

Opinion on the proportionality and legality of the measures taken by the Government during the state of emergency

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This Opinion analyses how the mechanisms of management of the state of emergency established by the Parliament Decision [no. 55/2020](#) of 17.03.2020 regarding the declaration of the state of emergency and subsequently applied through the provisions of the [Decisions](#) of the Commission for Exceptional Situations of the Republic of Moldova.

The opinion will refer to the legal aspects established through the acts mentioned above, including the amendments made to Law no. [212/2004](#) on the state of emergency, siege and war regime through Law no. [54/2020](#).

Executive Summary

This opinion analyses the derogations established by the CES Decisions from the general rules of the Administrative Code and the Civil Procedure Code related the conditions for challenging the CES decisions, the derogations from the norms of the Misdemeanour Code in the matter of misdemeanours committed in the context of the state of emergency, the derogations from the provisions Labour Code related to the dismissal of employees, derogations from the general provisions of the legal professions legislation - notaries, lawyers and bailiffs related to the application of disciplinary sanctions, as well as derogations from the provisions of the Customs Code and customs legislation related to the imports of lots of medicines in the eastern regions of the country.

Findings

The derogations provided in the CES Decisions are disproportionate and contrary to the provisions of Article 54 of the Constitution. In particular, derogations from the rules of the Administrative Code, the Code of Civil Procedure, the Labour Code and the Misdemeanour Code are contrary to the restrictions imposed by Article 54 of the Constitution, namely the impossibility of restricting the right to free access to justice (Article 20 of the Constitution). The impossibility of effectively exercise a remedy before the court is mainly due to the reduced terms of appeal, the CES itself establishing the rules of challenge of its own provisions, the lack of appeal / recourse for the decisions examining the appeals against the provisions of the CES.

At the same time, the derogations from the rules related to the exercise of the profession of lawyer, notary and bailiff in the part related to the application of disciplinary sanctions is in contradiction with the provisions of the previous provisions and disproportionate with the measures that are being followed in the context of the state of emergency.

The derogations from the rules established in the customs legislation affect the actors involved in the pharmaceutical field and distort the market for pharmaceutical products.

Recommendations

1. The procedural norms on the challenge of the provisions of the CES can be included in the existing normative framework, especially since via the amendments made to Law no. 211/2004 Parliament has retained the right to amend organic laws.
2. Exclude the exceptions for the right not to be fired during leave, the right to be reinstated and compensation for damages caused by illegal dismissal, as well as establish a limited number of employees, which are essential to ensure the application of emergency measures, for whom some of the rights resulting from the Labour Code are restricted. The right of appeal cannot be limited in any way, to ensure compliance with the provisions of Articles 54 and 20 of the Constitution.
- 3 Revision of the provisions of points 22-40 of the Decision no. 4 of March 24, 2020 of the CES related to the derogations from the provisions of the Misdemeanour Code, indicating sufficient time to allow the sanctioned party to form his/her defence and to present the evidence relevant to the defence (appeal within 3-5 days, review the case by the court within 3-5 days), the exclusion of derogations related to the grounds of challenge and of appeal, with the application of the existing norms of the Misdemeanour Code.
4. Establishing jointly with the Notarial Chamber, the Bar Association and the National Union of Bailiffs a list of lawyers, notaries and bailiffs who can be contacted in emergency situations, keeping the remote work for the other members of the given professions as far as possible;
5. Developing a protocol with detailed rules related to the specifics of the provision of notarial, legal and enforcement activities in urgent cases. The main elements should include:
 - a. Exclusion as far as possible of the documents on paper, including the transmission of the documents in electronic format with the application of the electronic signature (including the use of *MSign* platform), and, if necessary, for authentication purposes;
 - b. Identifying and equipping isolated areas for communication with clients if the notary, attorney or enforcement services cannot be provided remotely;
 - c. Treatment of surfaces and documents on paper support with ultraviolet light;
 - d. Compulsory payment of services through electronic payments offered by commercial banks (p2p, internet banking) or opening the option of using *MPay* for private operators.
6. Abandoning derogations from the provisions of the customs legislation regarding the import of medicines for the Transnistrian region.

