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Recognition of ECHR provisions in the institutional quarantine procedure

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Abstract: *The institutionalized quarantine measure was implemented through a procedure necessary for the intended purpose, namely the regulation of the exceptional situation of the global pandemic, being based on the norms contained in WHO No. 414/2020 regarding the establishment of the quarantine measure for persons in the international public health emergency caused by the COVID-19 infection and the establishment of measures to prevent and limit the effects of the epidemic. In this regard, the Regulation of 27.07.2010 on the organization and functioning of the county public health departments and the municipality of Bucharest, adopted by WHO No. 1078/2010, required the Ministry of Health and the subordinate deconcentrates to coordinate the measures applicable to persons and medical assistance in the pandemic, respectively institutionalized quarantine. The article analyzes the legality of the application of legal norms in the case of institutionalized quarantine, with reference to the provisions of Article 147 of the Romanian Constitution, Articles 3 and 5 of the European Convention on Human Rights, as well as the analysis of the interpretation in case law, using descriptive methods in which we detailed the concept of degrading treatment, qualitative methods based on the bibliographic study and analysis of the connections between the concepts of legality, clarity, predictability and proportionality. The main objective is related to the exposition of the ways of protecting vulnerable groups, with an emphasis on institutionalized quarantine measure, on the national legislation that regulates them, and the purpose of the research is related to the identification of positive discrimination measures in national practice, as well as the importance of protecting measures.*

Keywords: *norms; quarantine; institutionalized; ECHR; case law;*

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Introduction

The institutionalized quarantine measure found in the pandemic situation caused by COVID-19 infection was based on WHO norms no.414/2020 (WHO No. 414/2020 on the establishment of quarantine measures for persons in the international public health emergency situation caused by COVID-19 infection and establishing measures to prevent and limit the effects of the epidemic) and of the Regulation in 27.07.2010 (Regulation of 27.07.2010 on the organization and functioning of the county public health departments and the municipality of Bucharest, adopted by WHO no. 1078/2010), by applying specific measures to people returning from areas with a major risk of contamination.

The respective measure, established during the state of emergency at national level, was derogatory to the constitutional order, which required the application of the provisions of Article 15 of the European Convention on Human Rights, respectively the issuance of a notification related to the provisions of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In this regard, including Decree no.195/2020 (Decree no. 195/16 March 2020 on the establishment of a state of emergency on the territory of Romania, published in the Official Gazette no. 212/16 March 2020) contained norms regarding the need to restrict the exercise of certain rights and freedoms during the pandemic, in conjunction with the Severe Acute Respiratory Syndrome Surveillance Methodology (issued by the National Institute of Public Health Romania on 16.03.2020), with reference to the recognition of the measure of institutionalized quarantine, in order to protect the general public interest and the restriction of individual rights.

Regarding a potential tortious civil liability for the establishment and application of the measure of institutionalized quarantine, given the legal basis (Liviu Pop, Ionuț Florin Popa, Stelian Ioan Vidu, p.241) and the purpose of the civil legal act (Gabriel Boroi, Carla Alexandra Anghelescu, 2012, p.204), this required the accumulation of conditions (Ioan Adam, 2021, p.954) essentials related to the commission of an act considered illicit.

Practically, civil liability could not be admitted in the case of non-execution related to the fulfillment of applicable mandatory legal provisions, not being based on an attitude contrary to the law, given that the recognition of a normative framework cannot represent tortious liability (Ioan Adam, 2021, p.228).

In terms of contractual civil liability, fault means lack of diligence in producing a contractual result, contrary to the tortious aspect of harmful consequences in terms of patrimonial or moral damage (Gabriel Boroi, Liviu Stănciulescu, 2012, p.240).

Application of Article 147 of the Romanian Constitution

Regarding the legality and soundness of the court's solution regarding the application of Article 147 paragraph 4 of the Romanian Constitution, namely the fact that the decisions of the Constitutional Court are generally binding and have force only for the future after publication in the Official Gazette of Romania, the situation in which they became part of the normative legal order after the occurrence of the analyzed facts and their consequences, in this case the situation of institutionalized quarantine, can be discussed.

