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# HUMAN RIGHTS AND DEMOCRACY DURING COVID-19 IN THE REPUBLIC OF MOLDOVA

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# INTRODUCTION

This thesis addresses the response to Covid-19 pandemic in the Republic of Moldova. The latter will be framed in the constitutional evolution of the Moldovan legal system and specific attention will be paid to how these responses impacted human rights and the democratic character of the State.

The time frame which will be considered spans from the first-ever applied constitution on the territory of today's Republic of Moldova, after the return of Bessarabia to Romania (1918-1940), to todays' Constitution and, more specifically, to the recent declaration of the state of emergency in the wake of Covid-19 pandemic. It should be noted that, before 1918, Moldovan constitutionalism could be classified as an incipient one, because it was initiated and promoted under the influence of local customs and laws. The application of classic European constitutionalism was brief while socialist constitutionalism was embraced over a long period of time. For this reason, the characteristics of socialism were well established in Moldovan society, and this contributed to slow down the transition towards democracy after the country's independence from 1991. This is reflected in the weak rule of law and the tendency to circumvent the law.

In the wake of Covid-19 pandemic, these features of Moldovan constitutionalism were magnified and the declaration of the state of emergency showed how this state of exception was used to violate human rights and basic principles of democracy.

The present analysis will therefore focus on Moldovan constitutional scholarly work and comparative constitutional research in English and Italian, in order to better understand the evolution of Moldovan constitutionalism and the state of emergency regulation. In addition, examination of Moldovan laws and courts' decisions will be undertaken. In particular, a case brought to the Constitutional Court will be at the center of attention while referring at international norms and obligations which the Republic of Moldova must abide by. Accordingly, relevant case law of the European Court of Human Rights will be discussed.

More precisely, the first part of the thesis illustrates the constitutional evolution of the Republic of Moldova. As it was anticipated above, prior to being an independent state, several constitutions were adopted. These constitutions were influenced and adapted by

the social-economic reality and classical European constitutionalism prevailed on the socialist one only after the USSR collapsed.

The second chapter regards the constitutional models of the state of emergency and the different ways of dealing with emergencies. The history and cultural factors of a state have an essential role in foreseeing the state of emergency explicitly or implicitly. States of emergency are critically important from a human rights perspective because the suspension of legal order often paves the way for systematic human rights violations. The Covid-19 pandemic has created a situation in which numerous countries around the world have been “forced” to declare a state of emergency to deal with it, and the Republic of Moldova did so for the first time in its history. The enormous extent of the challenges posed by the pandemic required remarkable democratic resilience in order to avoid that emergency powers curtail fundamental rights and conflict with the rule of law. On the other hand, States are expected to anticipate the relevant dangers, be proactive and take any measures they deem appropriate in advance, by application of the “precautionary principle”.

The last chapter focuses on a claim filed before the Constitutional Court of the Republic of Moldova asking the latter to review the recent modification of the Law on the state of emergency, siege and war because, in certain circumstances, it could undermine democratic principles and human rights.

As a state of emergency can sometimes be used as a pretext for abuses, such as arbitrary detention, censorship, or other authoritarian measures, the concluding remarks will discuss the legitimate desire for more determinate rules to constrain state discretion under the circumstances.

## FIRST CHAPTER

## THE CONTEXT OF THE MOLDOVAN CONSTITUTION.

**Contents: 1.1.** The notion and origin of constitutionalism. **- 1.2.** The constitution as a concept. **- 1.3.** Early examples of constitutions. **- 1.4.** The historical context of the birth of the Republic of Moldova and its Constitutions. **- 1.4.1.** The Romanian Constitution of 1866. **- 1.4.2.** The Romanian Constitution of 1923. **- 1.4.3.** The Romanian Constitution of 1938. - 1.4.4. Constitution of the Moldovan Soviet Socialist Autonomous Republic of 1925 within Soviet Ukraine. **- 1.4.5.** Constitution of the Moldovan Soviet Socialist Autonomous Republic of 1938. **- 1.4.6.** Constitution of the Moldovan Soviet Socialist Republic of 1941. **- 1.4.7.** Constitution of the Moldovan Soviet Socialist Republic of 1978. **- 1.5.** The early acts after independence. **- 1.6.** The constitutionalism in the Republic of Moldova: the making process and adoption of the Constitution mechanisms still in force nowadays. **- 1.7.** Internal and external influences. **- 1.8.** The Constitution as the Supreme Law. **- 1.9.** Conclusions.