1. The regulatory framework in the field of public health surveillance

The Law no. [10/2009](#) on the state supervision of the public health provides, among other things, tools for the management of public health emergency situations, via the extraordinary National Commission of public health (hereinafter NCPH). The Government is competent to create the NCPH, to approve its [Regulations](#) and to adopt additional acts, necessary for the implementation of Law no. 10/2009. These include the Government Decision no. [1431/2016](#) for the approval of the Regulation on the early warning system and rapid response for the prevention, control of contagious diseases and public health events. Among the tools available under the Regulation is the establishment of three alert levels - yellow (possible danger), orange (potential danger) and red - confirmed danger.

The NCPH issued its [first Decision](#) on February 2, 2020 in the context of the public health status related to COVID-19, where the state of affairs related to the infection were established and additional requirements were set to monitor the situation, take measures to verify travellers and replenish stocks of equipment and supplies. In this context, the first case of infection with COVID-19, registered in Italy, a member state of the EU where a considerable number of citizens of the Republic of Moldova are staying or traveling, was confirmed on January 31, 2020.

2. Regulatory framework related to the state of emergency

The Law no. 212/2004 on the state of emergency, siege and war states that in the case of exceptional situations, including biological and social, the Parliament can establish a state of emergency through a Decision setting out the reasons that were the basis for the establishment of the respective condition, the territory that is covered by the declared state of emergency, its duration, the urgent measures, the competent bodies.

Via the Law no. 54/2020 the Parliament operated on the same day with the approval of the Decision no. 55/2020 on the declaration of the state of emergency, amendments to the Law no. 212/2004, including with the inclusion in several articles (art. 20, 22, 24, 25) of a general provision for the competences of the Commission for Exceptional Situations (hereinafter the CES), the Minister of Internal Affairs and the Civil Protection and Exceptional Situations Service - "**exercising other necessary duties**". At the same time, via Law no. 54/2020 the Parliament excluded the restrictions related to the "adoption, amendment or repeal of organic laws and electoral legislation" during the period of emergency, siege or war.

Thus, the CES, the Ministry of Internal Affairs and the Civil Protection and Exceptional Situations Service obtained a non-exhaustive list of competences, without establishing a mechanism to evaluate the **proportionality** of the measures that are taken. At the same time, the Parliament can amend the organic and ordinary laws, including those related to elections.

3. Restrictions to certain rights and freedoms

The Law no. 212/2004 also refers to the provisions of article 54 of the Constitution, providing that the restriction of the exercise of the rights and freedoms provided by the Constitution can take place depending on the gravity of the situation and in accordance with the Constitutional requirements.

Subsequently, article 54 of the Constitution establishes three essential requirements related to the restriction of the exercise of rights and freedoms:

- a. they are to be stipulated in organic laws, and their enforcement is to comply with the unanimously recognized norms of international law and which are necessary to protect national security, public order, restore the legality and mass termination of crimes or disturbances;

- b. It cannot be applied to the rights and freedoms established in articles 20-24 of the Constitution, namely - free access to justice (art. 20), presumption of innocence (art. 21), non-retroactivity of the law (art. 22), right of everyone to know their rights and duties (art. 23) and the right to life, to physical and mental integrity (art. 24).
- c. The restriction of the rights must be proportional to the condition which determined it and it cannot touch the existence of the right or of the freedom.

Thus, the Constitution of the Republic of Moldova imposes the requirement of **proportionality** of the measures applied and limits the restriction of the essential rights and freedoms such as access to justice, the presumption of innocence, the right to life and to physical and mental integrity, the non-retroactivity of the law.