Practically, it is sometimes stated that the simple fact of not registering a case on the court's docket does not lead to the conclusion that that legal relationship is exhausted, the exhausted or in force nature of a legal relationship being a matter that must be left to the discretion of the judge of the case, who, depending on the concrete factual and legal situation, but also depending on the matter in which he judges, it is necessary to pronounce on the incidence of a decision of the Constitutional Court in that case.

On the other hand, we consider that the analysis of the possible non-conformity of a normative act in relation to the provisions of the Romanian Constitution cannot be discussed in a substantive procedural framework, as the courts are not in a position to rule on the constitutionality of a legal norm.

Thus, if a decision of the Constitutional Court became part of the normative legal order after the occurrence of the facts described in a request submitted to the court, the resolution required the investigation of the applicant facts and the effects produced, all exhausted at the date of the notification of the courts in relation to the norms in force at the date of their commission, the court being unable to judge an alleged illicit exhausted prior to the declaration of unconstitutionality and the publication in the Official Gazette of the decision of the Constitutional Court.

However, the court, without proceeding to substitute its own analysis of the imputed facts with that carried out by the Constitutional Court on the occasion of resolving an exception of unconstitutionality raised subsequently, was to resolve the case pertinently.

Presidential ordinance procedure

Regarding the incorrect application by the court of Article 21 of the Romanian Constitution, 13 in relation to Article 6 par. 1 of the ECHR, correlated with Art. 997 et seq. C proc civ. regarding the presidential ordinance procedure, we consider that, although the normative act qualifying the act under consideration did not expressly provide for the possibility of contesting the ordered measure of institutionalized quarantine, nevertheless, in view of the legal provisions invoked, it cannot be held that there would have been no possibility of contesting the ordered measure. Thus, the possibility of formulating a request in the presidential ordinance procedure, provided for by the common law norms of the Code of Civil Procedure, allowed the lifting of the ordered measure, being sufficient even if the special legal provisions did not provide for the possibility of contesting this measure.

Given that the objection may be raised that the presidential ordinance would not represent an effective means of appeal to contest such an ordered measure, according to Art. 21 of the Romanian Constitution art. 13 in relation to art. 6 par. I ECHR, because this path would not have been expressly provided for by law, and the jurisprudence of the courts in Romania was to reject as inadmissible such requests, which could not be considered a path to access justice, the Baia Mare Court ruled in file 5354/182/2020 by Civil Sentence no. 3787/18.06.2020 admitting the presidential ordinance formulated by a person illegally subjected to the quarantine measure.

Also, we cannot consider that a person was restricted from free access to justice enshrined in the provisions of art. 21 par. 1,2 and 3 of the Romanian Constitution, by the fact that WHO no. 414/2020 on the basis of which the institutionalized quarantine measure was applied did not provide, on the date of placement in quarantine, for the issuance of an administrative act or the possibility of contesting the measure.

In this regard, art. 42 paragraph. I of the Annex to Decree no. 195/2020 on the establishment of the state of emergency on the territory of Romania provided that during the state of emergency, the trial activity continues in cases of special urgency, established by the governing boards of the courts, and the Superior Council of Magistracy gives guidance, in order to ensure a uniform practice regarding the manner of establishing the cases to be tried during the state of emergency. Practically, in application of art. 23 paragraph. (1) and 41 paragraph. (1) letter. g) of Law m.317/2004 on the SCM, Decision no. 257/17.03.2020 was adopted, which in art. 1 letter b) requires that during the state of emergency, the court's activity is limited to cases of special urgency, including the presidential ordinance.

The provisions of Article 997 et seq. of the Code of Civil Procedure regulate the presidential ordinance procedure as a special procedure through which provisional measures can be taken in urgent cases, to preserve a right that would be damaged by delay, to prevent imminent damage that could not be repaired, as well as to remove obstacles that would arise during an execution. Thus, although definitive measures cannot be taken by means of the presidential ordinance, which would resolve the dispute in substance, the doctrine has recognized the possibility of measures being ordered in cases that have as their object the "obligation to do" when the aim is to stop abusive acts, in this case preserving the temporary nature of the measures taken.

