, may be included at the same time under these two branches of international law. The Court states that in the present case, the two branches of international law mentioned above are taken into account, namely human rights and, as *lexspecialis*, international humanitarian law.[1]

Analyzing the content of the Geneva Conventions and the Additional Protocols, we can distinguish several categories of armed conflicts:

a) international armed conflicts between states, governed by the Hague Conventions and provided in Article 2, common to the four Geneva Conventions, of 1949, and in art. 1 § 3 of Protocol I, of 1977;

b) wars of national liberation from colonial domination, from foreign occupation and those against racist regimes, regulated by art. 1 §4 of Protocol I;

c) armed conflicts that do not have an international character, stipulated by art. 3 common to the four Geneva Conventions, of 1949 *"armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties". "*[2]

d) non-international armed conflicts, covered by art. 1 of Protocol II, 1977 - International Armed Conflicts (Protocol I) and taking place in the territory of a High Contracting Party between its armed forces and dissident armed forces or organized armed groups which, under the leadership of a responsible command, exercise such control over a part of its territory so as to enable it to conduct sustained and coordinated military operations.[3]The territorial control is not exercised directly by the occupying forces, but by a puppet government or other form of subordinate local power (the link between the de facto organs or agencies and the foreign power identifies the circumstances in which it "occupies" or carries out its activity on a certain territory only by acts of some de facto bodies or agents[4]) However, it is difficult to assess the degree of influence required to achieve this scenario. Any interference in the affairs of a third country does not necessarily mean that there is an occupation. Relations between local authorities and foreign forces vary in intensity depending on the circumstances and always show some mutual influence, even a degree of concertation, in decision-making. To resolve this issue, the International Criminal Tribunal for the former Yugoslavia identifies the "general control" criterion. There is occupation when a state has "global control" of local agents who themselves exercise "effective control" of the territory in question.[5]

The European Court of Human Rights has commented on the issue of "effective control" in the case of *Loizidou v. Turkey*[6]. The jurisdiction of a state is primarily territorial. This presumption may be limited in exceptional circumstances, in particular when a State is prevented from exercising its

[1]The advisory opinion of the International Court of Justice from 2004 on the Legal Consequences of theConstruction of a Wall in the Occupied Palestinian Territories (Online: https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-FR.pdf, accessed on 12.04.2021)

[2]Geneva Convention for the Improvement of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea from August 12, 1949 (Online https://constitutii.files.wordpress.com/2017/01/conventia-de-la-geneva-ii.pdf, accessed on 14.04.2021)

[3]Additional Protocol II to the Geneva Conventions of August 12, 1949 on the Protection of Victims of Non-International Armed Conflicts (Online: https://constitutii.files.wordpress.com/2017/01/protocolul-aditional-ii.pdf, consulted on 16.04.2021)

[4]Judgment of the First Instance of the International Criminal Tribunal for the Former Yugoslavia of May 7, 1997, § 584 (Online: https://www.icty.org/x/cases/tadic/tjug/fr/tad-tj970507f.pdf, accessed on 19.04.2021)

[5]Sylvain Vité, Typologie des conflits armés en droit international humanitaire : concepts juridiques et réalités, p.5, (Online: https://www.icrc.org/en/doc/assets/files/other/irrc-873-vite-fre.pdf, accessed on 20.04.2021)

[6]The case of Loizidou v. Turkey, (preliminary objections), Judgment of 23 March 1995, Series A no. 310, § 62 (Online: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-62474%22]}, accessed on 17.04.2021)

authority in a part of its territory.[1] Given the object and purpose of the Convention, a Contracting Party may also be liable when, as a result of a military action - legal or illegal - it exercisesa*de facto* control over an area outside its national territory. The obligation to ensure respect for the rights and freedoms guaranteed by the Convention in such a region results from such control, whether exercised directly by the armed forces of the State concerned or by a subordinate local government. The European Court of Human Rights, in its decision over the Bankovic's case, assesses the situation of "effective control" and when a state by consent, invitation or acceptance of the local government, exercises all or some public powers that would normally be exercised by that government, actions of war or revolt or *"actions of a foreign state which supports the establishment of a separatist regime in the territory of the state concerned"*.[2]The lack of an effective control over the region on the left bank of the Dniester - Transnistria, was invoked by the Republic of Moldova in the case of Ilascu and others v. Republic of Moldova and the Russian Federation.[3]

