WRITTEN OPINION

of Promo-LEX Association on the Request of the Constitutional Court of March 27th, 2020

www.promolex.md

Promo - LEX

Promovarea democrației și a drepturilor omului

Promo - LEX
Promovarea democraţiei şi a drepturilor omului
str. Petru Movilă 23/13
MD-2004 Chişinău, Republica Moldova
tel./fax: +373/ 22 45 00 24
e-mail: info@promolex.md
www.promolex.md

WRITTEN OPINION

of Promo-LEX Association

on the Request of the Constitutional Court of March 27th, 2020

Context

On March 23rd, 2020, a group of MPs addressed the Constitutional Court with a petition to check the constitutionality of the following legal provisions: - paragraphs 2, 3, 4 and 5 of Art. I of Law no. 54 of 17 March 2020 amending the Law no. 12/2004 on the regime of the state of emergency, siege and war; - articles 20 letter k), 22 letter i), 24 letter g) and 25 letter j) of Law no. 212 of 24 June 2004 on the regime of the state of emergency, siege and war as well as – the wording "other actions required" in article 2 para. 12) of the Parliament's Decision no. 55 of 17 March 2020 on the declaration of the state of emergency. On the same lines, the authors of the aforementioned petition requested the Court to stay the proceedings of the disputed rules under article 25^1 of the Law no. 317 of 13 December 1994 on the Constitutional Court and article 7^1 of Code of the Constitutional Jurisdiction no. 502 of 16 June 1995.

On March 24th, 2020, the Constitutional Court has rejected the request submitted by the group of MPs to stay the proceedings of the aforementioned provisions.

Therefore, on March 27th, 2020, the Constitutional Court requested the Promo-LEX Association to submit a written opinion on the aforementioned petition.

By means of the present Opinion, Promo-LEX provides its views on the following issues:

1. the state of affairs, the normative instruments and area falling under its competence.
2. The conditions that the law/legislative amendment must meet in order to constitutionally operate the restriction of human rights and freedoms.
3. Amendment of Law in the context of activation of art. 15 of ECHR by the Republic of Moldova.
4. Practical considerations guided by the relevant ECtHR case-law.
5. Reviewing the legality of the rules adopted, compliance with pre-existing legal provisions.

The Promo-LEX Association will set out its views neither on the admissibility of the request nor on the competence of the Constitutional Court to examine the petition.

The state of affairs, the normative instruments and area falling under its competence

The Constitutional Court found (JCC 12/2018) that the level of accuracy of the legislation depends to a considerable extent on the content of the normative instruments in issue, the area falling under its competence as well as both on the number and status of those to whom it is concerned.

Thus, we reckon that the predictability of the rules whose review of constitutionality has been requested therein, refers to and is applicable in the specific situation – "state of emergency" limited by time and space. The state of emergency has been established upon the adoption of the Parliament's Decision no. 55/2020 on the declaration of the state of emergency (17 March 2020), for

str. Petru Movilă 23/13
MD-2004 Chişinău, Republica Moldova
tel./fax: +373/ 22 45 00 24
e-mail: info@promolex.md
www.promolex.md

a period of 60 days (until 15 May) throughout the territory of the Republic of Moldova, with the possibility of extending this period under art. 15 of Law 212/2004.

Pursuant to arts. 3-4 of Law 212/2004, this state of affairs is governed by the Constitution of the Republic of Moldova, previously mentioned law, other normative acts, as well as international agreements to which the Republic of Moldova is a party. The laws and other normative legal acts enacted up to the declaration of the state thereof act insofar as they do not conflict with the aforementioned law. Following the lifting of the state of emergency, the normative acts adopted for this period shall be repealed requiring no special notice to be given in this respect.

Similarly, the operating conditions of state bodies are subject to change in the event of the establishment of a state of emergency. Pursuant to art. 8 of the Law, during the state of emergency (...) some tasks of the local and central public administration shall be entrusted to the competent bodies provided for by Law 212/2004, in the manner determined by the Government, whilst the local and central public administration authorities shall only exercise those tasks, which have not been delegated to the competent bodies referred to in para. (1) having also the obligation to provide them with the required support.

