

THE EXCEPTIONAL STATE IN ROMANIA AND FRANCE. A COMPARATIVE ANALYSIS. CASE STUDY: THE STATE OF EMERGENCY

DOI:10.47743/rdc-2022-1-0004

Drd. Adina GHIDURA (NICĂ)*

Abstract

The Romanian Constitution regulates in a limiting way exceptional states, given the “special” legal regime applicable during their development.

Although the text of the French Constitution was an important source of inspiration in the process of drafting the Romanian Constitution, the regulation of exceptional states is different in the two Constitutions. For example, in Romania, the state of emergency represents one of the exceptional states regulated by the constitutional text, while in France it is regulated by Law.

However, beyond the differences regarding the regulation of the exceptional state, we will be able to observe the similarities in terms of the content of the set of measures imposed by the establishment, in 2020, of the state of emergency in the two states.

The main objectives of the research were the presentation of the exceptional states in Romanian and French law, the description and comparison of the state of emergency in both countries and the identification of the challenges that have arisen from this exceptional state. In order to achieve the above-mentioned objectives, we used the following research methods: the historical, analytical and comparative methods and the case study.

The leading results of the study are getting an overview of the regulation of the exceptional states in Romania and France and of the establishment of the state of emergency in 2020, with implications regarding the way in which the democratic states could ensure the legal order during these “special” times.

Keywords: *Constitution, legal system, exceptional states, state of emergency, fundamental rights and freedoms*

I. Introduction

In the spring of 2020, in the context of the very rapid spread of the SARS-CoV-2 virus, the Romanian state faced an unprecedented crisis, for the management of

* Bucharest University of Economic Studies; Doctoral school of law; Email: ghidura.adina@gmail.com.

which it had to resort to certain mechanisms, provided by the Constitution, but which they were not used until then.

As it is well known, the health crisis has occurred worldwide, with the World Health Organization declaring a “pandemic” on March 11, 2020¹; the pandemic is defined as “an epidemic spread over a very large area, which crosses international borders and usually affects a large number of people”².

As a result, each state had to resort to the tools at its disposal to limit the effects of the virus. Usually, these instruments consisted in enacting, in accordance with the existing legal provisions at national level, an exceptional state (“state of emergency”, “state of health emergency”, “national emergency”) which involved, inter alia, the imposition of a set of restrictive measures on fundamental human rights and freedoms.

The objectives of this research can be grouped into two categories. On the one hand, the research aims at presenting the subject of exceptional states in Romanian and French law, as well as the description and comparative analysis of the state of emergency in Romania, respectively of the state of health emergency in France, both established in 2020. On the other hand, starting from the case study regarding the state of emergency, the research will identify some of the challenges that the two states encountered in the process of maintaining the legal order during the development of this exceptional state.

The way in which each of us understood and accepted the imposition of measures that, in order to limit the effects of the pandemic, also restricted, to a greater or lesser degree, the exercise of some of the constitutionally guaranteed rights and freedoms, depended on perception and individual interests. Thus, both in Romania and at the international level, several types of attitude towards restrictive measures have emerged among the population, which can be summarized in the acceptance and rejection of the imposition of these measures. It is this different approach to the imposed measures and to the effects of the health crisis that has determined our interest in this topic.

From the point of view of the specialized literature, in Romania works have been elaborated in which are presented the matter of exceptional states and the ways of restoring the legal order in the context of establishing exceptional states, and, among these, we mention: “Restoring constitutional order exceptional” (Constantin Florea, 2007), “The legal regime of exceptional states. Constitutional dictatorship at the intersection with the democratization of the army” (Florin Maciu, 2011), “Exceptional states” (Constantin Sava, Constantin Monac, 2000).

¹ *Speech by the Director General of the World Health Organization* on 11 March 2020, available at <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (accessed on November 30, 2021).

² Miquel Porta, *A Dictionary of Epidemiology*, 6th edition, Oxford University Press, 2016, available at <https://www.oxfordreference.com/view/10.1093/acref/9780199976720.001.0001/acref-9780199976720-e-1373?rskey=qo5qnh&result=1554> (accessed on November 30, 2021).

The authors concentrated the above-mentioned works on the presentation of regulation regarding the exceptional states and on the implications of the establishment of an exceptional state for the state military forces – their role and their attributions. The Florin Maciu's work describes, in detail, only the state of mobilization and the state of war, having only an introductory chapter about the exceptional states, in general.