Determining the legal nature of armed conflict as international or non-international is a complex operation, arising from all the circumstances of the case, important for the application of international human rights law and international humanitarian law, as well as for prosecuting international crimes. The International Criminal Tribunal for the Former Yugoslavia identifies situations in which an armed conflict becomes international: "it is indisputable that an armed conflict has an international character if it involves two or more states. In addition, an internal armed conflict that arises in the territory of a state may become international (or, depending on the circumstances, may also have an international character) if: 1) the military forces of another state intervene in the conflict or, if 2) certain participants in the internal armed conflict acts on behalf of that state.[4] The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia considered conflicts in the former Federal Republic of Yugoslavia to be of a mixed nature, noting that a party to a non-international armed conflict may be considered a *de facto* agent acting on behalf of a state.[5]

When determining the existence of an internal conflict (rebellion, protest) or an armed conflict with or without international character, the intensities of the actions are taken into account. In order to distinguish an armed conflict, within the meaning of article 3 of the Geneva Conventions on other forms of serious violence, such asinternal disturbances and tensions, riots or acts of banditry the situation must reach a certain level of confrontation, taking into account two criteria:

1) Hostilities must reach a minimum level of intensity. This may be the case, for example, when hostilities are collective or when the government is obliged to use military force against insurgents other than the police. As regards the criterion of intensity, these data may be related to the collective nature of the struggle or to the fact that the state is obliged to use the army when its police forces can no longer cope with the situation. The duration of the conflict, the frequency of acts of violence and military operations, the nature of the weapons used, the movement of the civilian population, the territorial control exercised by opposition forces, the number of victims (dead, wounded, displaced, etc.) are also factors that can be taken into account.[6]

2) Non-governmental groups involved in the conflict must be considered to be "parties to the conflict", meaning that they must have organized armed forces. This means, for example, that these

[1]The case of Ilascu and others v. Moldova and Russia (Application no. 48787/99), § 312 (Online: http://justice.md/file/CEDO_judgments/Moldova/ILASCU%20SI%20ALTII%20(ro).pdf, consulted on 12.04.2021)

[2]ibidem, § 311 (Online: http://justice.md/file/CEDO_judgments/Moldova/ILASCU%20SI%20ALTII%20(ro).pdf, accessed on 12.04.2021)

[3]ibidem, § 300, (Online: http://justice.md/file/CEDO_judgments/Moldova/ILASCU%20SI%20ALTII%20(ro).pdf, accessed on 12.04.2021)

[4]Decision of the Court of Appeal of the International Criminal Tribunal for the Former Yugoslavia of July 15, 1999, §84 (Online: https://www.icty.org/x/cases/tadic/acjug/fr/tad-991507e.pdf, consulted on 15.04.2021)

[5] Ibidem, § 89

[6]Sylvain Vité, Typologie des conflits armés en droit international humanitaire : concepts juridiques et réalités, p.5, (Online: https://www.icrc.org/en/doc/assets/files/other/irrc-873-vite-fre.pdf, accessed on 20.04.2021)

forces must be subject to a certain command structure and that they must have the capability to conduct sustainable military operations.[1]

The term "war" is used in the internal law of countries, the states declaring a state of war in an appropriate way. Regarding the national legislation, in the Constitution of the Republic of Moldova, as well as in Law no. 212/2004 on the regime of state of emergency, of siege and war, the term "state of war" is used, which means "*regime established throughout the country in case of notification of the declaration of war or an armed aggression against the Republic of Moldova, in order to defend sovereignty, independence, unity, territorial integrity and constitutional order".*[2]