4. The competences of the CES based on Law no. 212/2004

Article 22 of Law no. 212/2004 establishes that the CES can take the following actions:

- a. issue provisions related to the application of measures to protect the population and property, to locate and mitigate the consequences of exceptional situations, to defend the rule of law and to maintain or restore the state of legality;
- b. controls the activity of the commissions for exceptional situations of the local public administration authorities and analyses the implementation of the rescue and intervention operations, adopts measures for the timely provision of these commissions with the necessary forces and means;
- c. exercise the exclusive right to prohibit the organisation of meetings, public demonstrations and other mass actions;
- d. coordinates the activity of the mass media on informing the population about the causes and magnitude of the exceptional situation, about the measures taken by the Government to prevent the danger, the mitigation of the consequences of this situation and the protection of the population, as well as on familiarising the population with the rules of behaviour during the exceptional situation;
- e. decides, in case of need, the temporary stop of gas supply, electricity and drinking water;
- f. limit or prohibit the sale of alcoholic beverages;
- g. establishes the procedure for appointing and dismissing the managers of economic entities and public institutions, the cases when the workers' resignation is allowed;
- h. establishes the special regime of use of the airspace;
- i. exercises other necessary tasks.

Thus, in the case of an exceptional situation, such as the one established by Parliament on 17.03.2020, the CES has powers that could restrict some rights and freedoms of citizens, including those related to: freedom of movement and freedom of assembly, as well as organisational aspects that relate to the management of the exceptional situation, including the management of the airspace, the trade in goods and the appointment and dismissal of the managers of public institutions and economic entities, including when the workers' resignations are allowed. The legal norm that was additionally instituted on the basis of Law no. 54/2020 by which the CES "exercises other necessary tasks" is, similarly to the rules establishing rather specific competences for the CES, subject to the three requirements imposed by Article 54 of the Constitution, including the requirement of **proportionality**.

5. The Decisions issued by the CES from March 17, 2020 until March 28, 2020

From the moment of establishing the state of emergency, the CES issued 8 Decisions: [no. 1 of March 18, 2020](#), [no. 2 of March 20, 2020](#), [no. 3 of March 23, 2020](#), [no. 4 of March 24, 2020](#), [no. 5 of March 25, 2020](#), [no. 6 of March 26, 2020](#), [no. 7 from March 27, 2020](#) and [no. 8 from March 28, 2020](#).

The Decisions issued by the CES include provisions that reflect the specific fields of intervention, as established in art. 22 of Law no. 212/2004. After a general analysis of the provisions, a series of gaps can be identified, which are also partially dictated by the urgency of the actions. However, the essential elements established by Article 54 of the Constitution, namely the **proportionality** and **justification** of the actions taken, are missing. Moreover, some provisions are on the verge of legality, as they do not meet the requirements provided by Article 54 para. (2) and (3) of the Constitution related to the justification and the scope of restriction of rights and freedoms.

5.1. Establishing the conditions to challenge the CES Decision

The Decision no. 4/2020 of the CES, paragraphs 4-11 establish procedural rules related to the challenge of the provisions of the CES. **Thus, the subject whose acts can be challenged establishes itself the contestation procedures.** The regulations establish a period of 24 hours for the challenge from the moment of publication on the Government site, it is not possible to suspend the action of the contested provision neither by contestation nor by any interim decision of the judge. The appeal is examined by the Chisinau Court of Appeal and the appeal is examined within 72 hours. The decision of the Chisinau Court of Appeal is irrevocable from the moment of the ruling, i.e. not subject to any challenge.

Thus, the above-mentioned rules are procedural rules established for the case of challenge of the Decisions issued by the CES, which were not adopted by the Parliament, but based on a decision of the CES, which should be subject of a judicial review under the general conditions established by the Administrative Code. Instead, the CES approves its own rules of challenge, which were published on March 24, 2020, and the term of challenge, according to the provisions of the provision no. 4, **was only 24 hours**. On the other hand, it is not clear why the CES has introduced a special procedure for challenging its own decisions, with very limited deadlines and with special courts that will examine the appeals, given that the CES acts are immediately enforceable.

At least two of the 3 requirements set out in Article 54 of the Constitution have been breached. Thus, the norms provided in paragraphs 4-11 of CES Decision no. 4 of March 24, 2020 do not comply with the limitations which could be applied to the right to free access to justice. In reality, the CES has excluded the fair timeframes available to citizens to challenge the CES Decisions. Moreover, there is no appeal against the decisions of the Chisinau Court of Appeal. In the meantime, the Decision no. 4 of the CES was challenged in court and on March 27 2020, the Chisinau Court of Appeal issued a decision by means of which it **dismissed the case**, considering the actions proportionate.