The provisions of the Commission for Exceptional Situations of the Republic of Moldova shall enter into force at the time they are adopted and are mandatory and enforceable for the managers of the Central and Local Public Administration Authorities, of economic operators, of public institutions, as well as for citizens and other persons within the territory of the Republic of Moldova.

In light of the existing state of affairs, of the field covered by the Law 212/2004 as well as of the unlimited number of persons to whom they are addressed (the population of the Republic of Moldova), Promo-LEX concludes that the enforcement of measures by the authorities of the Republic of Moldova that seek to prevent, mitigate and liquidate the consequences of the state of emergency, are able to affect and they do affect the human rights and fundamental freedoms. It should be noted that the measures already approved therein seem to infringe the right to life, to move freely, to hold meetings, the right to work, the right to education, the right to freedom of conscience, access to information and freedom of expression, the right to study and right to a system of health protection, etc.

However, we reiterate that the measures applied therein must be proportionate to the intended purpose and avoid any arbitrary situation. For this reason, and in order to protect the citizens of the Republic of Moldova against any arbitrary situation, the only possible and strongly needed solution especially in the field covered by Law 212/2004 is to include an exhaustive list of measures that can be applied when a state of emergency is being declared.

The conditions that the law/legislative amendment must meet in order to constitutionally operate the restriction of human rights and freedoms

The restriction of human rights and freedoms is an exception regulated by the fundamental law, which gives the legislator leverage to act in certain critical situations, being able to impose limits, in situations expressly provided for by the law, on guaranteeing certain fundamental rights. The express regulation of this event will be identified within the provisions of the Constitution of the Republic of Moldova in art. 54 – Restriction on the exercise of certain rights or freedoms. The authors of the petition requested the Court to check the constitutionality of several provisions referring directly to an imminent breach of this constitutional article. The Promo-LEX Association will further comment on a legal explanation regarding the provisions of art. 54 in the context of recalling international provisions that refer to certain similar hypotheses.

str. Petru Movilă 23/13
MD-2004 Chişinău, Republica Moldova
tel./fax: +373/ 22 45 00 24
e-mail: info@promolex.md
www.promolex.md

First of all we will refer to the Universal Declaration of Human Rights, namely art. 29 para.(2) showing the ability to restrict certain rights: "*In the exercise of his rights and freedoms, everyone shall be subject **only** to such limitations as are determined **by law**, solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".* In the semantics of this provision, the conjuncture in which certain limitations can be operated is emphasized, but at the same time, reference is also made to a need for explicit regulation of the limitation, taking into account first of all compliance with the principles of accessibility, clarity and predictability. However, the law within the meaning of this provision must provide exhaustive and clear perspectives on the rights and freedoms to be restricted.

The European Convention on Human Rights enshrines the possibility of the restriction of rights in several circumstances: in the case of the freedom of thought, conscience and religion, pointing out that: "*Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others"*. The same textual approach is offered by the ECHR in the case of freedom of expression, the rights to respect for private and family life, as well as in the case of freedom of movement. In this case, it is emphasized that in addition to the obligation of the state to provide for the restriction of rights by law, there is also the need for the existence of measures necessary for public safety, the protection of public order, **health**, morals, etc. In order to build a legislative framework designed to intervene promptly in the elucidation of exceptional situations described above, the legislative text should expressly provide for the rights and freedoms to be restricted. The requirement thereof is imposed by the exceptional nature on the one hand, but also by the specific purpose of the measure in emergency situations on the other hand, this being an aim, which cannot be achieved by ambiguous and unclear provisions.