The expression "*Armed aggression*" means the use of force by a state against the sovereignty, territorial integrity or political independence of another state or in any way incompatible with the Charter of the United Nations.[3]

The state requesting the application of article 15 of the ECHR and invoking the state of war, will have to apply both national law, in the sense of qualifying armed aggression as war or not, and international law on conflicts. At the same time, we believe that the European Court of Human Rights will expose itself on state of war, in the sense of the application of international humanitarian law.

In the following we intend to analyze the other ground - another public danger that threatens the life of the nation, which can be invoked by states within the meaning of Article 15 of the ECHR. The European Court of Human Rights has been seized several times in order to interpret this ground, so that in 1961 the Court had to give an assessment of the actions of the Irish Government, which by its Declaration of July 5, 1957 established special powers of detention against the suspect. The applicant, who is a member of the IRA (Irish Republican Army) stated, in particular, that he had been deprived of his liberty, without being brought before a court, between July and December 1957 he was locked up in a military detention camp in the Republic of Ireland.[4] The Court found that the Irish Government had grounds for declaring that there was a public danger in the Republic of Ireland, threatening the life of the nation, arising from the conjuncture of several constituent elements, namely: the existence in the territory of the Republic of Ireland of a secret army acting outside the constitutional order, who used violence to achieve their goals; and this army also operated outside the state, severely compromising the Republic of Ireland's relations with the neighboring country; the progressive and alarming worsening of terrorist activities in the autumn of 1956 and throughout the first half of 1957 was also taken into account.[5]

European Court of Human Rights in the case of A. and Others v. United Kingdom has ruled on the existence of a "public danger that threatens the life of the nation" on the existence of an eminent danger: the Court has confirmed that a state cannot be required to wait for a disaster to take the necessary measures. National authorities have a wide margin of appreciation for the threat, according to the information in their possession. Importance must be given to the relevant decisions of the Executive and Parliament. It is also necessary to pay particular attention to the assessment of national courts, which are better prepared to assess the evidence of the existence of a danger.[6] In this regard, the Minister of Internal Affairs of the United Kingdom presented information to the British courts to prove the existence of a real danger of terrorist attacks against Great Britain. All the national judges who took part in the examination of the case were convinced of the imminence of the alleged danger. Even though Al Qaeda had not yet carried out any attacks on British soil, we cannot blame the

[1]International Committee of the Red Cross (ICRC), Comment le terme « conflit armé » est-il défini en droit international humanitaire?, 2008 (Online: https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict-fre.pdf, accessed on 15.04.2021)

[2] Law on legal regime of the state of emergency, of siege and war no. 212 of 24.06.2004, In: Official Gazette of the Republic of Moldova, no. 132-137 from 06-08-200

[3]The Law on National Defense no. 345 of 25.07.2003, In: Official Gazette of the Republic of Moldova, no.200-203 of 19.09.2003

[4]The case of Lawless v. Ireland (no.3) (Online: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57518%22]}, accessed on 14.04.2021)

[5]Ibidem, § 28

[6]The case of A. and Others v. United Kingdom (Online: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-91406%22]}, accessed on 12.04.2021)

national authorities for believing in the "imminence" of the attack. States should not be forced to wait for a disaster to take the necessary steps to prevent it. They have a wide margin of appreciation to assess the danger depending on the information available to them. The opinion of the executive and that of Parliament are of greater importance and it is necessary to place great trust in national courts that are better placed than the European judge to assess the evidence of a danger. Consequently, the Court acknowledges that there was a life-threatening danger to nations.[1]