### 1.1. The notion and origin of the constitutionalism.

The notion of constitutionalism has more than one definition. One is the interpretation of Pierre Pactet who claimed: "The Constitutionalism …tried to replace the existing customs… written constitutions conceived as a first step in limiting absolutism and often the despotism of monarchical powers. The liberals demanded the modes of transmission and exercise of political power to be fixed once and for all in a fundamental book, serving as a rule of the game".[1] Another interpretation of this concept: "it is a movement which aims to replace existing, vague, imprecise customs and which leaves a vast possibility of discretionary action through written constitutions".[2]

The origin of the constitutionalism is considered to derive from the Greek notion "νόμοι" meaning a distinct framework of ancient laws which could not be modified by the Popular Assembly.[3] This word inspired Aristotle to develop the idea of "πολιτεία" according to which the laws constitute the foundation of the state. According to Caton

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1 P. Pactet, *Institutions politiques. Droit constitutionnel*, MASSON,1992, cit., p.67.
2 I. Deleanu, *Drept constituțional și instituții politice*, BUCURESTI,1991, cit., p.139.
3 D. Turpin, *Droit constitutionnel*, PRESS UNIVERSITAIRES DE FRANCE,1994, p.73.

L'Ancien, it is the idea of a "supple Constitution" consisting of rules, the majority of them being customs created by several generations.[4]

The first traces of the constitutionalism affirmation may be identified during the English revolutionary attempts to elaborate an official document in 1649. This document, called *Agreement of the Free People of England,* contained 30 articles about provisions which limited the prerogatives of the rules and established a few natural and historical human rights. The *Instrument of Government,* promulgated by Cromwell in 1653, has been also considered as a "first written Constitution". Similarly, a great significance in the affirmation of the constitutionalism has the Swedish constitutional texts of 1634, 1719-1720 and 1772 (revised in 1789).

Among the first written Constitutions may be included the Federal Constitution of the USA of 1787, the French Constitution and the Polish Constitution of 1791. They all three have been promoting the "rational liberalism". These constitutional texts contained all the principal elements of the Social Contract. It can be said that a Constitution may be considered as an expression of the social pact concluded among all its components.

One part of the meaning of the nowadays constitutionalism may be identified for the first time in the political-legal doctrine of the USA as the supremacy of the constitution on other normative acts. Over the years, the term "constitutionalism" has been developed and extended: "constitutionalism as a state government limited by the constitution; constitutionalism as the totality of knowledge about the constitution as a fundamental law of the state and society; constitutionalism represents a political system which has its basements on the constitutional methods of government".[5]

The European constitutionalism phenomenon has three essential features:

- *The principle of separation of power* is a necessity of the democratisation, and it is also a guarantee of social freedom and people security considering to the state's authorities. John Locke has formulated this principle for the first time. It has been further developed by Montesquieu who distinguished among three powers: *legislative, executive and judicial*. He claimed this theory as being imperative in

[4] I. Guceac, *Evoluția Constituționalismului în Republica Moldova,* TIPOGRAFIA CENTRALA, 2001, p.87.

[5] I. Guceac, *Constituția la răscruce de milenii,* Ediția a II-a, revăzută și adăugită, EDITURA ACADEMIEI ROMANE, 2016, cit., p.186-187.

order to prevent the abuse(s) of office, and the necessity of a check and balances system. This principle is a remedy to ensure the states activities harmony, democracy affirmation and the protection of human rights;

