

THE PROBLEM OF RESTRICTIONS WHEN TAKING INTO ACCOUNT THE COVID-19 PANDEMIC

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Abstract: *The Covid-19 pandemic has radically changed the way people comprehend the concept of „fundamental right”. Without previously planning on this, we have been witnesses to an apparent „violation” of some rights we do not only consider to be natural, but also mandatory for any democratic society. Being worried about the effects it might have on health, state institutions have taken the decision to restrict certain liberties, be it totally, or partially. Moreover, people have had their right to circulate limited, while others could not benefit from medical services, due to the overload that has affected sanitary institutions. Given this point of view, it is mandatory to analyze the legal boundaries that have to be taken into consideration, when talking about these decisions, so that legal matters be respected, even though, there have been some limitations put in place at the moment.*

Key words: *Covid-19, emergency state, fundamental rights.*

1. General provisions

The Covid-19 pandemic was a real challenge for all of humanity. Slowly, people were caught up in feelings they had never experienced. The world’s States faced a question they had to deal with legally: The restriction of fundamental rights. Therefore, the State entities applied various measures which they considered appropriate at that time: restricting the possibility of leaving home, transferring education and jobs (where possible) to the virtual area, imposing limitations on the number of people who can stay in an enclosed or open space, and so on..

The effects were felt not only on an economic level, but also on a social level. Ideas have emerged that have challenged the legality of some measures, but also voices that have supported the need to apply tougher rules. Also, the quality of information was a major cause of stress during the pandemic (Apan&Bala, 2021, p.99).

Romania is a Member of the European Union, and this requires that the domestic legislation be in perfect harmony with that of the European Union. Moreover, the

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European Court of Human Rights “oversees” that societies governed by democracy are characterized by a balance when the restriction of freedoms is necessary to satisfy a general interest. From the legal perspective, the measures that state entities have adopted were as special as the context we all experienced, which is why the legal literature has debated this issue with interest.

The Universal Declaration of Human Rights establishes, by Article 13, that “1. Everyone has the right to move freely and to choose his or her residence within the borders of a State. 2. Everyone has the right to leave any country, including his own, and return to his country. We must also mention Article 12 of the International Covenant on Civil and political Rights, which States that “1. Any person who is lawfully on the territory of a State shall have the right to move there freely and to freely choose his or her residence. 2. Everyone is free to leave any country, including his own country. The aforementioned rights may be subject to restrictions only if they are provided for by law, necessary so as to protect national security, public order, public health or morality or the rights and freedoms of others and are compatible with the other rights recognized in the present Covenant. 4. No one may be arbitrarily deprived of the right to enter his own country.”

Therefore, we can note that the right to free movement is an integrated part of the list of fundamental rights, which is why its consecration was made both at international and national level, proof in this regard being Article 25 of the Romanian Constitution: (1) “the right to free movement, in the country or abroad, is guaranteed. The law shall lay down the conditions for the exercise of this right. (2) every citizen is guaranteed the right to establish his domicile or residence in any locality in the country, to emigrate and return to the country.

The right to free movement, as we can see, comprises two components: The possibility recognized by law for the subject of law to move within the territory of a state entity, and the right to leave this space. From the point of view of the legal system of the European Union, the right to free movement is closely linked to the notion of “European citizenship”, that is, to the privilege granted to persons to reside, to pursue professional activities, to pursue study programs and so on within the Community

2. Right of movement at EU level

Human rights must be viewed as a whole so that they are capable of creating an effective legal framework for their exercise. Moreover, the state is obliged to create legal levers to hold all those who unduly limit the freedoms of a subject of law, an aspect that even the European institutions mention. However, a turning point was in 2020, when most countries in the world adopted restrictions, especially those aimed at free movement.

Legally, European law consists of two categories: Rules that have a constitutional value, contained in the founding treaties (Cucerescu, 2013, p.14) and rules that are stipulated in all the legal acts adopted by the institutions operating within the European Union. Therefore, in the “European family”, the question of limiting the right to move, as well as reintroducing control at state borders, has been raised. The main argument in this regard was that migration favors the transmission of diseases, requiring isolation or

quarantine of all persons who are infected or suspected of being infected with the Covid-19 virus.