Therefore, the norms provided in paragraphs 4-11 of Decision no. 4 of March 24, 2020 breach the unanimously recognized principles at international level concerning the right to a fair trial, or as it is formulated in Article 20 of the Constitution - the right to an effective remedy.

Given the limitations imposed by the Constitutional Jurisdiction Code, the CES provisions are not the subject of a constitutionality control and can only be applied in the context of the existing provisions, which, as mentioned above, provide, following the modifications operated by Law no. 54/2020 also **“the exercise of other duties required”** for the CES.

Imposing such restrictions on fundamental rights that cannot be restricted in principle by virtue of the provisions of article 54 paragraph (2) of the Constitution, in addition to not being justified, they are not proportionate to the purpose they pursue, as according to the official data presented by the CES, on March 29, 2020, 263 confirmed cases of infection with COVID-19 were registered, 110 suspected cases and 2 deaths. The CES Decision did not specify in any way why the terms of examining the appeals

against the provisions of the CES were so drastically restricted and which were the reasoning for establishing rules of procedure which essentially restrict the right to an effective remedy.

Conclusion

The provisions of paragraphs 4-11 of the Decision no. 4 of March 24, 2020 of the CES are in contradiction with the provisions of article 54 of the Constitution and of Law no. 212/2004 on the state of emergency, siege and war, as it restricts the fundamental rights which cannot be restricted and are not proportional to the factual situation.

Recommendation

The procedural norms on the challenge of the provisions of the CES can be included in the existing normative framework, especially since via the amendments made to Law no. 211/2004 Parliament has retained the right to amend organic laws.

5.2. Application of derogations from the provisions of the Labour Code

The CES has assumed through Decision no. 4 of March 24, 2020 the function of derogating from the provisions of the Labour Code, in particular those related to:

- a. Exceptions related to the dismissal from the workplace during leave - Article 86 para. (2) of the Labour Code;
- b. The impossibility of dismissal without the agreement of the trade union body - Article 87 of the Labour Code;
- c. Reinstatement to the workplace - article 88 of the Labour Code; and
- d. The employer's liability for the illegitimate transfer or release from the workplace.

Moreover, in addition to the specific provisions that are no longer applicable, paragraph 3 of Decision no. 4 of March 24, 2020 also excludes any other "conditions, restrictions and dismissal rules", thus not being applicable during the state of emergency. The rules set out in paragraph 3 of the Decision in fact exclude any restrictions for dismissal, without any liability on the part of the employer for illegal dismissal or for the damages caused by it.

As with the application of the special procedural rules for challenging the Decisions of the CES, this provision is not in conformity with the provisions of Article 54 of the Constitution, as it excludes any effective remedy for labour relations, provided for by Article 20 of the Constitution and from which no derogations are possible, and is manifestly disproportionate to the current state.

The norms of paragraph 3 of the Decision no. 4 of March 24, 2020, in fact, excludes anything established in labour relations throughout the territory of the Republic of Moldova and gives the politicians the freedom to intervene with any employee of any administrative authority, public institution, state or municipal enterprise, or majority state-owned enterprise to be released from office without any subsequent liability for the illegal dismissal or payment of damages.

Conclusion

Exemptions from the Labour Code provisions that ensure stability and predictability for public or private sector employees with majority state capital are an instrument of influence and intimidation of employees, which can be easily abused and without any legal consequence for such actions.

Recommendation

Exclude the exceptions for the right not to be fired during leave, the right to be reinstated and compensation for damages caused by illegal dismissal, as well as establish a limited number of

employees, which are essential to ensure the application of emergency measures, for whom some of the rights resulting from the Labour Code are restricted. The right of appeal cannot be limited in any way, to ensure compliance with the provisions of Articles 54 and 20 of the Constitution.