As a result, if a normative act did not expressly provide for the possibility of contesting the ordered measure, in relation to the invoked legal provisions, it cannot be held that there was no possibility of contesting the measure, although the special legal provisions did not provide for the possibility of contesting a certain measure, thus not restricting free

access to justice enshrined in the provisions of art. 2l paragraphs 1, 2 and 3 of the Romanian Constitution.

With regard to a possible decision of the Constitutional Court, the analysis concerns its application in time, namely the moment at which it became part of the normative legal order in relation to the occurrence of certain facts and their consequences, in the circumstances in which it concerned the unconstitutionality of certain legal texts or ordinances that legally substantiated the issuance of the Order of the Minister of Health no. 414/2020. Thus, a situation of exhaustion of the claimed facts and their effects, in relation to the norms in force and the moment of their occurrence, with reference to the context brought into debate, would lead to an exhausted alleged illicit action, which the courts could no longer resolve.

As a result, if the illicit act occurred prior to the declaration of unconstitutionality and the publication of a decision of the Constitutional Court in the Official Gazette, respectively the issuance of the legal norms that substantiated the issuance of OMS no. 414/2020, the situation did not require an extraction from the content of the decision as a procedure for the own interpretation of another court, given that even the arguments of the Constitutional Court in admitting an exception of unconstitutionality with that object could not be used in the court referred to as evidence of possible previous illicit acts. By proceeding in this way, the court would expose itself to a genuine disregard of the cause of the action brought, mainly through the lack of investigation of the facts established for analysis, thus reaching a substitution of its own interpretation that it was obliged to make, assimilating the analysis of the Constitutional Court from the content of Decision no. 458/2020.

As regards the trial, it consists of resolving an action seeking compensation for moral prejudice resulting from the imposition of the institutionalized quarantine measure, prejudice based on the action of state bodies to unlawfully and arbitrarily order a measure that resulted in a violation of fundamental human rights, implicitly guaranteed by both the Constitution and the European Convention on Human Rights. The rights claimed to have been unlawfully violated refer to the right to liberty, the right not to be subjected to inhuman and degrading treatment, affecting both the method of regulation by means of a normative administrative act, and with reference to the impossibility of a real challenge, the method of implementation or the non-application of less intrusive measures compared to an institutionalized quarantine

We also take into account the fact that such an action for damages cannot be related to an investment of a court with the investigation of an illicit act of the legislator in adopting, through its bodies, a normative act with constitutional defects, which would have determined a takeover of the considerations of the Constitutional Court Decision no. 458/2020, the investment of such a dispute does not imply a reference to the special provisions contained in the Administrative Litigation Law, which would have allowed the granting of compensation to injured persons as a result of provisions of Government ordinances declared unconstitutional. We specify that the Constitutional Court Decision no. 458/2020 provides for the admission of the exception of unconstitutionality of the norms that substantiated Order no. 414/2020, respectively of Article 25 paragraph 2 of Law no. 95/2006 on the reform in the field of health, establishing the failure to meet the guarantees of constitutionality by establishing the powers of the minister to supplement and amend at any time the regulation relating to the conditions under which persons with communicable diseases may be hospitalized, the regulation thus having an unpredictable and uncertain character, being lacking clarity and predictability. Such a possibility granted to the competent minister means leaving it to this administrative authority to impose the conditions for the establishment and termination of the institutionalized quarantine measure, without also introducing the necessary guarantees for the recognition of the fundamental rights of persons.

It can be noted, compared to what was previously stated, the non-recognition of some standards of constitutionality that a normative act must contain in the conditions of regulating measures depriving or restricting freedom, practically an establishment of reasons and conditions of application, the nature of the applicable procedure, the right to appeal to justice, the establishment of guarantees, as well as the application of gradual measures in the conditions of the impairment of the rights of the person, which would determine the clarity, proportionality and predictability of the norm according to the case law of the ECHR, through which it would be drafted with sufficient clarity to allow the person to correct his or her conduct. In this regard, the guarantees for respecting the rights of persons such as access to justice must not be limited only to verifying the content of WHO No. 414/2020, but also to the provisions of Article 21 of the Constitution, respectively to guaranteeing access to justice, with reference to the compatibility of the procedures regulated in common law regarding the measure of institutionalized quarantine.