Compared to these works, the main novelty of our research is the focus on the ways in which a country could preserve the legal order and the fundamental human rights and freedoms during the exceptional states.

Regarding the recent topic of the state of emergency established in 2020, we have not identified relevant papers, but there are, however, scientific articles that address, in an analytical manner, this topic, namely "The exceptional state established / declared constitutional, condition of the derogating measures regarding human rights" (Corneliu-Liviu Popescu in *Annals of the University of Bucharest – Law – Legal Forum*, April 2020), "How long does the state of emergency last?" (Bogdan Dima, *Juridice.ro*, April 2020), "Jurisprudential inconsistencies regarding the possibility of restricting the exercise of fundamental rights or freedoms. The issue of limiting the exercise of fundamental rights and freedoms in the context of establishing a state of emergency or a state of alert" (Lidia Barac, *Juridice.ro*, May 2020).

Relevant papers on the state of emergency have been published in France, as well as scientific articles, including: "The Coup d'état d'urgence – Surveillance, repression et libertés" (Arié Alimi, 2021), "Urgence sanitaire" (Éric Caumes, 2020), "Instruction et éducation, quel impact de l'état d'urgence sanitaire sur ces droits?" (Margot Bizaro, Coline Huloux, Clémence Massé, 2021).

In our opinion, these works published in France (especially Alimi's work) highlight the severity with which the state institutions violated the human rights and freedoms, but we think that the authors need to accept that, in 2020, the pandemic crisis was, indeed, very serious and that it required, measures limiting, in a some extent, the human rights.

Regarding the research methodology, the process of documenting and collecting data and information was mainly based on descriptive research, and the process of analysis and interpretation of data was carried out through explanatory research, the research methods used being the historical method (for identifying the legal provisions regarding the exceptional states), the analytical and the comparative method (the exceptional states of the two states being analysed and presented comparatively, for a better example of similarities and differences) and the case study (for presenting and analysing the state of emergency established in 2020 in Romania, respectively in France).

II. Definition and description of “exceptional states”

Exceptional states are special crisis situations that states are forced to resort to, in certain circumstances, such as facing a natural disaster, a pandemic, an armed attack, a war, terrorist acts etc.

During the period in which exceptional circumstances are established, the state may, as a rule, take measures which involve restricting the exercise of certain rights or freedoms. However, the restrictive measures cannot be taken by the state at random, but must comply with specific conditions and be accompanied by a set of guarantees for citizens. Also, the restrictive measures that the state may take in such crisis situations must be proportionate to the purpose for which they were instituted and cease as soon as the circumstances that gave rise to them have ended.

III. Regulation of “exceptional states” and the attributions regarding their establishment

Given the “special” legal regime applicable during the existence of exceptional states, the Romanian Constitution³ regulates these states in a restrictive manner. Thus, from the content of the constitutional provisions, results the regulation of four exceptional states, without these being explicitly addressed, grouped as such, in the content of the Constitution.

Basically, the constitutional text refers, on the one hand, to the state of mobilization and the state of war – in the field of defence of the country (art. 65, 73, 92) and, on the other hand, to the state of siege and the state of emergency, defined as exceptional measures (art. 93).

The legal regime applicable to the four exceptional states can be established only by the Parliament, by organic law, in accordance with the provisions of art. 73, para. (3), lit. f) and g). Establishing such a legal regime of such states appears as a necessity and a guarantee for citizens, in the context in which, as we have previously stated, while any of the exceptional states is instituted, the state may take measures involving restricting the exercise of certain rights or freedoms.

A second guarantee is also offered by the constitutional provisions that condition such a restriction on the exercise of certain rights or freedoms by several other mandatory aspects listed by art. 53, namely: “to take place only if it is necessary for the defence of national security, order, health or public morality, the rights and freedoms of citizens; conducting criminal investigation; prevention of the consequences of a natural disaster, a disaster or other particularly serious disaster. At the same time, the

³ *The Constitution of Romania* (adopted in 1991, in its revised form in 2003 and published in the Official Gazette of Romania, Part I, no. 767 of October 31, 2003), C.H. Beck Publishing House, Bucharest, 2011.

restriction must be available only if it is necessary in a democratic society; be proportionate to the situation which determined it; be applied in a non-discriminatory manner and without prejudice to the existence of a right or freedom”.