Even though the external limitation of the right to travel was a difficult but achievable issue, the real challenge was to stop traveling from the inside, which questioned both the economy and the satisfaction of people's basic needs. The Schengen area, characterized by freedom of movement, became, in 2020, a real "fortress" full of control filters. An important point was the acceptance of the European Commission for States to reintroduce the identification of all persons traveling internationally. Moreover, Regulation (EU) 2016/399 on the establishment of the Schengen Borders Code contains some provisions that we also need to mention.

Therefore, the right of freedom under Regulation (EU) 2016/399 can only be limited where there is a general interest. Moreover, the situation purports that the interest should not only be that of the state entity that adopts such a decision, but also serve the other States. Thus, the role of border control is to contribute effectively to combating illegal immigration, trafficking in human beings, but also to adopt preventive strategies so as to prevent threats to internal security, public order, public health and the international relations of the Member States.

Moreover, the border Code also stipulates that the reintroduction of control can be restored even if there are serious threats to public order or internal security, especially if there are terrorist or other types of threats made by organized crime.

From this point of view, the question has been raised whether the danger of people being infected with a contagious disease can be a basis for applying harsh restrictions, the answer being a positive one. There was also a question of non-compliance with Directive 2004/38/EC of the European Council and of the European Parliament which established both the right of persons to move freely and their right of residence in the territories of state entities which are members of the Community. Therefore, measures restricting free movement must be based on the danger of spreading an epidemic disease, relevant in this regard being the definitions provided by the World Health Organization.

The European Union legal framework allows for national travel restrictions, but only if there is no discrimination against nationals of other state entities resident in the host Member State. Moreover, in order to ensure that there is no difference in applicability, the 'proportionality principle' has been created, so that any measure that is adopted must be proportionate to the potential danger. In other words, we must ask ourselves, rhetorically, of course, whether the measures that have been taken have been adequate and effective to prevent the spread of the Covid-19 pandemic.

One argument in this regard may be that, retrospectively, the spread of diseases has been influenced by the migration of peoples. Moreover, intra-Community transmission has been favored by the movement of people, whether we limit it to Community space or third territories. Thus, even if, from a certain perspective, we are tempted to believe that the measures taken by the countries of Europe were not proportionate, we must also recognize that the pandemic has generated a degree of concern, and the uncertainties about the possible long-term effects on people have been, and still are, characterized by uncertainty. It is thus difficult to really assess whether proportionality

has been respected, especially since the measures were a first from a legislative perspective. State entities have experienced a real legislative challenge, and they have used all the tools to ensure that the legal framework is respected.

3. The right to health within the European Union

The European Union has labelled public health a priority. So the strategy of facing the pandemic was a common one, especially when the distribution of vaccines began. Moreover, as the pandemic is still a reality in many countries, there are regular meetings between various European leaders, both to detail the experience in their country and to identify the most appropriate common solutions that can be adopted.

Article 35 of the Charter of Fundamental Rights of the European Union States provides that “everyone has the right to preventive health care and to receive medical care under the conditions laid down by national laws and practices. A high level of protection of human health shall be ensured in the definition and implementation of all Union policies and actions.” It is therefore beyond doubt that, from a legislative point of view, the European area is well protected.

The fight against the Covid-19 pandemic was based on three solid principles, set out in a document based on the meeting of the members of the European Council on 26 March 2020. The first one was the idea that actions should be based on science and public health should be put first. Thus, restrictive measures are nothing more than political decisions, which need to be taken in a balanced way, as they also affect other sectors, such as the economic one. Moreover, the Member States of the European Union must update their measures, scientific studies being a real help in this regard.

The second principle is based on the need for coordinated action by Member States to make cooperation as well as the measures taken effective. Thus, even when the approach is not common, there needs to be a permanent dialog between state entities so that the crisis generated can be overcome effectively.

The third principle provides for the need for mandatory respect and solidarity between Member States. It is true, therefore, that the pressure that has existed and still exists on health systems is not the same among States, and the accumulated experiences must be brought to the attention of all professionals. There is also a need for mutual assistance in the event of this type of disaster. This principle has been fully applicable, and the aid actions of the Member States themselves are proof of this. Thus, while some sent doctors and nurses to help health systems, other state entities were able to send medical equipment, consequently saving many lives.

On 2 February 2021, the provisional guide “Covid 19: Health and safety at work for health workers” was also drawn up. According to it, even though the pandemic has affected most sectors, health workers must benefit from safe working conditions. In fact, even when the World Health Organization declared the Covid-19 pandemic on 11 March 2020, emphasis was placed on the need for the professionals’ right to health to be carefully analyzed, this category being particularly exposed. However, this should not be interpreted in a narrow sense, but in a broad sense, so that all workers must benefit from health care and safety.