The European Court of Human Rights emphasizes that states do not, however, enjoy unlimited power in this area. The national margin of appreciation goes hand in hand with European control.[2] Regarding the impact of Article 15 of the ECHR in the case Lawless v. Ireland, the extensive interpretation of the concept of *flagrante delicto* could not be regarded as an appropriate response to the state of emergency, since its legal consequences went far beyond the legal framework of the state of emergency and the special circumstances were not justified in the light of the state of emergency. In conclusion, it could not be stated that a pre-trial detention order which was not issued "in accordance with a procedure provided by law" but was "imposed by a strict extent".[3]

The attempted military coup of July 15, 2016 in Turkey, led the state to declare a state of emergency on July 21, 2016. In the case of *ShahinAlpay v. Turkey* and the case of *Mehmet HasanAltan v. Turkey* concerning the complaint of two journalists, arrested and detained following the attempted military coup, the Court noted in both cases that the Turkish constitutional court, after examining the facts declaring a state of emergency from a constitutional perspective, found that the attempted coup created a serious threat, threatening the life and existence of the nation. Considering the conclusions of the Constitutional Court, as well as all the available elements, the Court decided that the attempted military coup represents a "*public danger that threatens the life of the nation*" within the meaning of article 15 of the Convention.[4]

In another relevant case, *Aksoy v. Turkey*, the Court found the seriousness of the terrorist problem in the south-east of the country and the difficulties encountered by the State in taking measures to combat it effectively. In this regard, he considered that the scale and particular effects of the activity of the Kurdistan Workers' Party (PKK) in this region created a "public danger that threatens the life of the nation".[5]

The restrictions apply *ratione loci*, or in the case of *Yurttas v. Turkey*[6], the European Court of Human Rights mentioned that the derogation from the Convention, within the meaning of art. 15 are applied only to the territory indicated in the notification declaration, and not to the entire territory of the state.

The test of proportionality is often failed by the state in the sense of the measures it applies when establishing the state of emergency or, the practice of the European Court of Human Rights shows that states do not act to the strict extent required by the situation, taking into account several relevant factorssuch as: the nature of the rights affected by the derogation, the circumstances that led to the emergency and its duration. In this regard, the Court found that in order to counter a real and imminent threat of a terrorist attack, the State acted disproportionately and discriminatory against a group of alleged foreign terrorists by applying indefinite detention. The threat came from both British and foreign nationals, and the potential negative effects of detention without trial could be similarly detrimental to a British national or a foreigner. The Court concluded the violation of article 5 § 1

[1] Ibidem, § 56

[2]The case of Brannigan and McBride v. The United Kingdom, May 26, 1993, § 43, Series A no. 258 B (Online: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-62376%22]}, accessed on 12.04.2021)

[3]The case of AlparslanAltan v. Turkey (Online: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-192803%22]}, accessed on 13.04.2021)

[4]The case of SahinAlpay v. Turkey, (Online: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-181827%22]}, accessed on 12.04.2021)

[5]The case of Aksoy v. Turkey, December 18, 1996, application 21987/93), §§ 70 and 84 (Online: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-62563%22]}, accessed on 12.04.2021)

[6]The case of Case of Yurttas v. Turkey (Online:https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-66345%22]},}, accessed on 15.04.2021)

(right to liberty and security) because the derogation measures were exaggerated by the fact that they operated unjustified discrimination between British and foreign nationals.[1]

Given the situation in China, the World Health Organization, at the end of January 2020, decided to declare a state of public health emergency of international interest, which is defined as "*an extraordinary event that is determined to pose a public health risk in other countries because of the risk of the international spread of the disease and that it may require coordinated international action*". [2]At the same time, this definition implies a situation:

• serious, sudden, unusual or unexpected;

• which has implications for public health beyond the affected State's national border;

and

• which may require immediate international action.[3]

The reaction of the states was not delayed, so that from March 16, 2020, 10 member states of the Council of Europe declared a state of emergency (Albania[4], Armenia[5], Estonia[6], Georgia[7], Latvia[8], North Macedonia[9], Moldova[10], Romania[11], San Marino[12], Serbia) that exercises its right to derogate from the Convention, in the light of Article 15 of the ECHR. The text of the notifications shall indicate expressly the measures taken by the competent authorities, as well as the proof of the declaration of a state of emergency at national level, its duration and the argumentation of the need to establish a state of emergency.