Based on the constitutional provisions, in Romania, the normative acts were adopted that regulate, in detail, the legal regime of the exceptional states, namely the *Government Emergency Ordinance (GEO) no. 1/1999 on the state of siege and the state of emergency* approved with amendments and completions by Law no. 453/2004, respectively *Law no. 355/2009 on the regime of the state of partial or total mobilization of the armed forces and of the state of war*.

In accordance with the provisions of GEO no. 1/1999, the *state of siege* represents “the set of exceptional measures of a political, military, economic, social and other nature applicable throughout the country or in some administrative-territorial units, established to adapt the country's defence capacity to serious dangers, current or imminent, which threatens the sovereignty, independence, unity or territorial integrity of the state”⁴, and the *state of emergency* is defined as “the set of exceptional measures of a political, economic and public order nature applicable throughout the country or in some administrative units – territorial institutions which are established in the following situations: a) the existence of current or imminent serious dangers regarding national security or the functioning of constitutional democracy; b) the imminence of the occurrence or occurrence of calamities which make it necessary to prevent, limit or eliminate, as the case may be, the consequences of disasters”⁵.

In the field of defence of the country, Law no. 355/2009 defines and regulates the state of mobilization and the state of war. Thus, the *state of mobilization* includes “all the extraordinary measures that can be instituted, mainly in the political, economic, social, administrative, diplomatic, legal and military fields, planned and prepared in peacetime, as well as the actions carried out for their application. according to the law, the emergence or imminence of a serious threat that may affect the sovereignty, independence and unity of the state, the territorial integrity of the country and constitutional democracy”⁶, and the *state of war* refers to “all extraordinary measures that can be instituted, mainly in the political, economic, social, administrative, diplomatic, legal and military fields, in order to exercise the inherent right of the state to individual or collective self-defence”⁷.

Regarding the attributions related to the establishment of exceptional states, in Romania, they are also provided by the constitutional text, there being differences between the four states.

⁴ Art. 2 of the *Government Emergency Ordinance (GEO) no. 1/1999 on the state of siege and the state of emergency*, available at <https://legislatie.just.ro/Public/DetaliiDocument/16739> (accessed on January 15, 2022).

⁵ Art. 3 of *GEO no. 1/1999*.

⁶ Art. 1 of the *Law no. 355/2009 on the state of partial or total mobilization of the armed forces and the state of war*, available at <https://legislatie.just.ro/Public/DetaliiDocumentAfis/113725> (accessed on January 15, 2022).

⁷ Art. 2 of the *Law no. 355/2009*.

The state of siege and the state of emergency “shall be established by the President, by decree countersigned by the Prime Minister, the President requesting the Parliament to approve the measure adopted within five days of its adoption”⁸.

The state of mobilization is declared by: Parliament [art. 65 (2), c)]; President, with the prior approval of the Parliament [art. 92 (2)], respectively by the President, without the prior approval of the Parliament, only in exceptional cases [art. 92 (2)], its decision being submitted to the Parliament after approval, no later than five days after its adoption. The state of war is declared by the Parliament [art. 65 (2), d)].

As can be seen, all four exceptional states provided by the Romanian Constitution have in common the establishment of exceptional/ extraordinary measures to support the state in its efforts to return to the state of normality existing before the event/ situation that generated the exceptional state.

In addition to the two types of guarantees for citizens described above – the way of establishing the legal regime, respectively the mandatory conditions that the exceptional states must comply with, a third category of guarantee refers to the attributions of declaring/ instituting exceptional states, namely the fact that Parliament has a key role to play in declaring/ establishing exceptional states. According to the constitutional provisions, the Parliament either declares, approves or agrees with the taking of exceptional measures.

In Romania, from the adoption of the Constitution, in 1991, until 2020, when the state of emergency was established, the state did not have to resort to any of the exceptional states provided by the constitutional text.

The Constitution of the French Republic contains three provisions on exceptional circumstances.

Thus, Article 16 of the French constitutional text refers to the exceptional measures “which the President may take when the institutions of the Republic, the independence of the nation, its territorial integrity or the fulfilment of international commitments are seriously and immediately threatened and when the normal functioning of public authorities’ constitutional law is interrupted”⁹. This measures shall be taken by the President after consultation with the Prime Minister, the Presidents of the Parliamentary Assemblies and the Constitutional Council.