Application of Article 5 of the ECHR

With regard to Articles 12 and 20 of the Romanian Constitution, the text of the Convention refers to the lawful detention of a person, a condition sine gua non of any of the deprivations of liberty regulated by Article 5 of the ECHR.

In this regard, in relation to the rulings of the European Court regarding the requirement that the restriction of a fundamental right be made only by law and to the interpretation of this notion from the perspective of accessibility and foreseeability, it cannot be considered that the measure of institutionalized quarantine does not comply with the requirement of legality, given that this measure was provided for by WHO No. 414/2020, issued pursuant to Article 25 paragraph (2) of Law No. 95/2006 and Article 8 paragraph (1) of GEO No. 11/2020, being in accordance with Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

As regards the infringement of the right to individual liberty, a right guaranteed and protected by Article 23 of the Romanian Constitution and Article 5 of the ECHR, it is well-founded to argue that its alleged illegal character cannot be upheld, given the special context in which the facts took place, the measures being taken in response to the exceptional situation determined by the COVID 19 pandemic.

Moreover, Article 15 of the European Convention on Human Rights allows for derogations and provides that, in case of war or other public danger threatening the existence of a nation, a Member State may take measures derogating from the obligations provided for in the Convention, to the strict extent that the situation requires and provided that such measures do not contravene other obligations arising from international law.

Thus, the measure of institutionalized quarantine does not take the form of a deprivation of liberty, respecting the requirements of legality, clarity, foreseeability and proportionality in relation to the purpose of its establishment and the concrete effects it has produced. Practically, the absence of judicial practice on a certain legal issue does not constitute unpredictability of the law (Kudrevicius and others v. Lithuania, judgment of 15 October 2015 (Grand Chamber), application no. 37553/05), and the doctrine has emphasized that foreseeability primarily presupposes the accessibility of the law both in terms of its physical content and the meaning of the notions contained therein, making it possible to anticipate the legal consequences of its disregard.

Thus, physical access to the legislation is ensured internally by publication in the Official Gazette, according to Article 78 of the Constitution and 11 and 12 of Law no. 24/2000, the moment of entry into force being rigorously established, the legality deriving from the fact that the quarantine measure was provided for by WHO no. 414/2020, a normative act in force on the date of its adoption, published in the Official Gazette of Romania with number 201 of March 12, 2020 and brought to the attention of the public through the mass media.

At the same time, as regards the proportionality of the measure to the intended purpose, it was imposed at the beginning of the declaration of the pandemic, the period in which scientific information on the mode of transmission of the disease and the methods of prevention and treatment were quite limited and changed from one day to the next, the purpose of the state taking the measure of institutionalized quarantine for a period of 14 days being to prevent the population from getting sick and to protect the lives of individuals, or from this perspective the measure would not have been disproportionate to the intended purpose, constituting a prompt response by the authorities to the obligation provided for in Article 34 paragraph (2) of the Constitution by which the state is obliged to take measures to ensure hygiene and public health.

Regarding the duration of the measure, it cannot be argued that the legal text in force was not clear and foreseeable or that the duration was excessive, given paragraph 2 of Article 1 of WHO no. 414/2020, namely 14 days established in accordance with the medical information at that time regarding the period of transmission of the virus, paragraph 2 of Article 6 of the WHO establishing the exit from quarantine after the 14-day period if the person was clinically healthy, so that the measure of mandatory institutionalized quarantine imposed was necessary and proportionate at that time to the intended purpose, namely the need to prevent the transmission of the COVID 19 virus in relation to the scientific information available to the authorities.