On March 17, 2020, the Parliament of the Republic of Moldova declared a state of emergency between March 17 and May 15, 2020.[13]

The issuance of this decision was based on the epidemiological situation through COVID-19 infection. The Parliament argued the legality of establishing the state of emergency, referring to Law no. 212/2004 on the regime of state of emergency, of siege and war.

According to the Law on the state of emergency, of siege and war, the state of emergency means "a set of measures of a political, economic, social and law enforcement nature, which are provisionally established in some localities or throughout the country, in case of:

a) the imminence of the triggering or triggering of exceptional situations of a natural, technogenic or biological-social character, which makes it necessary to prevent, diminish and liquidate their consequences;

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[1]The case of A. and Others v. United Kingdom (Online: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-91406%22]}, accessed on 12.07.2020)

[2]IHR Emergency Committee (WHO), press release, (Online: https://www.who.int/ihr/procedures/fr_ihr_ec_faq.pdf, accessed on 15.03.2021)

[3] ibidem

[4]The Notification (Note Verbale) from the Republic of Albania to the Council of Europe of 01.04.2020 on the declaration of a state of emergency (Online.Https://rm.coe.int/16809e0fe6), accessed on 23.04.2021)

[5]The Notification (Note Verbale) from the Republic of Armenia to the Council of Europe of 20.03.2020 on the declaration of a state of emergency (online: https://www.coe.int/fr/web/portal/home,https://rm.coe.int/09000016809cf886, consulted on 23.04.2021)

[6]The Notification (Note Verbale) from the Republic of Estonia to the Council of Europe of 16.03.2020 on the declaration of a state of emergency (Online: https://rm.coe.int/09000016809ce9f2, accessed on 23.04.2021)

[7]The Notification (Note Verbale) from Georgia to the Council of Europe of 23.03.2020 on the declaration of a state of emergency (Online: https://rm.coe.int/09000016809cff21, accessed 23.04.2021)

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[11]The Notification (Note Verbale) from Romania to the Council of Europe from 03.04.2020 regarding the declaration of a state of emergency (Online: https://rm.coe.int/16809e16bf, consulted on 23.04.2021)

[12]The Notification (Note Verbale) from San Marino to the Council of Europe of 08.07.2020 on the cessation of the state of emergency (Online: https://rm.coe.int/16809ef4e5, accessed on 28.04.2021)

[13]Parliament Decision no. 55 of 17 March 2020 on the declaration of a state of emergency(Online:http://www.parlament.md/Actualitate/Noutati/tabid/89/NewsId/2374/language/roRO/Default.aspx, consulted on 29.03. 2021)

b) the existence of a danger for national security or the constitutional order, which makes it necessary to defend the rule of law, maintain or restore the state of legality.[1]

The term "epidemiological" is to be interpreted as an exceptional situation, according to the Regulation on the classification of exceptional situations and the accumulation and presentation of information in the field of protection of the population and territory in case of exceptional situations found in the category "contagious diseases of people ", in the subclassification" epidemic; pandemic "(Annex 1 to the Regulation on the classification of exceptional situations and on the accumulation and presentation of information in the field of protection of the population and territory in case of exceptional situations - Classifier of exceptional situations), notions arising from" *exceptional biological and social situation* " of Law no. 212/2004 which was the basis for declaring a state of emergency in the Republic of Moldova.[2]

In accordance with article 2 of the Parliament Decision no. 55 of 17.03.2020, "During the state of emergency, the Commission for Exceptional Situations of the Republic of Moldova will issue provisions for the implementation of the following measures:

1) the establishment of a special regime of entry and exit from the country;

2) the establishment of a special traffic regime on the territory of the country (...) ".[3]

The limitation of human rights and freedoms, governed by both national law and the ECHR, must pass the test of proportionality and reasonableness. Analyzing the measures imposed by art. 2 of the Parliament Decision no. 55 of 17.03.2020, we find that, in fact, a restriction of the right to free movement is established, within the meaning of article 54 of the Constitution. Returning to the content of article 54 of the Constitution, the grounds for the restriction are exhaustively listed, and they are made in:

- national security interests
- territorial integrity,
- economic well-being of the country,
- public order,
- in order to prevent mass unrest and crime,
- protection of the rights, freedoms and dignity of others,
- preventing the disclosure of confidential information or guaranteeing the authority and impartiality of justice

The reasoning of the legislator, when referring to restrictions in the interests of national security, leads to the protection of the sovereignty, independence and territorial integrity of the country, its constitutional regime, economic, technical-scientific and defensive potential, legitimate rights and freedoms of the person against informative and subversiveactivity of special services and foreign organizations, against the criminal attacks of certain groups or individuals.[4]

Analyzing the legal content of each of the grounds, we find a constitutional omission, namely - the public health ground, which is not found in any of the grounds invoked above, but which is subject to the declaration of a state of emergency on the one hand and, imposing restrictions, on the other hand. In this order of ideas and in support of those mentioned above, we will highlight the relevant international regulatory framework, as well as the constitutions of other states to support this opinion, but also the tangential regulatory framework of the Republic of Moldova.

According to article 12 of the International Covenant on Civil and Political Rights, article 2 of the Optional Protocol no. 4 of the European Convention on Human Rights, article 45 of the Treaty on the Functioning of the European Union, the restriction of the right to free movement may be admitted,

[1]Law on legal regime of the state of emergency, of siege and war no. 212 of 24.06.2004, In: Official Gazette of the Republic of Moldova, no. 132-137 from 06-08-2004

[2]The Regulation on the classification of exceptional situations and on the manner of accumulation and presentation of information in the field of population and territory protection in case of exceptional situations, approved by Government Decision no. 1070 of 16.11.2010 (with subsequent additions) In: Official Gazette of the Republic of Moldova, no. 227-230 from 19-11-2010

[3] ibidem

[4]Law on National Defense no. 618 of 31.10.1995, In: Official Gazette of the Republic of Moldova, no.10-11 of 13.02.1997

when there is a need to implement measures to protect public health. On March 17, 2020, the Parliament of the Republic of Moldova declared a state of emergency between March 17 and May 15, 2020.[1]

The issuance of this decision was based on the epidemiological situation through COVID-19 infection. The Parliament argued the legality of establishing the state of emergency, referring to Law no. 212/2004 on the regime of state of emergency, of siege and war.

According to the Law on the state of emergency, of siege and war, the state of emergency means "a set of measures of a political, economic, social and law enforcement nature, which are provisionally established in some localities or throughout the country, in case of:

a) the imminence of the triggering or triggering of exceptional situations of a natural, technogenic or biological-social character, which makes it necessary to prevent, diminish and liquidate their consequences;

b) the existence of a danger for national security or the constitutional order, which makes it necessary to defend the rule of law, maintain or restore the state of legality.[2]

The term "epidemiological" is to be interpreted as an exceptional situation, according to the Regulation on the classification of exceptional situations and the accumulation and presentation of information in the field of protection of the population and territory in case of exceptional situations found in the category "contagious diseases of people ", in the subclassification" epidemic; pandemic "(Annex 1 to the Regulation on the classification of exceptional situations and on the accumulation and presentation of information in the field of protection of the population and territory in case of exceptional situations - Classifier of exceptional situations), notions arising from" *exceptional biological and social situation* " of Law no. 212/2004 which was the basis for declaring a state of emergency in the Republic of Moldova.[3]