This Article 16 of the French Constitution was invoked only once, in 1961, following a coup (d’etat) in Algeria.

Article 35 of the French Constitution refers to the state of war, but the constitutional provisions do not describe this exceptional state, but only the powers to declare a state of war. The legal status of the state of war is set out in the French Defence Code (approved by Ordinance in 2004)¹⁰.

⁸ *Romanian Constitution*, art. 93 (1) and art. 100.

⁹ *Constitution of the French Republic* (adopted in 1958, in its revised form), translated into Romanian, available at <https://constitutii.files.wordpress.com/2013/02/franta.pdf> (accessed on January 15, 2022).

¹⁰ *French Defence Code*, approved by Ordinance in 2004, available at <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006071307/> (accessed on January 16, 2022).

The third provision is contained in art. 36 – the state of siege, but only at the level of attributions in terms of its establishment. The regulation of the state of siege is also carried out within the French Defence Code which, at art. L2121-1, provides that the “state of siege can only be declared [...] in case of imminent danger resulting from a foreign war or an armed insurrection”¹¹.

The state of war and the state of siege in France have not been declared/ decreed since the Second World War, so art. 35 and art. 36 of the current Constitution of the country have not been invoked so far.

The state of emergency is also an exceptional state in France, but, unlike the case of Romania, it is not established by the Constitution, but by Law no. 55-385 of April 3, 1955 on the state of emergency, as amended. Article 1 of *Law no. 55-385 provides that “a state of emergency may be declared either in case of imminent danger resulting from serious attacks on public order, or in case of events which, by their nature and gravity, have the character of a public calamity”*¹².

The state of emergency was decreed in France, based on Law no. 55-385, several times, namely in 1955 during the Algerian war, in 1984 in New Caledonia, in 2005 during the civil riots in the suburbs and in 2015, as a result of the terrorist attacks in Paris.

From the point of view of the powers to establish exceptional states in France, they are set out in the text of the Constitution for “exceptional measures”, “state of war” and “state of siege”. For the “state of emergency” relevant in this regard is Law no. 55-385.

Thus, the exceptional measures provided in art. 16 of the Constitution of France “shall be taken by the President of the Republic, after official consultation with the Prime Minister, the Presidents of the Parliamentary Assemblies and the Constitutional Council”¹³.

The state of war is declared by the Government and is authorized by the Parliament, according to the provisions of article 35 of the Constitution.

Article 36 provides that the state of siege is decreed in the Council of Ministers, but its extension must be authorized by the Parliament.

The state of emergency is decreed in the Council of Ministers, but can only be extended by the Parliament.

Therefore, in France, the roles of the President of the Republic and the Council of Ministers are very important in establishing exceptional measures/ states, the involvement of the Parliament in this process being different from one exceptional state to another, as follows: with regard to exceptional measures, Parliament is only

¹¹ Article L2121-1 of the *French Defence Code*.

¹² *Law no. 55-385 of 3 April 1955 on the state of emergency*, available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000695350/> (accessed on January 22, 2022).

¹³ *Article 16 of the Constitution of the French Republic* (adopted in 1958), translated into Romanian, available at <https://constitutii.files.wordpress.com/2013/02/franta.pdf> (accessed on January 15, 2022).

officially consulted, but, on the other hand, the declaration of a state of war must be authorized by Parliament. The state of siege and the state of emergency are decreed without the need for the intervention of the Parliament, but their extension can be done only with the authorization of the Parliament (state of siege), respectively only by the Parliament (state of emergency).

Although the Romanian Constitution is French-inspired, however, there are several differences between the two states in terms of how to regulate and the powers to establish exceptional states. Thus, in Romania, the regulation of the four exceptional states is carried out exclusively through the Constitution, only their legal regime being subsequently established by law. In contrast, in France, exceptional measures are not only provided for in the Constitution, but also in law. From this point of view, it can be concluded that the matter of exceptional states is regulated in a more structured and clear way in Romania, compared to France.

From the point of view of the attributions regarding the establishment of exceptional states, in Romania the role of the Parliament is very important, compared to France where the intervention of the Parliament is punctual and, in some places, limited, which could determine a minus guarantee for citizens concerning restrictions on fundamental human rights and freedoms, all the more so as the Constitution of the French Republic does not explicitly provide for any other kind of guarantee for them.