Application of Article 3 of the ECHR

Regarding the application of Article 3 of the European Convention on Human Rights, which states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment, in relation to the manner in which the institutionalized quarantine measure was applied, according to the interpretation, inhuman or degrading treatment requires the existence of suffering or humiliation of the person in relation to the circumstances of the case and the context of the measure applied.

We consider that an assessment of degrading treatment must relate to the specific situations in which the European Court of Human Rights considered that they had an inhuman or degrading character, for example if a person had been subjected to a thorough body search in an inappropriate manner, if he had been the subject of humiliating comments (Iwanczuk v. Poland, 2001, § 59), or if by keeping him in detention until the application of an administrative measure, without having access to recreational activities and without receiving adequate food (Tabesh v. Greece, 2009, § 38] etc. The assessment of the existence of this criterion is relative and depends on all the circumstances of a case, such as the duration of the treatments, their physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc. (Ireland v. the United Kingdom Decision of 18 January 1978, Series No. 25, page 65, paragraphs 162).

The concept of inhumanity of the prohibition refers to the implications of an uncivilized nature of the physical or mental suffering that is generated by the respective treatment, and that of degrading is linked to specific feelings associated with the degrading and humiliating effects of the ill-treatment applied.

At the same time, not all objectionable or unpleasant aspects of treatment or punishment constitute a violation of Article 3 of the ECHR (Ocalan v. Turkey, ECHR Judgment of 12 May 2005, application no. 46221199, paragraph 181), the assessment being one specifically related to the circumstances of the case, the treatment being "degrading" if it humiliates or demeans a person, in order to overcome his moral and physical resistance, taking into account the concrete situations in which the European Court of Human Rights considered that the treatment or punishment had an inhuman or degrading character.

We consider that none of the elements deduced to the judgment constitute a violation of the rights protected by the provisions of Article 3 of the ECHR, given that the case law of the European Court of Human Rights reveals as forms of inhuman treatment ill-treatment through physical violence, excessive force disproportionate to the person's detention, the conditions inadequate conditions of detention, failure to provide basic medical care and lack of appropriate medical care for detainees, leaving the victim in the custody of those who previously mistreated her, illegal detention in a psychiatric institution and subjecting her to forced psychiatric treatment, prolonged ignoring of the person's allegations or forcing her to vomit in order to obtain evidence, extradition or expulsion to the country where there is an increased risk of being subjected to inhuman or degrading treatment, etc.

On the other hand, according to the case law of the ECHR, examples of degrading treatment refer to the conduct of a body search by a person of the opposite sex, with the victim being stripped naked, touching her genitals and her food, placing the handcuffed person in a metal cage during court hearings, exposing the handcuffed person during public court hearings, without the measure being reasonably necessary, recruiting and maintaining the 71-year-old applicant in military service for a term, with the obligation to participate in training, etc.

For example, treatment or punishment has been held to be degrading when a person with a serious disability was deprived of their liberty in inappropriate conditions and risked developing injuries (Price v. the United Kingdom, 2001, § 30), or when a person had their hair forcibly shaved by prison authorities without legal basis (Yankov v. Bulgaria, 2003, §§ 120-121), when the person was detained for a long time in an extremely overcrowded and unsanitary prison environment (Kalashnikov v. Russia, 2002, § 102), or when they were subjected to an inappropriate body search, with humiliating remarks made (Iwariczuk v. Poland, 2001, § 59).

In this respect, the COVID-19 pandemic represented an exceptional situation, similar to the force majeure regime, particularized by a protection regime related to the general public interest, by recognizing coercive measures necessary to apply regulations derogating from common law, but proportionate to the intended purpose and objective in relation to fundamental human rights (Delia-Mihaela Marinescu, 2021, p.8-17).

Conclusions

The institutionalized quarantine measure applied in the state of global pandemic was based on the provisions of WHO No. 414/2020, the respective measure also reported to the state of emergency at the national level, thus becoming derogatory to the constitutional order, but also legal with respect to the provisions of Articles 3 and 5 of the European Convention on Human Rights.