The provisions of art. 4 para. (1), art. 5 para. (2), art. 12 para. (3), arts. 18-19, art. 21, art. 22 para. (2) of the International Covenant on Civil and Political Rights, lays down the manner of restricting certain rights, as follows: "*The rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant".* In the sense of this international norm, we also identify the imperative regulation regarding the need for the restriction to be provided for by law, but also to have specific reasoning that would argue for a possible restriction of human rights and freedoms.

In the context of the petition submitted to the Constitutional Court, we conclude that the wordings used by the legislator in the text of the law: "*enforcement of other required measures*" or "*exercise other required tasks*", do not offer the subject of law an express guarantee on the respect of his rights and freedoms. We will base our position on the reasoning that, in a state governed by the rule of law, the legal norm must always be interpreted in the sense of the priority of freedom over authority, that is, always in favor of the person and to the detriment of authority. The authority that seeks to limit the rights must be penalized. This way of interpretation is natural, since the text is aimed at guaranteeing the rights and freedoms of the person. Where a term broadening the authority's powers is used, the term must always be interpreted *stricto sensu* (in this context express and precise provisions on the restriction of rights are necessary).

The law must meet certain conditions in order to constitutionally operate the restriction of human rights:

1) The first condition is that the law should be known. This means first of all that the law must be made public. In order to meet the conditions of predictability, the law must be sufficiently clear so

str. Petru Movilă 23/13
MD-2004 Chişinău, Republica Moldova
tel./fax: +373/ 22 45 00 24
e-mail: info@promolex.md
www.promolex.md

that a subject of law with secondary education can reasonably understand the content of the law. The predictability of the norm derives from the quality of the rule of law, a quality that the Republic of Moldova claims to have. The condition of predictability has a broad meaning, that is, it is not only that laws must be made known to the public, but that they can be changed for the future in a way that is predictable for people.

Thus, in order to comply with the condition of predictability, the subject of law must reasonably expect that the rule could be changed. In the context considered by us, it is practically infeasible to analyze the predictability of the constructions operated in the law: "*enforcement of other required measures*" or "*exercise other required tasks*", as the provisions thereof do not provide the necessary clarity to the subject of law that will be restricted in his rights and freedoms, since the legal provision offers imprecise and general possibilities to the authorities. Moreover, these possibilities could trigger abusive side effects. The suggestion in this situation refers to the possibility of the legislator to supplement the legislative framework, depending on social developments, with new, express and exact provisions, aimed at regulating contemporary appearances related to the restriction of one right or another. **Finally, all regulations that are intended to restrict certain rights must provide a clear perspective on which rights/ freedoms/ actions/ measures/ competences/duties they relate to.**

2) Another condition that the legal norm must meet suggests that the restriction must be necessary. In order to guarantee the citizens' rights and freedoms through the defense of national security, that restriction must be absolutely necessary to achieve the goal. In that sense, the restriction may not be operated unless it is necessary to achieve the aim.

Following on from that, **the Promo-LEX Association does not challenge the opportunity for making certain amendments to the legislation relating to the exceptional situation at national level,** but cannot accept the establishment of a vague regulatory framework, which could endanger the observance of human rights. In this context, it concludes that any limitation/restriction **must have a clear content and be expressly provided by law.** The lack of precise legal rules to determine exactly what measures might be applied, and the spectrum of the powers of the authorities, open the possibility of potential abuses by the competent authorities. However, the regulatory framework in such a sensitive period must be carried out in a clear, predictable and unobtrusive manner, so as to remove, as far as possible, the eventuality of any arbitrary situation or the abuse of those called to apply the legal provisions. As a positive consequence, having rules with a clear content, we could also analyze the condition on the necessity of restriction, however at present this is impossible, because the subject of law cannot know what to expect from the authorities, due to the imperfection related to accuracy, clarity, predictability and necessity.

str. Petru Movilă 23/13
MD-2004 Chişinău, Republica Moldova
tel./fax: +373/ 22 45 00 24
e-mail: info@promolex.md
www.promolex.md

Amendment of Law in the context of activation of art. 15 of ECHR by the Republic of Moldova