An explanation for the difference in the regulation of exceptional states in the two states may come from the year of the adoption of the two Constitutions, namely the year 1958 in France, respectively the year 1991 in Romania; the difference of over 30 years between the adoption of the Constitutions of the two states has undoubtedly determined a different approach, much more flexible and organized in the case of Romania.

Moving from the provisions of national legislation to those at the international level, we mention that the restriction of the exercise of certain rights or freedoms must comply with the provisions of international conventions, pacts and treaties that both Romania and France have signed, among others which we mention the *European Convention on Human Rights* which, in art. 15 (1) and (2) defines the conditions under which derogations may be made from the obligations laid down therein: “1. In the event of war or other public danger threatening the life of the nation, take measures which derogate from the obligations laid down in this Convention, in so far as the situation so requires and provided that such measures do not conflict with other obligations under international law. (2) The preceding provision does not allow any derogation from Article 2 [*a.n. the right to life*], except in the case of death resulting from lawful acts of war, nor from Articles 3 [*a.n. prohibition of torture*], 4 (paragraph 1) [*a.n. prohibition of slavery and forced labor*] and 7 [*a.n. no punishment without law*]¹⁴.”

¹⁴ *The European Convention on Human Rights*, adopted in Rome in 1950, available at https://www.echr.coe.int/documents/convention_ron.pdf (accessed on February 12, 2022).

IV. Case study: state of emergency

In 2020, in the context of the pandemic caused by the rapid spread of the SARS-CoV-2 virus, in order to limit its effects, the states of the world had to resort to mechanisms specific to crisis situations.

In Romania, according to the provisions of art. 93, para. (1) and of art. 100 of the Constitution, the President, by *Decree no. 195/16 March 2020*¹⁵, established the state of emergency on the entire territory of the country, for a period of 30 days, which was subsequently extended, by another 30 days, by the *Decree of the President of Romania no. 240/14 April 2020*¹⁶.

In those circumstances, the legal order was amended by laying down measures restricting the exercise of certain rights, namely: "a) freedom of movement; b) the right to family and private life; c) inviolability of the domicile; d) the right to education; e) freedom of assembly; f) the right of private property; g) the right to strike; h) economic freedom"¹⁷.

Also, in order to prevent the spread of the virus and to manage its effects, also by the above-mentioned Decrees, two categories of measures were established, namely first aid measures with direct and immediate applicability, respectively first aid measures with gradual applicability. The two types of measures were presented and detailed in Annexes 1 and 2 of the two Decrees.

In France, the state of emergency was not decreed based on Law no. 55-385 / 1955, but based on a specific law (Law 2020-290 of March 2020)¹⁸ which introduced a new type of state of emergency, namely the state of health emergency. The same law established this state for a period of two months, then extended by Law 2020-546 of May 2020¹⁹ for a period of another two months. Subsequently, the state of emergency health was reinstated in France, by Decree of the Council of Ministers²⁰, in October 2020 for one month and extended by successive Laws until June 1, 2021.

¹⁵ *Decree no. 195/16 March 2020 on the establishment of the state of emergency on the Romanian territory*, available at <https://legislatie.just.ro/Public/DetaliiDocumentAfis/223831> (accessed on February 12, 2022).

¹⁶ *Decree no. 240/14 April 2020 regarding the extension of the state of emergency on the Romanian territory*, available at <https://legislatie.just.ro/Public/DetaliiDocumentAfis/224849> (accessed on February 12, 2022).

¹⁷ Article 2 of *Decree no. 195/16 March 2020*.

¹⁸ *Law 2020-290 of March 2020 on the management of the emergency situation caused by the COVID-19 epidemic*, available at <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041746313/> (accessed on February 12, 2022).

¹⁹ *Law 2020-546 of May 2020 extending the state of health emergency and supplementing its provisions*, available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041865244/> (accessed on February 12, 2022).

²⁰ *Decree 2020-1257 of October 2020 declaring the state of health emergency*, available at <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042424377> (accessed on February 12, 2022).

According to the provisions of Law 2020-290 / March 2020, “during the state of health emergency, the Prime Minister may, by Decree issued on the basis of the report of the Minister of Health, restrict or prohibit the movement of persons and vehicles, prohibit persons from to leave the home, to order measures for the implementation of quarantine, to order measures of placement and detention, to order the temporary closure of certain categories of units open to the public, to limit or prohibit meetings or assemblies, to order the requisition of all property and services for the control of the virus, to take temporary measures to control the price of certain products, to take all necessary measures to provide patients with the appropriate medicines, to take measures, if necessary, to restrict entrepreneurial freedom for the sole purpose of puts an end to the health disaster”²¹.

