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COVID-19 Legal Insights



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1. Activating the derogation from the application of the ECHR provisions

Romania activated the derogation from the application of the provisions of the European Convention of Human Rights in the context of the state of emergency generated by the COVID-19 epidemic

Article 15 of the European Convention of Human Rights (ECHR) provides for the possibility of the signatory states to derogate from the provisions guaranteeing the protection of fundamental human rights to the extent strictly required by the public danger situation and only after the prior notification of the Secretary General of the Council of Europe.

On 17 March 2020, the Permanent Representation of Romania registered at the Secretariat General of the Council of Europe a *note verbale* whereby it announced that some of the emergency measures taken by Presidential Decree No. 195/2020 establishing the state of emergency involve derogations from the obligations undertaken under the ECHR¹.

1. What does ECHR Article 15 provide?

Article 15 of the ECHR comprises a provision allowing the Signatory States to derogate, under exceptional circumstances, from their obligation to guarantee and protect certain human rights.

The legislative text consists of **three paragraphs**.

The **first paragraph** refers to the exceptional situations in which one may take measures derogating from its obligations under the ECHR, namely in case of a public danger threatening the life of the nation, and limits the taking of derogatory measures only to the extent strictly required by the exigencies of the situation, and only provided that such measures are not inconsistent with other obligations of the state under international law (other treaties and conventions ratified).

The **second paragraph** protects certain fundamental rights from any derogation or reservation.

¹<https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005/declarations>

The **last paragraph** comprises procedural provisions compelling the Signatory States to inform the Secretary General of the Council of Europe of the measures which they have taken and the deadline by which such measures should be implemented.

2. What are the rights in respect of which no derogations or reservations may be formulated?

Paragraph 2 of Article 15 of ECHR protects certain rights from derogation:

- Right to life (except in respect of death resulting from lawful acts of war);
- Right not to be tortured or inhumanly treated;
- Right not to be held in slavery or servitude;
- Right not to be convicted for an action or an omission which did not constitute an offence at the time when it was committed.

A series of rights protected by additional protocols to the ECHR are also added thereto, out of which we note:

- Protocol No. 6 abolishing the death penalty;
- Article 4 of Protocol No. 7 providing that no one shall be liable to be tried twice for the same act.

3. What are the exceptional situations in which derogations may be formulated?

Article 15 of ECHR provides that the Signatory States may formulate derogations from the application of the Convention in “**time of war or other public emergency threatening the life of the nation**”. In the case-law of the Court of Strasbourg (Case of [Lawless v Ireland No. 3](#), § 28), the syntagma was interpreted as referring to “*an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed*”.

A wide margin of appreciation is left to the Signatory States on the analysis of the opportunity of declaring a state of emergency, nevertheless, the States do not enjoy an unlimited discretion in this respect, as the domestic margin of appreciation is subject to the supervision of the European Court of Human Rights.

Although the majority of the cases analysed by the Strasbourg judges on the application of Article 15 concerned states of war or terrorist threats, the criteria established by the Court would justify certain derogations from the ECHR also in the situation created by the COVID-19 epidemic, given the serious danger to the health of all citizens, regardless of the area or occupation.

4. Under what conditions can derogatory measures be taken?

The text of Article 15 compels the Signatory States to strictly meet the criterion of the proportionality of the measure when such measure restricts the exercise of certain human rights protected by the ECHR.

The Court of Strasbourg stated (Case of *Ireland v the United Kingdom*, § 207) that the state should determine what is necessary to overcome the emergency situation, nevertheless its margin of appreciation are not unlimited in this respect, as the Court judges may analyse whether the restriction was justified by the circumstances and whether it complies with the obligations undertaken under the international law (Case of *Mehmet Asan Altan v Turkey*, § 94).

In order to verify whether the restrictive measure was adequate, the Court of Strasbourg established by its case-law a series of evaluation criteria:

- Whether ordinary laws would have been sufficient to meet the danger caused by the public emergency;
- Whether the measures taken are a genuine response to the emergency situation;
- Whether the measures were used for the purpose for which they were granted;
- Whether the derogation is limited in scope, as provided by its reasoning;
- Whether the need for the derogation was reviewed before adopting the measure;
- Whether there were any attenuations in the measures imposed;
- Whether the measures were subject to safeguards;
- The importance of the rights at stake;
- Whether judicial control of the measures is practicable;
- The proportionality of the measures and whether their application involved any discrimination;
- Whether the measure was lawful and had been effected in accordance with a procedure prescribed by law;
- Whether the views of any national courts on the issue have been respected.

5. What are those rights restricted by the measures taken by the Romanian state?

The procedural rules established by the third paragraph of Article 15 provide that any derogations from the application of the Convention should be notified to the Council of Europe. The Romanian state complied with this obligation and presented the rights that it established to restrict in the exceptional situation generated by the pandemic:

- Freedom of movement;
- Right to private and family life;
- Inviolability of domicile;
- Right to education;
- Freedom of assembly and association;
- Right to the protection of private property;

- Right to strike;
- Economic freedom.

The intrusions into the exercise of the rights should be limited to those expressly provided for above, and must be proportional to the objectives pursued by the derogatory legislation. Otherwise the state shall no longer be entitled to justify the restriction by invoking Article 15 of ECHR.

Any amendment to the rights at stake, to the measures indicated, or to the 30-day initial period of the state of emergency should be subject to a new notification to the Council in order to be able to benefit from the application of the provisions of the ECHR.

6. What remedies do the persons in respect to whom disproportionate or unjustified restrictive measures have been taken have at their disposal?

Once the ECHR was ratified by the Romanian state, its provisions and the jurisprudential interpretation thereof became mandatory for the national courts and public institutions, as the litigants have the possibility to directly invoke the proportionality criteria established by the judges of the Court of Strasbourg.

The disproportionate or unjustified nature of a measure may be invoked both before the public entities liable for ensuring that measures are taken, and within judicial proceedings.

If your interests have been or will be affected by non-compliant restrictions of the fundamental rights protected by the ECHR, and the prejudice cannot be remedied at national level, you may refer directly to the European Court of Human Rights in order to obtain either a removal of the consequences of such breaches, or a fair compensation of the prejudice sustained.

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Editors

COVID-19 - Legal Insights is our response to the COVID-19 outbreak. We shall keep you informed on the various legal challenges posed by the coronavirus, thanks to a dedicated practice group comprising lawyers with different backgrounds, such as compliance/regulatory, corporate and commercial, insurance, labour and employment, litigation and arbitration, insolvency, public procurement, data privacy, tax and customs. In addition, our taskforce offers strategic advice on crisis-specific matters: corporate restructuring, review and (re)negotiation of agreements (including collective bargaining agreements and individual employment contracts), performance of the contracts which are affected by force majeure and hardship, unblocking pre-litigation relationships, etc. To be up to date with the news in these matters, you may access the resources available at the following link: <http://www.tuca.ro/covid-19/>



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