According to the Declaration[1] registered at the Secretariat of the Council of Europe based in Strasbourg under the no. FRA-CoE/352/169 of 19 March 2020, submitted by the Representation of the Republic of Moldova to the Council of Europe, we conclude that in addition to the announcement of the international institution on establishing the state of emergency in the Republic of Moldova until May 15th, 2020, CoE was also announced about the activation of Art. 15 of the ECHR allowing for certain derogations from the enforcement of the Convention, under the conditions of the state of emergency caused by the COVID-19 pandemic. This could be interpreted as a protection measure taken by the authorities of the Republic of Moldova, protection against possible petitions submitted with the ECtHR that would target abuses or other human rights violations.

The sequencing of recent strategic and legal measures raises several concerns for Promo-LEX as an exponent of civil society:

a) March 17th, 2020 – "the article[2] 20 is supplemented with the letter k) worded as follows: enforcement of other required measures". Article[3] 22, para. (1) is supplemented with letter i) worded as follows: "exercise other required tasks". Article[4] 24 is supplemented with letter g) worded as follows: "exercise other required tasks". Article[5] 25 is supplemented with letter j) worded as follows: "exercise other required tasks" under Law no. 54 amending the Law no. 12/2004 on the regime of the state of emergency, siege and war.
b) March 17th, 2020 – a state of emergency is declared in the Republic of Moldova under Parliament's Decision no. 55 of 17.03.2020. *Inter alia*, the wording of the Decision thereof in addition to a multitude of tasks of the Commission for Exceptional Situations also provides for the section (12) ***enforcement of measures*** *that seek to prevent, mitigate and liquidate the consequences of the* (COVID-19) *Coronavirus Pandemic*;
c) March 19th, 2020 – The Secretariat General of the Council of Europe is informed about the activation of Art. 15 of the ECHR allowing for certain derogations from the enforcement of the Convention, under the conditions of the state of emergency caused by the COVID-19 pandemic.
The concern of the Promo-LEX Association is related to the accumulation of these events, which could represent an imminent danger with regard to the situation of respect for human rights in the Republic of Moldova. As the priorities and objectives of the Promo-LEX Association include, among other things, the promotion and defense of human rights, we will describe below what are the reasons for concern in the context of legislative changes, but also in the context of the activation of Art. 15 ECHR.

Article 15 of the European Convention on Human Rights provides that *"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 this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law"***. This article affords to the governments of the States parties, in exceptional circumstances, the possibility of derogating, in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms under the Convention. In March and April 2020, in the context of the COVID-19 health crisis, Latvia, Romania, Armenia, the Republic of Moldova, Estonia, Georgia, Albania and North Macedonia notified the Secretary General of the

[1] https://rm.coe.int/09000016809cf9a2
[2] The measures applicable during the state of emergency
[3] Competences of the Commission for Exceptional Situations of the Republic of Moldova
[4] Competences of the Civil Protection and Exceptional Situations Service
[5] Competences of the Ministry of Internal Affairs

str. Petru Movilă 23/13
MD-2004 Chişinău, Republica Moldova
tel./fax: +373/ 22 45 00 24
e-mail: info@promolex.md
www.promolex.md

Council of Europe of their decision to use Article 15 of the ECHR.[6] It should be noted that Article 15 has also been considered in the past only in exceptional circumstances[7].

The fact that the authorities have indicated their intention to make use of the exceptional provisions provided in art.15 ECHR, already gives us an indication that there are hypothetical certain premises that lead and could lead directly to the violation of human rights (these premises do not prescribe which rights could be violated - any), and in conjunction with the recently amended provisions using the same uncertain mechanism based on the regulation of unlimited powers "bestowed" upon the authorities, we can really conclude that the situation regarding the respect of certain human rights in the Republic of Moldova can be compromised. Given the fact that the doctrine has often stated that the ECHR is the strongest guarantee for the respect of human rights and freedoms, the fact that the Moldovan authorities have "overshadowed" its provisions clearly gives cause for further concern. Most of the CoE member countries did not hurry to make use of the provisions of art. 15, even if among them there are countries with less democratic views.