Consequently, based on the provisions of Law 2020-290 and the Public Health Code, on March 23, 2020, the Decree of the Prime Minister of France was issued, which established the concrete measures necessary to deal with the pandemic²².

In the following, we intend to present a brief comparison of the situation in the two states, analysing issues such as: how to establish and extend the state of emergency, duration, how to establish the set of restrictive measures of rights, the content of the set of measures.

From the point of view of establishing the state of emergency, we note that, in Romania, it was established and extended by Decree of the President, based on the constitutional provisions and the Government Emergency Ordinance 1/1999. The decrees of the President of Romania were countersigned by the Prime Minister, according to art. 100, paragraph (2) of the Constitution and were approved by the Parliament, in accordance with art. 93, para. (1) of the constitutional text.

On the other hand, in France, the state of health emergency was decreed by the Law which introduced the notion of “state of health emergency” and was also extended by Law, to be subsequently reinstated by Decree of the Council of Ministers and extended by successive Laws.

With regard to the laws establishing or extending the state of health emergency in France, the Parliament has fulfilled its constitutional role of adopting these organic laws.

Regarding the Decree of the Council of Ministers, the Public Health Code (as amended by Law no. 2020-290) provides that “The National Assembly and the Senate shall be informed, without delay, of the measures taken by the Government under the title of the state of health emergency. In monitoring and evaluating these measures, the National Assembly and the Senate may request any additional information”²³. Therefore,

²¹ Article 2 of *Law 2020-290 of March 2020*.

²² *Decree 2020-293 which provides the necessary general measures to deal with the COVID-19 epidemic in the state of health emergency*, available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041746694/> (accessed on February 12, 2022).

²³ Article L3131-13 of the *French Public Health Code* (adopted in 1953, in its revised form), available at <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006072665/> (accessed on February 12, 2022).

in France, the Decree of the Council of Ministers establishing the state of emergency must not be subject to the approval of the Parliament, but any extension of the state of health emergency “can only be authorized by law”²⁴.

As a result, in terms of how to establish and extend the state of emergency/health emergency, although the role of the legislature and the executive is different in the two states, however, it can be seen that Parliament is present in the process of establishing and extending this exceptional state, which means that this category of guarantee regarding the restriction of fundamental rights and freedoms is maintained.

In terms of duration, in Romania the state of emergency was initially established for 30 days, and then it was extended for another 30 days, which means that it had a total duration of 60 days (March-May 2020). In France, the state of health was initially declared for two months and extended for another two months; subsequently, the state of emergency was reinstated for a period of one month and extended several times, thus lasting a total of approximately 11 months (March-July 2020, October 2020-May 2021).

At the same time, France has, compared to Romania, the particularity of having already faced several times with states of emergency established under Law 55-385, as we mentioned in the previous section of the research; the state of emergency was last declared in the context of the terrorist attacks in France and lasted for almost two years (November 2015-October 2017). Therefore, the establishment of a new state of emergency, less than three years away from the most recent one, and its extension for almost a year, caused the dissatisfaction of the French population.

Regarding the way of establishing the set of restrictive measures of rights, in Romania they were specified even by the Decree by which the state of emergency was established, while in France, the establishment of measures restricting certain human rights is done, generally, through the *Public Health Code*, and concretely through Decrees of the Prime Minister.

The content of the set of measures established with the establishment of the state of emergency in Romania, respectively of the state of emergency in France, as well as the way of its implementation was very similar, given the finality that both states had in mind, namely limiting / stopping the spread of the virus and managing the effects it has produced.

V. Challenges and conclusions

Establishing a state of emergency in Romania and a state of health emergency in France in 2020, in the context of the pandemic caused by the spread of the SARS-CoV-2

²⁴ *Ibidem*.

virus and its implications for human rights and fundamental freedoms, is a research topic particularly interesting, but also complex.

Given that both states are members of the Council of Europe and signatory states of the European Convention on Human Rights, it has been necessary to comply with the provisions on fundamental rights and freedoms, even in this unprecedented crisis at European level.