5.3. Application of derogations in the field of misdemeanour law

Paragraphs 22-40 of the Decision no. 4 of March 24, 2020 of the CES establishes new procedural rules related to the review of appeals against sanctions applied to offenders on urgent misdemeanour cases by virtue of the state of emergency or in cases of breach of the provisions of the CES decisions.

Thus, the deadline for lodging the appeal and the appeal to the decision of the court is 24 hours from the application of the sanction, respectively, from the moment of issuing the decision. It is not possible to reinstate the appeal, the grounds for the application of the appeal and the appeal are different than those provided by the Misdemeanour Code, the examination of the appeal takes place within 48 hours from the moment the case entered the court. Only in motivated cases, the term can be extended by another 24 hours. Similar to challenging the provisions of the CES, the terms are significantly reduced, without any possibility of a reinstatement, and the offenders may not effectively exercise their rights of defence in such reduced terms.

This measure cannot be convincingly justified. The application of the misdemeanour sanction in the form of a fine in times of crisis cannot in any way justify the reduction of the disputed term of the sanction or of the term for examining the appeal. On the other hand, the reduced time limits of 48 hours for examining the appeal in the first instance and appeal courts is clearly insufficient for the defence to be able to prepare its evidence, including in the case of the application of the sanctions provided for by article 76¹ of the Misdemeanour Code, recently introduced by Law no. [52/2020](#). The penalties for the misdemeanours provided for in article 76¹ of the Misdemeanour Code are from 22500 to 25000 MDL for presenting false data in the epidemiological file or refusing to submit data, and from 22500 to 25000 MDL for natural persons and from 50000 to 75000 MDL for legal entities for non-observance of the rules of prophylaxis, prevention and / or control of epidemic diseases, if their actions have endangered public health.

Conclusion

Similarly to the derogations from the norms of the Civil Procedure Code and of the Administrative Code related the challenge of CES decisions, we are in the situation of some constitutional rights restrictions that are not allowed by the provisions of article 54 of the Constitution, in particular the provisions of article 20 of the Constitution - the right to an effective remedy.

Recommendation

Revision of the provisions of points 22-40 of the Decision no. 4 of March 24, 2020 of the CES related to the derogations from the provisions of the Misdemeanour Code, indicating sufficient time to allow the sanctioned party to form his/her defence and to present the evidence relevant to the defence (appeal within 3-5 days, review the case by the court within 3-5 days), the exclusion of derogations related to the grounds of challenge and of appeal, with the application of the existing norms of the Misdemeanour Code.

5.4. Applying derogations from the provisions of the regulations of the legal professions - attorneys, notaries, bailiffs

By means of point 2 of Decision no. 2 of March 20, 2020 of the CES, the notarial services were mentioned as being provided only upon request from the commercial banks and in connection with the registration in the register of real estate guarantees and the authentication of the mortgage contracts,

necessary for the agricultural field to access the credits for this period of the year. Subsequently, through point 19 of Decision no. 6 of March 26, 2020, it was established that in case of lack of continuity of activity by lawyers, notaries and bailiffs, those will be treated as a disciplinary offense and sanctioned with exclusion from the profession.

The justification underlying the establishment of the state of emergency and the measures applied by the CES but also by CNESP, are due to the contagious nature of COVID-19 and the need to restrict the movement as much as possible in order to prevent the virus from spreading. However, contrary to the general measures required by the population, including isolation at home, moving only for strictly necessary purposes for purchasing food, pharmaceuticals and moving to work for employees who ensure the implementation of emergency measures, in fact, through point 19 of the Decision no. 6 of March 26, 2020 of the CES, lawyers, notaries and bailiffs are forced to go to work. The vague formulation of health-epidemiological measures in ensuring continuity in fact does not contribute to the implementation of the measures prescribed by the previous Decisions of the CES and of CNESP for notaries, lawyers and bailiffs.

On the other hand, through the same Decisions of the CSE and CNESP, the activity of the courts was reduced only to urgent cases, and it was not necessary for attorneys to participate in court hearings, except in those cases. Similarly, the activity of notaries is less intense due to the reduction in the number and intensity of the services that are provided by the entities that could request notarial documents. For example, ASP provides a reduced number of services.