In accordance with article 2 of the Parliament Decision no. 55 of 17.03.2020, "During the state of emergency, the Commission for Exceptional Situations of the Republic of Moldova will issue provisions for the implementation of the following measures:

1) the establishment of a special regime of entry and exit from the country;

2) the establishment of a special traffic regime on the territory of the country (...) ".[4]

The measures imposed by article 2 of the Parliament Decision no. 55 of 17.03.2020, in fact, represents the restriction of the right to free movement, within the meaning of art. 54 of the Constitution.imposed by art. 2 of the Parliament Decision no. 55 of 17.03.2020, we find that, in fact, a restriction of the right to free movement is established, within the meaning of article 54 of the Constitution. Returning to the content of article 54 of the Constitution, the grounds for the restriction are exhaustively listed, and they are made in:

- national security interests
- territorial integrity,
- economic well-being of the country,
- public order,
- in order to prevent mass unrest and crime,
- protection of the rights, freedoms and dignity of others,
- preventing the disclosure of confidential information or guaranteeing the authority and impartiality of justice

[1]Parliament Decision no. 55 of 17 March 2020 on the declaration of a state of emergency(Online:http://www.parlament.md/Actualitate/Noutati/tabid/89/NewsId/2374/language/roRO/Default.aspx, consulted on 29.03. 2021)

[2]Law on legal regime of the state of emergency, of siege and war no. 212 of 24.06.2004, In: Official Gazette of the Republic of Moldova, no. 132-137 from 06-08-2004

[3]The Regulation on the classification of exceptional situations and on the manner of accumulation and presentation of information in the field of population and territory protection in case of exceptional situations, approved by Government Decision no. 1070 of 16.11.2010 (with subsequent additions)

[4] ibidem

In the following, we intend to briefly analyze the content of the reasons invoked in Article 54 of the Constitution in order to identify in which of them the restriction of the right to free movement can be included, in the context of declaring a state of emergency. The reasoning of the legislator, when referring to restrictions in the interests of national security, leads to the protection of the sovereignty, independence and territorial integrity of the country, its constitutional regime, economic, technical-scientific and defensive potential, legitimate rights and freedoms of the person against informative and subversive activity of special services and foreign organizations, against the criminal attacks of certain groups or individuals.[1]

Analyzing the legal content of each of the grounds, we find a constitutional omission, namely - the public health ground, which is not found in any of the grounds invoked above, but which is subject to the declaration of a state of emergency on the one hand and, imposing restrictions, on the other hand.

According to article 12 of the International Covenant on Civil and Political Rights[2], article 2 of the Optional Protocol no. 4 of the European Convention on Human Rights[3], article 45 of the Treaty on the Functioning of the European Union[4], the restriction of the right to free movement may be allowed, when there is a need to implement measures to protect public health. Referring to the legislation of other countries, we mention the Romanian Constitution, which provides, as grounds for restricting rights and freedoms, public health or morality. According to Article 53 of the Romanian Constitution, "*The exercise of certain rights or freedoms may be restricted only by law and only if required, as appropriate, for: the defense of national security, order, health or public morality, rights and the freedoms of citizens; conducting criminal investigation; prevention of the consequences of a natural disaster, of a disaster or of a particularly serious disaster*". [5]