- *The promotion and protection of human rights and fundamental freedoms.* In England, in 1215, it has been adopted a historical document called *Magna Carta Libertum* which has been imposed to King John. Hobbes developed two important theories regarding human rights: the theory about natural rights and the theory of social contract. Locke has elaborated these theories. These ideas had led to the *Petition of Right (1628)* and *Bill of Rights (1689)*: two constitutional documents with the intent to protect specific individuals against the state. It should be mentioned Montesquieu and Jean-Jacques Rousseau who had given a significant contribution to the establishment of human rights;
- *Definition and incorporation of the notion of the rule of law*. It is the third feature of the European constitutionalism promoted by the German-French doctrine. According to Locke, the rule of law exists in a state where the law reigns, human rights and fundamental freedoms are established, and the separation of power is realized.[6] Moreover, people are entitled to revolt if the states' authorities violate their rights. Kant claims the existence of a state and its goal are the results of the necessity of defending and developing the citizen's inalienable rights.[7] Malberg develops this theory " a state which in relation with its subjects, for the guaranty of their statute, obeys itself to the regime of law and operates on them thought rules, which some of them establishes the citizens' rights and other rules fix the ways and the means which may be utilised in the realisation of the state's interests- two types of rules which have the common effect of limiting the state's power".[8]

The Republic of Moldova adhered to the characteristics of European constitutionalism, laying the foundations for democracy only after its independence in 1991. The majority of constitutions from countries in eastern Europe with a post-socialist background has taken advantage of being inspired by the worldwide experience. However, the post-socialist context and the particular transitions to democracy influenced several

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[6] J. Locke, *Two Treaties on Government*, LASSLET, 1965, p.64.
[7] I. Kant, *Critica ratiunii pure*, EDITURA STIINTIFICA,1972, p.300-330.
[8] C. Malberg, *Contributie la teoria generala a statului*, SIREY,1920, cit., p. 488-489.

provisions of these constitutions. It can be said the political and historical context of the Republic of Moldova had a significant impact on its constitutionalism.
It can be said that the Republic of Moldova has autochthonous constitutionalism.[9]

### 1.2. The constitution as a concept.

The constitution as the fundamental law of a State appeared only at the end of the XVIII century during the first revolutions. The term "constitution" in this sense can be found in the *Declaration of the rights of man,*[10] 1787 in the USA and in *Declaration of the rights of man and the citizen,*[11] 1789 in France. The term "constitution" indicated the fundamental law of a State which incorporated its basic norms and the ones by which the government is organized. It ensured the limitation of the absolute power previously belonging to the monarch and those rights and freedom of people which were considered "inalienable, natural and sacred" having a relatively constant character.[12] Nowadays constitution may be considered a complex of norms which affirms and regulates the governance principles as well as the citizens' rights, freedoms and duties. It has the objective to liquid the social status, refraining the tyranny and proclaiming human rights and fundamental freedoms.
The idea of a written constitution derived from the social contract theory by J.J. Rousseau, the separation of power by Montesquieu, and natural human rights theory by Grotius, Locke, Rousseau. There was a need of written norms for guaranteeing and ensuring rights all embodied in a Constitution.
The constitution has two different meanings: one refers to "the nature of a country concerning its political conditions…" and another meaning refers to "a law that concerns itself with the establishment and exercise of a political rule".[13] The first

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[9] I. Guceac, *Evoluția Constituționalismului în Republica Moldova,*TIPOGRAFIA CENTRALA, 2001, p.36.
[10] "We, the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." -Preamble, U.S. Constitution.
[11] Art.16 "A society in which the observance of the law is not assured, nor the separation of power defined, has no constitution at all", Declaration of the rights of man and the citizen.
[12] P. Pacted,*Textes de Droit constitutionnel*, LGDJ,1989, cit., p.8.
[13] D. Grimm, *Constitution: Past, Present and Future,* OXFORD SCHOLARSHIP ONLINE, October 2016.

definition regards more “empirical or descriptive constitution” while the second definition is a “normative and prescriptive” concept.[14] Whereas constitutions in the empirical sense have always existed, the constitution in the normative sense is a relatively modern phenomenon. It is belied that the first written constitution has been adopted in Virginia State (29 July 1776), followed by the adoption of the other states until the creation of Confederation in 1787. This can be called the first “wave” of the constitutionalism.[15] The adoption of the USA Constitution in 1787, the French Constitution in 1791 and the Polish Constitution was adopted in 1791 has to be mentioned. The Polish constitution, in force only for 1 year, tried to replace the anarchy with a democratic monarchy constitution.[16]