A similar state of affairs can be seen in the case of bailiffs, whose activity is significantly reduced by virtue of the restrictions established by the provisions of the CES, in particular the annex to the Decision no. 1 of March 18, 2020. Thus, imposing the continuity of activity for notaries, attorneys and bailiffs and setting the harsh sanction of exclusion from profession is disproportionate and in contradiction with the measures imposed to reduce the spread of COVID-19 virus.

Conclusion

The derogations applied to attorneys, notaries and judicial executors, including those related to the application of disciplinary sanctions for exclusion from the profession, are disproportionate and inconsistent with other measures imposed by CES and CNESP. Furthermore, due to vague nature of the continuity of activity requirement as well as the competence of the MoJ to apply the disciplinary sanctions, there are risks of biased and non-transparent application of the respective measures.

Recommendations

1. Establishing jointly with the Notarial Chamber, the Bar Association and the National Union of Bailiffs a list of lawyers, notaries and bailiffs who can be contacted in emergency situations, keeping the remote work for the other members of the given professions as far as possible;
2. Developing a protocol with detailed rules related to the specifics of the provision of notarial, legal and enforcement activities in urgent cases. The main elements should include:
 - a. Exclusion as far as possible of the documents on paper, including the transmission of the documents in electronic format with the application of the electronic signature (including the use of *MSign* platform), and, if necessary, for authentication purposes;
 - b. Identifying and equipping isolated areas for communication with clients if the notary, attorney or enforcement services cannot be provided remotely;
 - c. Treatment of surfaces and documents on paper support with ultraviolet light;
 - d. Compulsory payment of services through electronic payments offered by commercial banks (p2p, internet banking) or opening the option of using *MPay* for private operators.

5.5. Application of derogations from the provisions of the Customs Code

Point 41 of Decision no. 4 of March 24, 2020 allows during the state of emergency the economic agents active in the eastern regions of the Republic of Moldova to carry out the procedures for customs clearance of goods at customs stations without collecting import or export rights and paying for the environmental tax, without applying the economic policy measures for the lots of medicine, provided that they remain on the territory of the Transnistrian region, based on the limits and with the acceptance of the Drugs Agency.

This provision in fact allows the import of medicine without the import rights being charged, the only limitation being the quantities established by the Drugs Agency. Moreover, due to the unresolved nature of the dispute, the Government cannot ensure that the drugs will remain on the Transnistrian territory during the period of emergency. Instead, this derogation from the rules of the Customs Code offers a possibility to import goods that will later be marketed in pharmacies in the controlled territories. The reasoning for the derogations from the provisions of the Customs Code and the general customs legislation for lots of medicine is not clear either. In fact, there is a difference of treatment for the lots of medicine that are sold in the eastern regions compared to the rest of the country. Instead, these rules applied during the emergency can be used for non-payment of import rights, which will further affect the budgetary stability and the provision of sufficient resources during the emergency.

Conclusion

The derogations allowed for import without payment of customs duties for the lots of medicine directed to the eastern part of the country are disproportionate to the intended purpose and serve as a means of customs evasion, as well as a source of unfair competition for the networks of pharmacies that retail the drugs in the rest of the country.

Recommendation

Abandoning derogations from the provisions of the customs legislation regarding the import of medicines for the Transnistrian region.

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The Legal Resources Centre of Moldova (CRJM) is a non-commercial organisation that contributes to strengthening democracy and the rule of law in the Republic of Moldova, with an emphasis on justice and human rights. CRJM is an independent and apolitical analytical centre (think-tank) with rich experience in: analysing the activity and reforming the justice system; human rights reporting; strategic standing at the European Court of Human Rights (ECtHR); equality and non-discrimination; promoting reforms for a favourable environment for civil society organizations.

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The Institute for European Policies and Reforms (IPRE) was established in March 2015 as an independent, non-profit and apolitical analysis and research centre. It was created by a team of national and international experts, former government officials and career diplomats.

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