Practical considerations guided by the relevant ECtHR case-law.

In the Court's view, the scope of the concepts of predictability and accessibility depends to a considerable extent on the context of the rule in question, the field it covers and **the number** and quality of its addressees[8]. We will conclude that the legal norm, on which the petition no. 47a has been lodged with the Constitutional Court, covers practically all social relations on the one hand and addresses all citizens on the other hand. So, since the scope of the norm covers practically all human rights and freedoms, the norm could accordingly affect all subjects of law, regardless of age, legal capacity, sex, gender, social status, political membership, ethnicity and religion. The predictability in the context of ECtHR practice has been repeatedly characterized by the quality of the legislative text, in the sense of providing the individual with clear, concise and unambiguous provisions.

For example, with regard to the quality of the law to be "predictable" and "affordable", the European Court of Human Rights has pointed out in the case Sud Fondi SRL and Others v. Italy, judgment of 20 January 2009, that a legal framework that does not allow an "accused" to be aware of the meaning and scope of the criminal law is inappropriate not only by reference to the general notions of "quality" of the law, but also by taking into account the specific requirements of the notion of "criminal legality".

The ECtHR also recalls that a "law", within the meaning of Article 10 § 2 of the Convention, is a rule formulated with sufficient precision to allow a citizen to decide his conduct and **to foresee, reasonably, depending on the circumstances of the case, the consequences that might result from a particular fact[9].** We will conclude, that the formulations: ***enforcement of other required measures*** and ***exercise other required tasks,*** not only does not provide the subject's ability to anticipate certain events, requests or prohibitions from the authorities, but nor does it offer him potential to be able to decide on the conduct according to certain circumstances not yet covered by the legal norm.

In its vast jurisprudence, the ECtHR highlighted the importance of ensuring the accessibility and predictability of the law, establishing a series of benchmarks that the national legislator must take into account to ensure these requirements. Thus, in cases such as The Sunday Times v. the United

[6] ECtHR Sheet: *Derogation in time of emergency,* April 2020 https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf
[7] Measures of derogation taken by Ireland in 1957 to deal with activities of the IRA (Irish Republican Army) and its dissident groups, Derogations by the United Kingdom in the early 1970s following terrorist acts related to the situation in Northern Ireland, the Turkish Government has made use of the provisions of art. 15 following the attempted coup of 2016, etc.
[8] *Case Groppera Radio AG and Others v. Switzerland, Judgment of 28 March 1990, paragraph 68*
[9] *Case Amihalachioae v. Moldova*, para. 25

str. Petru Movilă 23/13
MD-2004 Chişinău, Republica Moldova
tel./fax: +373/ 22 45 00 24
e-mail: info@promolex.md
www.promolex.md

Kingdom of Great Britain and Northern Ireland (1979), Rekvényi v. Hungary (1999), Rotaru v. Romania (2000), Damman v. Switzerland (2005), the Court pointed out that "law can only be regarded as a rule stated with sufficient precision to allow the subject to regulate his conduct. The subject must be able to foresee the consequences that may arise from a given act". These legal benchmarks, strongly promoted by the ECtHR jurisprudence, should also be applied in the process of legislative edification in the Republic of Moldova, otherwise **the lack of precision of the norm can undoubtedly contribute to the violation of human rights and freedoms.**

Reviewing the legality of the rules adopted, compliance with pre-existing legal provisions

In addition, although it is an issue of legality and not of constitutionality, we would like to mention that the contested rules do not conform to the general rules set out in the text of the law, affecting the general conception of the law.

According to art. 2 of Law No.212/2004 the scope of the law is represented by:

a) the grounds, manner and conditions for declaring a state of emergency, siege or war and the competence of the authorities declaring it;
b) **the measures to be applied during a state of emergency,** siege or war, as well as the rights, obligations and liability of legal and natural persons during that period.