Regarding the qualification of a treatment as illegal during the period of institutionalized quarantine, as being contrary to the provisions of Article 3 of the European Convention on Human Rights, likely to lead to the engagement of patrimonial liability, the analysis must be related to the criteria introduced in the jurisprudence of the European Court of Human Rights, according to which a specific form of behavior of the authorities can be qualified as being contrary to the norms in the matter.

We are considering the existence of an autonomous legal notion, namely the internationally undefined notion of degrading treatment, analyzed in the jurisprudence of the ECHR and interpreted as a variable criterion related to the circumstances of the case, related to the sex, age, state of health of the victim, but also to the main purpose of the treatment, duration, means used, context of the measures applied or the conduct of the authorities.

On the other hand, we can appreciate that not every treatment not accepted by a person can be considered as degrading treatment, according to the meaning of Article 3 of the ECHR, given that the ECHR jurisprudence indicates as serious attacks on human dignity measures regarding the limitation of a person's social status, his reputation, the creation of feelings of fear, anxiety or inferiority with the aim of humiliating, demeaning and defeating physical or moral resistance.

In terms of the seriousness and consequences of an act to be qualified as belonging to degrading treatment, the simple fear of a person derived from a purely hypothetical and subjective situation is not sufficient to give rise to a prejudice that would be covered by a solution of a court, not implying the circumstantiality of a treatment contrary to Article 3 of the Convention.

In this regard, comparing the factual situation in which a person was subjected to institutionalized quarantine, with the facts considered degrading treatment in the ECHR jurisprudence, it cannot be held that, although potentially causing him negative feelings (frustration, worry), these are part of the category of inhuman or degrading treatment within the meaning of the provisions of the article of the ECHR, with reference to the overall context in which the respective measures were taken, namely the state of pandemic at the global level, the intended purpose being to avoid contact with any other persons in order to prevent potential contamination.

In this regard, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe issued certain guidelines on the treatment of persons deprived of their liberty only on 20.03.2020, which proves that the pandemic situation was evolving rapidly, with the authorities adapting their measures on the fly.

On the other hand, it cannot be established that a person was denied free access to justice, this being imposed by the provisions of Article 21, paragraphs 1, 2 and 3 of the Romanian Constitution, on the grounds that WHO No. 414/2020 on the basis of which the institutionalized quarantine measure was applied would not have provided, at the date of placement in quarantine, the issuance of an administrative act or the possibility of contesting the measure, the challenge being admissible through the common law of the presidential ordinance.

As a result, within the scientific research carried out, we have proven that the introduction into national legislation of legal provisions for the specific protection of persons as a result of taking the institutionalized quarantine measure, if it does not guarantee full access to certain rights and freedoms, may constitute a basis for the recognition of moral damage based on the action of state bodies to arbitrarily order measures contrary to the rights guaranteed by the Constitution and the European Convention on Human Rights.

References

Adam, I. (2021). *Tratat de drept civil. Obligațiile. Contractul* (Vol. 1) [*Treatise on civil law. Obligations. Contracts*]. Bucharest, Romania: C.H. Beck.

Adam, I. (2021). *Tratat de drept civil. Obligațiile. Responsabilitatea civilă extracontractuală. Faptul juridic civil* (Vol. 2) [*Treatise on civil law. Obligations. Non-contractual civil liability. Civil juridical act*]. Bucharest, Romania: C.H. Beck.

Boroi, G., & Anghelescu, C. A. (2012). *Curs de drept civil. Partea generală* [*Civil law course. General part*]. Bucharest, Romania: Hamangiu.

Boroi, G., & Stănciulescu, L. (2012). *Instituții de drept civil* [*Institutions of civil law*]. Bucharest, Romania: Hamangiu.

Marinescu, D.-M. (2021). The rights of persons deprived of freedom during the COVID-19 pandemic: Incidence of judicial error. *Jus et Civitas: Journal of Law and Administrative Sciences*, VIII(LXXII), 2, 8–17.

Pop, L., Popa, I. F., & Vidu, S. I. (2012). *Tratat elementar de drept civil. Obligațiile* [*Elementary treatise on civil law. Obligations*]. Bucharest, Romania: Universul Juridic.