A written constitution sets the political and legal order established in a country. This order can appear both through the initial constituent power and the calm evolution of political institutions. Thus, especially in totalitarian states, the constitution confines the victory of the violent revolution or the new ideological clichés. The constitutional doctrine has attributed to the concept of constitution two meanings: *de facto* and *de iure* constitution.[17] The *de facto* constitution implies the real politico-social organization within the respective society, including the real status of the individual. The *de jure* constitution presupposes a document, a fundamental law that avails of a supreme legal force, elaborated and adopted through a particular procedure. It should regulate the most important social relations.

It can be steady affirmed that the notion of the constitution has been evolving during the years. Its content was expanded or diminished depending on specific interests, the points of view expressed, and the degree achieved in knowing the constitutional phenomenon in society.

### 1.3. Early examples of constitutions.

[14] Ibid.
[15] I. Guceac, *Constituția la răscruce de milenii*, 2016. p.66.
[16] G. Sanford, *Democratic Government in Poland: Constitutional Politics since 1989*, PALGRAVE, 2020, p.11.
[17] I. Guceac, *Constituția la răscruce de milenii. Ediția a II-a, revăzută și adăugită,* EDITURA ACADEMIEI ROMANE, 2016, p.69.

The crystallization of the essential elements of the constitution, followed by its definition, does not coincide with its appearance. Thus, the constitution definition may be collocated between the XVIII and the relatively XIX centuries; it cannot be excluded a prior existence of what is interpreted nowadays as a "source of law that regulates the state organization of a society".[18]

Since the emergence of the first states, there have existed written and unwritten laws regarding the establishment and the organization of the authorities which have been governing. A significant example can be mentioned: the Lycurgus' laws in Sparta or Solomon's laws in Athene which later have been recognized as Constitutions.

According to Perlot and Boulouis, the existence of some customary constitutions before the ending of XVIII century may be noticed in "*the ancièn regime of France*".[19] They claim that a Constitution had existed because there were some written parts.

The first successful attempt to materialize constitutionalism is the Constitution of England, which can be considered the "first Constitution in the world".[20] The actual appearance of the Constitution of England has been a long and complicated process. The making-process of a Constitution of Great Britain began in 1215 with the *Magna Charta Libertum*. This historical document defined several privileges to the great feudal lords and representatives of the clergy. A series of written sources have followed this document.[21]

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[18] I.Guceac, *Evoluția Constituționalismului în Republica Moldova*, 2001, cit., p.37.

[19] M. Prelot, J. Boulouis, *Institutions politiques et droit constituttionnel*, DALLOZ,1972, cit., p.202.

[20] I.Guceac, *Evoluția Constituționalismului în Republica Moldova*, 2001, cit., p.38.

[21] "

- *Petition of Rights (1628).* It contained provisions that established guarantees against the arrest and confiscation of property outside of a pre-established court proceeding, etc.;
- *Habeas Corpus Act (1679).* Its prescriptions granted the courts the right to supervise the cases of detention and arrest of individuals;
- *Bill of Rights (1689).* Contained provisions granting the right to petition, to freedom of debate in parliament and the right of subjects to appoint their representatives by free election;
- *The Act of establishing the succession to the throne (1701);*
- *Reform Act (1832);*
- *Parliament's Acts (1911,1949,1958);*

Also, there are two categories of rules more:

- rules called by A. Disey "Conventions of the Constitution", they are not emanated from the legislative authority nor from the judicial one;
- Common law: all the rules that were not included in the text of a normative act were sanctioned by the courts." I. Guceac, *Evoluția Constituționalismului în Republica Moldova*, 2001, cit., p.39.

The state's organization of different countries has been regulated based on the customary law until the independence proclamation of the North America states (Philadelphia, on July 4,1776) and the French Revolution. Towards the ending of the XVIII and the beginning of XIX centuries, the customary regimes of the constitutionalism became unsatisfactory to the reality of that time. The customary norms were not formulated in a clear manner; they had incomplete content and were dynamic. The customary rules ignored whether a derogatory fact from custom was a commendable precedent or not, and they were not redoubtable limits to the established powers.