To this end, the Secretary General of the Council of Europe has developed and made available to the Member States *a Set of tools for respecting democracy, the rule of law and human rights in the context of the health crisis caused by COVID-19*, which also contains some principles must be complied with in the states of emergency, namely: “principle of legality, limited duration of the emergency regime and emergency measures, limited scope of emergency legislation, principle of necessity, distribution of power and control over the executive action during the state of emergency”²⁵.

Thus, it is emphasized that the role of the Parliaments and the Constitutional Courts / Councils remains essential even in these crisis situations, as it is necessary for the two institutions to ensure that the actions of the executive are justified.

In both states, the Parliament was a party to the process of establishing the state of emergency, with some differences resulting from the legislative provisions that were presented in the previous section.

However, in a situation where, during the state of emergency, the two governments had the constitutional opportunity to adopt ordinances to regulate a number of activities and measures in various fields, the question arises as to whether the role of Parliament has been maintained or if the executives did not take advantage of the situation, taking discretionary and, perhaps, unjustified measures. The French National Human Rights Advisory Commission expressed its concern in an opinion from April 2020: “as a matter of health emergency, the Parliament has not the means to fully fulfil its role to control the Executive, thus it is functioning to a minimum, its role being reduced by the power granted to the Government to adopt ordinances in very wide areas”²⁶.

Regarding the role of the Constitutional Court of Romania and that of the Constitutional Council of France, from this point of view there are certain differences between the two states. Thus, without carrying out a study of the jurisprudence of the Romanian Constitutional Court during this research, we can observe, however, that in Romania, during the state of emergency, the Court had no limitations regarding the analysis of unconstitutionality complaints. The situation was different in France because the Parliament adopted an organic law by which “the deadlines for the

²⁵ Council of Europe, *Toolkit for the observance of democracy, the rule of law and human rights in the context of the health crisis caused by COVID-19*, 7 April 2020, available at <http://ombudsman.md/wp-content/uploads/2020/04/SG2-1.pdf> (accessed on February 17, 2022).

²⁶ *Opinion of the National Advisory Committee on Human Rights in France – A-2020-3 Health Emergency and the Rule of Law*, 28 April 2020, p. 7, available at https://www.cncdh.fr/sites/default/files/avis_2020_-_2_-_200424_avis_etat_durgence_sanitaire_et_etat_de_droit.pdf (accessed on February 17, 2022).

analysis, by the Constitutional Council, of the priority issues of constitutionality were suspended for a period of three months²⁷, between April and June 2020.

In conclusion, the establishment in 2020 of the state of emergency in Romania and the state of health emergency in France, although it was an undesirable event, it is nevertheless a good opportunity to analyse and make proposals for improving the legislation that regulates its legal regime, as it is clear that just a practical confronting with such a situation can lead to a correct and informed examination of all its implications.

Through our research, we set out to present and describe analytically and comparatively the exceptional states, in general, and the state of emergency, in particular, in Romania and in France and to identify the main challenges encountered by the two countries during the state of emergency.

In the future, we intend to use the results of this research to make a series of concrete proposals for the improvement of our national legislation which regulates the exceptional states, with the final scope of better preserving the fundamental human rights and freedoms and of maintaining the legal order.

Bibliography

Alimi, Arié, *Le Coup d'état d'urgence. Surveillance, repression and freedoms*, Seuil Publishing House, Paris, 2021

Barac, Lidia, *Jurisprudential inconsistencies regarding the possibility of restricting the exercise of fundamental rights or freedoms. The issue of limiting the exercise of fundamental rights and freedoms in the context of establishing a state of emergency or a state of alert*, Juridice.ro, May 2020: [https://www.juridice.ro/683898/inconsecvente-jurisprudentiale-relative-la-possibilitatea-restrangerii-exercitiului-unor-drepturi-sau-libertati-fundamentale.html](https://www.juridice.ro/683898/inconsecvente-jurisprudentiale-relative-la-possibilitatea-restrangerii-exercitiului-unor-drepturi-sau-libertati-fundamentale-problematica-limitarii-exercitiului-unor-drepturi-si-libertati-fundamentale.html)

Bădescu, Mihai, *Constitutional law and political institutions*, Sitech Publishing House, Craiova, 2020

Bizaro, Margot, Huloux, Coline, Massé, Clémence, *Instruction et éducation, quel impact de l'état d'urgence sanitaire sur ces droits?*, in "La Revue des droits de l'homme", 2021: <https://journals.openedition.org/revdh/pdf/12954>

Council of Europe, *Toolkit for Respect for Democracy, the Rule of Law and Human Rights in the context of the health crisis caused by COVID-19*, 7 April 2020: <http://ombudsman.md/wp-content/uploads/2020/04/SG2-1.pdf>

²⁷ Law 2020-365 of March 30, 2020 on the management of the emergency situation caused by the COVID-19 epidemic, available at <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041768067> (accessed on February 17, 2022).