In our country, Article 34 of the Constitution, entitled “the right to health protection”, States that (1) “the right to health protection is guaranteed. (2) the State is obliged to take measures to ensure public hygiene and health. (3) the organization of medical care and social insurance system for sickness, accidents, maternity and recovery, control of the exercise of medical professions and paramedical activities, as well as other measures to protect the physical and mental health of the person shall be established according to the law.

Therefore, the state has a number of obligations related to the health sphere, including health protection, development of programs to improve the health system, reduction of mortality and so on. Moreover, it is natural for the Constitution to impose on the legislative authority the task of regulating the main areas and aspects such as: health care, social security, other measures for the protection of physical and mental health (Preduca, 2011, p.186). The issue of the violation of the right to health became even more contentious when certain restrictions were imposed on people who did not receive the vaccine for Covid-19. In fact, we all remember that access to certain areas was only allowed to people who had a green certificate. Therefore, even if we are apparently tempted to mention that the rights provided for in the Constitution have been violated, in reality, the right to health also implies a mandatory component that the legislator must consider: the protection of the subject of law. However, in those circumstances, where the exposure of an unvaccinated person could have been a real danger to that person, the limitation of presence in certain places appears as a form of individual protection and not as an abusive restriction.

Human conduct is not exclusively a matter of one’s own will, but is governed by certain rules (Ungureanu, 2016, p.1). The legislator is obliged to take into account the needs of the people, both legally and socially. The restriction of some rights is a sensitive issue, and the legislator has the task of protecting all social values, regardless of the situation in which they find themselves. Moreover, society needs protection, and this can only be achieved through legal norms.

The issue of the right to health has been and will be intensively debated within the European Union. The main responsibility for the provision and organization of the health system lies with state entities, but the European Union must work openly with them and create bridges for cooperation and development. European policies therefore need to be focused on protecting and improving citizens' health, actively supporting digitalisation and upgrading existing infrastructures, and preparing the Member States of the Community area to fight other future epidemics.

The European Commission’s Directorate-General for Health and Food Safety is tasked with supporting all efforts by state entities to improve citizens’ health and facilitate access to the health system.

The EU Health Program, conducted between 2021-2027, was meant to help countries cope with the COVID-19 pandemic, but also to create a crisis response system within the European Union. Therefore, among other things, the main aims of this program are: promoting health and preventing diseases, especially cancer, creating cooperation programs with international health impact, preventing and preparing for response to cross-border health threats, filling national stocks with pharmaceutical products that are

absolutely necessary in a limited situation, creating a human reserve made up of professionals of the medical sector, and so on.

From the other perspective, the Council's recommendations on measures relating to travel in the European Union were based on drawing attention to the issue of violations of the freedom of movement of people, even by introducing border controls or applying travel restrictions. However, it was argued that the possibility of restriction is a faculty recognized by Member States, since even the protection of public health is a responsibility incumbent upon them. Moreover, in order to avoid any problems that may arise in the provision of services, but also to have a minimum degree of predictability and transparency of decisions, the Council ensured coordination between the Member States of the European Union.

In 2020, the Council decided to adopt EU Recommendation 2020/1475, which was intended to establish a common framework for travel-related measures. Because of the vaccination, the year 2022 also required the adoption of EU Recommendation 2022/107, which is a positive response to the receptivity of the population towards vaccination. Therefore, persons holding the digital certificate should not be affected by restrictions on free movement, the validity of the document being recognized in all Member States of the Community area.

It was also decided that persons who do not have a digital certificate are required to get tested just before the trip or immediately after arrival, and persons working through transport, as well as patients who are forced to travel for medical reasons, are exempted from this procedure.

Therefore, the COVID-19 pandemic has given rise to many controversies, both in the legislative and medical sphere. As I have already mentioned, although some rights have apparently been violated, this decision was not an abusive one, but was based on health considerations. Moreover, the restriction of some rights appears to be an effective lever to fight epidemics, but this must not be interpreted in such a way that the legal framework undergoes changes motivated by exceptional states. From this point of view, the European Union acted like a very attentive spectator and finally intervened, through recommendations, decisions and so on, so that citizens would not lose their rights recognized by law.

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