The appearance of the first written constitutions have been recorded in some states of North America: Virginia in 1776, New Jersey in 1777 during the war of independence. During the same events, it was adopted on September 17, 1787, in Philadelphia the Constitution of the United States of America, which is still in force nowadays.

On the European continent, the first written constitution was adopted in Poland on 3rd May 1791 and in France on September 1791.[22] The French model of constitutionalism has been taken and copied by the majority of European States. It can be mentioned the written constitutions of Sweden (1809), Spain (1812), Norway (1814), Netherlands (1815), Greece (1822).

After the Second First War, written constitutions were adopted on the European continent. In 1918 it was adopted the first socialist constitution in the world - The Russian Soviet Socialist Federal Constitution. This constitution was the embodiment of the rule of the political minority that imposed its will on the whole of society, claiming to express the will and interests of the whole of society.[23] In 1924, it was adopted the Constitution of the Union of the Soviet Socialist Republics and the union and autonomous Constitutions of Ukrainian SSR, among which the Constitution of the Moldovan Autonomous Soviet Socialist Republic.

The constitutions are adopted during important political and historical events in the respective states. This period may be linked to the formation of a new state, to the change of the political course or the ideology. The newly formed Central European and Eastern European states after the First World War have adopted constitutions as proof

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[22] In force only for one year.

[23] I.Guceac, *Constituția la răscruce de milenii*, 2016, p.91-92.

of their legal legitimacy. The French Constitution from 1946 has introduced new rights as the free secular education, the right to vote for women, limiting the activity of private monopolistic associations.[24]

A new Constitution often served to reach declarative ideological purposes. The Soviet Socialist Constitutions contained norms regarding the constitution of communism and the state of all people. The constitution of the People's republic of China from 1982 at Article 1 declared that the state is based on "three popular principles". It represented a democratic republic of people, governed by the people and for the people, without disclosing the secret of the compatibility of democracy and dictatorship.[25]

The form of the government is declared in the constitution. This tradition began on the American continent during the Second Continental Congress of 1775. During this Congress, it was decided that the newly independent states of England have to be republics. Following, this form of state has been proclaimed in the 13 constitutions of the federal states.

## 1.4. The historical context of the birth of the Republic of Moldova and its Constitutions.

### 1.4.1. The Romanian Constitution of 1866.

After a century of annexation within the Russian Empire, Bessarabia,[26] currently the Republic of Moldova, became part of the Romanian Kingdom on Mach 27, 1918. During the period of the Greater Romania,[27] the constitution promulgated by Charles I on July 13, 1866, remained in force.

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[24] French Constitution, 1946.

[25] I. Guceac, *Constituția la răscruce de milenii*, 2016, p.93.

[26] It is the name given by the Russian Empire in 1812 to the territory of the Moldavian voivodeship between the Prut and the Dniester annexed by the Treaty of Bucharest of 1812, together with the Hotin district and historical Bessarabia (in Turkish Bugeac) ceded by the Ottoman Empire from 1812 after the end of the Russo-Turkish war (1806-1812). The fact that part of the territory of the voivodeship was ceded to Russia, despite the Romanian-Ottoman treaty guaranteeing the integrity of Moldova, is due to the skill of the French negotiator Gaspard Louis de Langeron who served the tsar's interests. C.C. Giurescu & D.C. Giurescu, *Istoria românilor*, ALBATROS, 1975, p.501.