In this sense, the law itself specifies the field it regulates, being necessary that at least the aspects highlighted in art. 2 thereof to be covered by the law in its entirety.

Art. 20 provides for the measures that can be applied during the state of emergency, **depending on the specific situation**. Taking into account, the provision of the norm of art. 20, as well as the character of the norm, we conclude that the legislator intentionally provided a list of exhaustive measures, which can be applied depending on the situation that generated the establishment of the state of emergency. Similarly, arts. 22, 24, 25 contained exhaustive lists of competences of the authorities during the state of emergency, it being imperative to keep the strict and exhaustive regulation of the measures and tasks during this period. *Ad absurdum,* the legislator could establish in the provisions of arts. 20, 22, 24, 25 only those general rules, according to which the authorities may apply depending on the concrete situation any necessary measures that is to say, they can exercise any powers required therein. Hence, we conclude that supplementing the aforementioned articles, with provisions that unlimitedly extend the spectrum of measures that can be applied and the powers that can be exercised, affects the general conception and the unitary and exceptional character of the law thereof, contrary to art. 64 of Law 100/2007 on normative acts.

Moreover, pending the entry into force of Law no. 54/2020, the Law on the regime of the state of emergency, siege and war provided for the restriction of adoption, amendment or repeal of the organic laws during the state of emergency, siege and war. **We consider that Parliament was not entitled to approve the amendments to the law on the day related to the emergency period, and the President was not entitled to promulgate the respective changes**[10] for the following reasons:

a) **The time of the entry into force of the Parliament's Decision** on the declaration of the state of emergency **is earlier than the time of entry into force of the Law** 54/2020 amending the Law on the regime of the state of emergency**.** Pursuant to art. 14 para. (1) of Law no. 212/2004, the decision on the declaration of the state of emergency **shall enter into force on its adoption.** Thus, at the time of the adoption of the Parliament's Decision no. 55 of 17 March (4:25 pm), amendments

[10] With their immediate implementation as of 17 March 2020.

str. Petru Movilă 23/13
MD-2004 Chişinău, Republica Moldova
tel./fax: +373/ 22 45 00 24
e-mail: info@promolex.md
www.promolex.md

to Law no. 212/ 2004 even if voted in Parliament, were not yet in force, taking into account the publication of both the Law no. 54/2020 and Decision 55/ 2020 in the Official Gazette no. 86 of 17 March 2020. According to the Law 54/ 2020 the latter shall enter into force on the day of its publication (17 March 2020).

b) Pursuant to art. 4 para. (2) of Law 212/2004, in force at the time of the declaration of the state of emergency, during a state of emergency (...) no amendments to the Constitution, no adoptions, amendments or repeal of organic laws are allowed therein (...). According to art. 1 of the Decision no. 55/ 2020, a state of emergency has been declared throughout the territory of the Republic of Moldova between March 17th – May 15th, 2020. Thus, on March 17th, a day that is part of the period of emergency, no amendment or repeal of organic laws, neither of Law no. 212/ 2004, as amended on 17 March 2020 were allowed.

In conclusion, the Promo-LEX Association believes that:

- the wordings used by the legislator in the text of the law: *"enforcement of other required measures"* or *"exercise other required tasks",* do not offer the subject of law an express guarantee on the respect of his rights and freedoms. Moreover, they deprive every one of the opportunity to know their responsibilities in a state of emergency imposed by the abstract powers vested in the authorities. **As a result, from the point of view of Promo-LEX, it contradicts the general constitutional provisions on fundamental human rights and freedoms;**
- in exceptional situations, **it is rather proposed that the legislature should supplement the legislative framework, depending on social phenomena, with new provisions that are precise and designed to regulate phenomena related to the restriction of a certain right.**
- **the Parliament was not entitled to approve the amendments made to the law on the day of the emergency period, while the President was not entitled to promulgate the amendments thereof** with immediate effect from 17 March 2020.