We consider that the observance of the principle of proportionality by the authorities of the Republic of Moldova during the establishment of the emergency regime is a questionable one, considering the discriminatory measures imposed by the Disposition of the Commission for Exceptional Situations (hereinafter - CES) no. 10 of 31.03.2020 (p. 22-24), which establishes a derogation from the provisions of art. 4, para. (7) of the Law on compulsory health insurance funds for 2020, no. 174/2019. The Government of the Republic of Moldova, during the state of emergency, starting with April 1, 2020, imposes the citizens of the Republic of Moldova and foreigners with residence permit on the territory of the Republic of Moldova, who intend to cross the state border on the way to enter the Republic of Moldovaand do not have the status of insured person in the system of compulsory health insurance (AOAM), to pay the compulsory health insurance premium in a fixed amount. Persons intending to cross the state border by air on their way into the Republic of Moldova will pay the compulsory health insurance premium, in a fixed amount, including through the governmental Mpay system.[6] Persons crossing the state border by land on the way to enter the Republic of Moldova, will complete and sign, obligatorily, the Declaration on their own responsibility regarding the obligation to pay within 72 hours the compulsory health insurance premium for 2020 (the model of the Declaration is attached, Annex No. 2).[7]

However, the authorities of the Republic of Moldova have notified that they exceed the scope of application of art. 15 of the ECHR, notifying the violation of the principle of proportionality and

[1]Law on National Defense no. 618 of 31.10.1995, In: Official Gazette of the Republic of Moldova, no.10-11 of 13.02.1997

[2]International Covenant on Civil and Political Rights (ICCPR), In: International Treaties No. 44 art. 254

[3]Protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, recognizing certain rights and freedoms other than those already contained in the Convention and in the first Additional Protocol to the Strasbourg Convention, 16.IX.1963 (Online: https://www.echr.coe.int/documents/convention_ron.pdf, accessed on 23.04.2021)

[4]Treaty on the Functioning of the European Union, In: Official Journal of the European Union, C 326/49 of 26.10.2012(Online:https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_2&format=PDF, accessed on 21.04.2021)

[5]The Constitution of Romania of November 21, 1991 (Online: http://legislatie.just.ro/Public/DetaliiDocumentAfis/47355, consulted on 02.04.2021)

[6]Provision no. 10 CES of 31.03.2020 repealed by the CES Disposition no. 13 from 03.04.2020 (Online: https://gov.md/sites/default/files/dispozitia_cse_nr.10.pdf, consulted on 15.04.2021)

[7] Ibidem, pp.24

reasonableness of the imposed measures, amended, by the Order of the Commission for Exceptional Situations no. 13 of 03.04.2020, as follows: „. *Persons crossing the state border by land and air on the way to enter the Republic of Moldova, will complete and sign, obligatorily, the Declaration on their own responsibility regarding the obligation to pay the compulsory health insurance premium for 2020* (the model of the Declaration is attached , Annex 2). "[1]

The measures and restrictions imposed by the authorities of the Republic of Moldova, referring to art. 15 of the ECHR will pass the proportionality test under several aspects, including the observance of the right to free movement, the observance of the right to freedom through the prism of art. 5 of the ECHR, in the context of the isolation of a person and forced hospitalization, the right to training within the meaning of Article 2 of the ECHR. However, the lack of a computer or the connection to the Internet, the household worries that determine the lack of support/ guide the children in the learning process, especially in rural areas, is a major impediment to the realization of the right to education.[2]According to the study of educational policies, the percentage of students in the Republic of Moldova who have access to a digital device for homework - 85%. For many students, distance learning is difficult or even impossible.[3]

Moreover, the Ministry of Education, Culture and Research of the Republic of Moldova, issued the order of 19.08.2020 on the organization of the 2020-2021 academic year in general education, which approved Special Regulations on the organization of the 2020-2021 academic year in the epidemiological context of COVID-19, for primary, secondary, high school and extracurricular education institutions,[4]fact that establishes limitations in order to exercise the right to training, by imposing a limited operating regime of educational institutions, reducing the number of hours for training, establishing a schedule especially attendance, measures, which in our opinion, are disproportionate in the sense of article 15 of the ECHR, given the functionality of other recreational and commercial institutions without program restrictions, institutions in which the risk of infection is increased.

As a result of the above, given the emergency situation, the test of functionality and proportionality is still to be assessed by the European Court of Human Rights, based on the restrictions imposed by the authorities, related to the provisions of the European Convention on Human Rights.

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