[27] The phrase is strongly associated with the Kingdom of Romania between 1918 and 1940, often considered the realization of the pan-Romanian goal. In 1920, after the incorporation of Transylvania, Bukovina, Bessarabia and parts of Banat, Crisana and Maramures, the Romanian state reached its largest peacetime geographical extent ever (295,049 km²). Today the concept serves as a guiding principle for

The procedure for adopting the Constitution of 1866 began at the ending of April.[28] From May 1, the draft constitution drawn up by the State Council and approved by the Council of Ministers was submitted to the Electoral Assembly by the royal lieutenant and the prime minister. The Electoral Assembly initiated the examination of the project through the committee of delegates. The Committee of Delegates modified the project, reaching from 114 to 130 articles, included in 8 titles during the examination process. Following the completion of the project by a special commission, this project was submitted for the King's approval. The Electoral Assembly voted this bill in the setting of June 29. It was sanctioned the new constitution on June 30, 1866.
The Romanian Constitution of 1866 has been strongly influenced by the Belgian Constitution of 1831, which at that time was considered being the most liberal in Europe. The Constitution enshrined principles generated by the French Revolution: freedoms and fundamental rights of citizens, national sovereignty, the separation of powers in the state, the responsibility of ministers.

### 1.4.2. The Romanian Constitution of 1923.

After the Union of Bessarabia with Romania occurred on December 1, 1918, and the establishment of the Romanian unitary state, the Constitution of 1866 no longer satisfied the needs and requirements of the country. This fact determined the idea of necessity of a new Constitution in a joint work of all provinces that formed Greater Romania. Other important factors led to the decision to draft a new Constitution as:

- "the normative content of the Constitution of 1866 had been subjected to hasty amendments by an exceptional procedure for the adoption of decree-laws;
- the new constitution had to include all the commitments that the state assumed following the conclusion of some international treaties and conventions and which had the value of some norms of constitutional law;

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the Unification of Romania and Republic of Moldova. C. C. Giurescu & D. C. Giurescu, *Istoria românilor*,1975.

[28]After the plebiscite for the election to the throne of Prince Carol of Hohenzollern-Sigmaringen, held between April 2-8, 1866, after which the people voted for his election. I. Guceac, *Evolutia Constitionalismului in Republic Moldova*, 2001, p.219.

- the process of legislative unification to cement in a unitary whole the new state organization. In order to carry out these reforms, in the new constitution it was necessary to enshrine the principles in the light of which these laws were to be elaborated;
- the need for a new Constitution was also determined by the fact that the Holy Land of Chisinau and the Great National Assembly in Alba Iulia had requested,[29] in the Declaration and Resolution, respectively, that the new state organization, conditioned by the incorporation of new provinces, become the common work of resulting from the collaboration and consent of all provinces, including through the debate and voting of the constitution by their representatives".[30]

The design of a unitary Constitution was required not only for jurisdictional reasons but also for political considerations. The idea of a new Constitution enlivened politicians and scholars. As a result of productive collaboration, four draft Constitutions were elaborated. In the end, the draft proposed by the National Liberal Party was accepted. The Constitution was adopted by the Constituent National Assembly of Deputies in the meeting of March 26, 1923, with a majority of 247 votes "for", 8 "against", and 2 abstentions out of a total of 369 deputies. This situation was certified by the President of the Assembly of Deputies, M.G. Orleanu and by the secretary D. Luca, as well as by the Constituent National Assembly of the Senate in the meeting of March 27, 1923, with the majority of 137 votes "for", 2 "against" and 2 abstentions from the total of 194 senators.

The Constitution was promulgated by King Ferdinand I by the Royal Decree no. 1360 of March 28, 1923, countersigned prime minister and 14 ministers, and it was published in the "Official Gazette" no. 282 of March 29, 1923. The Constitution maintained the structure of the Constitution of 1866 and was constituted by 138 articles structured in title. In addition, the Constitution of 1923 included new principles:

1. Consecration of democratic ideas and regulation of the process of asserting democracy;

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[29] It is a city that serves as the seat of Alba County in the west-central part of Romania. Located on the Mures River in the historical region of Transylvania. "Comunicat de presă privind rezultatele provizorii ale Recensământului Populaţiei şi Locuinţelor – 2011" (PDF). Alba County Regional Statistics Directorate. 2 February 2012. Archived from the original (PDF) on 18 April 2013. Retrieved 14 February 2012.

[30] I. Guceac, *Evolutia constituionalismului si a organizarii de stat in Repblica Moldova*, 2003, cit. p.227.