Council of Europe – Venice Commission, *Observatory on emergency situations*, 2020: https://www.venice.coe.int/files/EmergencyPowersObservatory/By_country-E.html
Constitution of Romania (adopted in 1991, in its revised form in 2003 and published in the Official Gazette of Romania, Part I, no. 767 of October 31, 2003), C.H. Beck Publishing House, Bucharest, 2011

Constitution of the French Republic (adopted in 1958, in its revised form), translated into Romanian: <https://constitutii.files.wordpress.com/2013/02/franta.pdf>
Caumes, Éric, *Urgence sanitaire*, Robert Laffont Publishing House, Paris, 2020

Decree no. 195/16 March 2020 regarding the establishment of the state of emergency on the Romanian territory: <https://legislatie.just.ro/Public/DetaliiDocument Afis/223831>

Decree no. 240/14 April 2020 regarding the extension of the state of emergency on the Romanian territory: <https://legislatie.just.ro/Public/DetaliiDocument Afis/224849>

Decree 2020-1257 of October 2020 declaring a state of health emergency: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042424377>

Decree 2020-293 laying down the general measures necessary to deal with the COVID-19 epidemic in the context of the state of health emergency: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041746694/>

Dima, Bogdan, *How long does the state of emergency last?*, Juridice.ro, April 2020: <https://www.juridice.ro/678835/cat-dureaza-starea-de-urgenta.html>

European Convention on Human Rights, adopted in Rome in 1950: https://www.echr.coe.int/documents/convention_ron.pdf

Florea, Constantin, *Restoring constitutional order exceptional*, Sitech Publishing House, Craiova, 2007

French Defence Code, approved by Ordinance in 2004: <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006071307/>

French Public Health Code (adopted in 1953, as revised): <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006072665/>

Government Emergency Ordinance (GEO) no. 1/1999 on the state of siege and the state of emergency: <https://legislatie.just.ro/Public/DetaliiDocument/16739>

Law no. 355/2009 on the regime of the state of partial or total mobilization of the armed forces and of the state of war: <https://legislatie.just.ro/Public/DetaliiDocument Afis/113725>

Law 55-385 of 3 April 1955 on the state of emergency: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT00000695350/>

Law 2020-290 of March 2020 on the management of the emergency situation caused by the COVID-19 epidemic: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041746313/>

Law 2020-546 of May 2020 extending the state of health emergency and supplementing its provisions: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041865244/>

Law 2020-365 of March 30, 2020 on the management of the emergency situation caused by the COVID-19 epidemic: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041768067>

Maciu, Florin, *The legal regime of exceptional states. Constitutional dictatorship at the intersection with the democratization of the army*, Universul Juridic Publishing House, București, 2011

Opinion of the National Advisory Committee on Human Rights in France – A-2020-3 State of Health and the Rule of Law, 28 April 2020: https://www.cncdh.fr/sites/default/files/avis_2020_-_2_-_200424_avis_etat_durgence_sanitaire_et_etat_de_droit.pdf

Popescu, Corneliu-Liviu, *The exceptional state established / declared constitutional, condition of the derogating measures regarding human rights*, Annals of the University of Bucharest – Law – Legal Forum, April 2020: https://drept.unibuc.ro/dyn_img/aubd/Starea%20excep%C8%9Bional%C4%83.pdf

Sava, Constantin, Monac, Constantin, *Exceptional states*, Forum Publishing House, București, 2000

Speech of the Director General of the World Health Organization on 11 March 2020: <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>

Porta, Miquel, *A Dictionary of Epidemiology*, 6th edition, Oxford University Press, 2016: <https://www.oxfordreference.com/view/10.1093/acref/9780199976720.001.0001/acref-9780199976720-e-1373?rsk=yo5qnh&result=1554>