2. Consecration and more consistent achievement of social protection, especially in the field of labour;
3. Consecration of legality as a foundation of state activity, achieved through control of constitutionality carried out through justice and inviolability of magistrates.[31]

The Constitution comprised a broad framework of rights and freedoms: individual freedom, inviolability of domicile, freedom of labour, freedom of trade and industry, property rights, freedom of opinion, freedom of conscience, freedom of the press, freedom of association, freedom of assembly, compulsory and free primary education. However, the Constitution incorporated some negative aspects, enshrining at para. 2, art. 6 "special laws voted by a 2/3 majority will determine the conditions under which women can have the exercise of political rights".[32] Distinguishing between the capacity of women to use in electoral law and that of the executive, it made possible the practical removal of women from voting by the electoral law of 1926. The same law deviated from the principle of representing the people, practically leading to a representation of the parties. Likewise, the property right proclaimed in the Constitution, not being accompanied by secure guarantees, left the complete possibility for expropriation in case of public necessity.[33]

The exact procedure of elaboration and adoption denoted the presence of a new Constitution, even if it is strongly influenced by the previous one. The Romanian Constitution of 1923 had the merit of being considered more democratic. It enshrined in a more profitable form the principle of legality and supremacy of the Constitution, establishing the control of the constitutionality of laws; it formulated in a new way the principle of national sovereignty, renouncing that of state sovereignty, declared the Romanian state a nation-state, unitary and indivisible; it forbade the colonization of the national territory with foreign populations or ethnic groups; it proclaimed broader civil rights and freedoms, including the census electoral system with a democratic electoral

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[31] I. Guceac, *Evolutia constitutionalismului in Republica Moldova*, 2001, cit., p.46-47.
[32] Constitutia Romaniei din 1923, art.6.
[33] "Apart from expropriation for the means of communication, public sanitation, defense of the country and works of military, cultural interest and those dictated direct general interests of the state and public administrations, the other cases of public utility could be established by laws adopted by a majority of 2/3". I. Guceac, *Evolutia constituionalismului si a organizarii de stat in Repblica Moldova*, 2003, cit. p.231.

system. In other words, the democratic character of this Constitution led to its re-entry into force in a partial form and modified after August 23, 1944.[34]

### 1.4.3. The Romanian Constitution of 1938.

The historical premises of the Romanian constitution of February 28, 1938, were determined by the socio-economic and political conditions in 15 years after the adoption of the previous constitution. At this stage, Romania has faced phenomena of instability internally and externally. It changed spheres of influence and forced to adapt its constitutional framework and political leadership mechanisms to new internal realities. Establishing a personal dictatorship, on February 10, King Charles II needed a legal consecration of the royal dictatorship. By the high Royal Decree no. 900 of February 20, 1938. King Carol II decreed the new constitution of Romania, deciding its submission to the "Romanian Nation to right knowledge and consent".[35] In the same number of the "Official Gazette" of Romania, are published:

1) "The Proclamation of King Charles II to the Romanians, which briefly presented the content of the new declared Constitution and submitted it to the "consent of the Romanian people";
2) The High Royal Decree no. 901 of February 20, 1938, by which the Romanian people were called on February 24, 1938, to decide by plebiscite on the Constitution decreed by the King;
3) The High Royal Decree no. 902 of February 20, 1938, by which five members of the Commission were appointed to total the result of the plebiscite".[36]

The Romanian voters registered in the electoral lists for the election of the Assembly of Deputies were obligatorily called to the plebiscite. The vote on the draft constitution was made by a verbal statement made at the electoral bureau. It drew up two lists: one for those who voted for and another list for those who voted against. At the plebiscite, 4,303,064 voters presented themselves, out of which 4,297,581 voters voted for the Constitution, against voting only 5,483.[37]

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[34] Decretul Regal nr.1626 din 31 august 1944.
[35] I. Guceac, *Evoluția Constituționalismului în Republica Moldova*, 2001, cit., p.50.
[36] Ibid., cit., p.51.
[37] Ibid., p.51.

The constitution entered into force on February 27, 1938, i.e. on the date of its sanction, abrogating, on the same date, the Constitution of 1923. This Constitution is also known as the "Constitution of Carol II".[38] It is considered a plebiscite constitution, although the plebiscite held on February 24 had a more formal character because King Carol II subjected the Romanian people "to right knowledge and consent",[39] and not for the approval of a new constitution.

The Constitution of 1938 conserved in general the structure of the previous constitution. If the normative content is considered, the Constitution promulgated in 1938 reestablished mainly the Romanian constitution of 1923. It regarded the sphere of human rights and freedoms granted to citizens, as well as the organization of public authorities, observance of democratic principles in this field. In Title II of the Constitution,[40] an emphasis was placed on the importance of duties to the fundamental rights and freedoms of citizens, and the death penalty was applied.

The territorial losses suffered by Romania in the summer of 1940, including Bessarabia, caused internal discontent and forced King Charles II, on September 15, 1940, by a decree-law, to suspend the 1938 constitution and to dissolve both parliamentary assemblies. The decree granted to General Ion Antonescu, the President of the Council of Ministers, full attributions for the state leadership. On the contrary, the royal prerogatives were considerably reduced.

### 1.4.4. Constitution of the Moldovan Soviet Socialist Autonomous Republic of 1925 within Soviet Ukraine.

The Constitution of the USSR 1924 and the Constitution of the Soviet Socialist Republic of Ukraine 1929 directly influenced and impelled the process of establishing the constitutional bases of the RASSM (fig.1). Constitutional commissions were formed for the elaboration of this Constitution: besides the Organizing Bureau of Central Committee of the Communist Party from Ukraine for the Moldovan RSSA in addition to the Ukrainian Central Executive Committee, the People Commissariat of Justice of the Ukrainian SSR and in addition to the Interim Revolutionary Committee of the

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[38] Ibid., cit. p. 50-51.
[39] Ibid., cit. 52.
[40] *"On the Duties and Rights of Romanians",* Constitution of Romania of 1938.

RASSM. The draft Constitution was drafted by the People Commissariat of Justice of the Ukrainian SSR, with the participation of representatives of the Provisional Revolutionary Committee of Moldova and the Political Bureau of the CC of the PC (b) in Ukraine, as well as other central bodies in Ukraine.[41]

During the meetings of the Soviet of People Commissioners of the SSR on November 20 and the Political Bureau of the CC of the CP (b) U on November 28, 1924, the principles of drafting the RASSM Constitution were examined and adopted. They were included in the basic design of the project.

Following a series of debates, corrections and completions, on April 8, 1925, the constitution draft was approved by the Presidium of the Central Executive Committee of Ukraine. It was decided to submit the project for examination to the First General Congress of the Soviets of Moldova.[42] On April 23, 1925, the deputies of the First General Congress of Soviets from the Moldavian RASS unanimously adopted the Constitution of the Moldavian RASS. However, this Constitution was not the work of the native population, as it should have been in democratic conditions. The statement founded the expression even in the text of the decision, which said: ".... to find good the Constitution of the Moldovan Soviet Socialist Autonomous Republic and submit it for full strengthening by the Congress of Ukraine of Soviets of deputies from workers, peasants and red soldiers".[43]

The RASSM Constitution established, from a legislative point of view, a dictatorship of the proletariat, based on the community between the working class and the peasantry. It declared the leading role of the Communist Party in the political organization of Soviet Moldova. The Constitution emphasized the principles of statehood, of the dictatorship of the proletariat, the fundamental law operated with the full power of the working masses, through the Soviets. The RASSSM Constitution laid the foundations for the functioning of the power of the working class and the peasantry in the form of a unitary system for the representation of the Soviet bodies of deputies of workers, peasants and soldiers of the Red Army.

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[41] V.Ivanov, Gh. Costachi, *Constitutia RRS Moldovenesti- triumf al democratiei socialiste*, CARTEA MOLDOVENEASCA, 1983, cit., p.36-37.

[42] I. Guceac, *Evolutia constituionalismului si a organizarii de stat in Repblica Moldova*, TIPOGRAFIA CENTRALA, 2003, p. 248.

[43] Ibid., cit, p.248.

According to the constitutional norms, justice was performed by the courts (popular courts of RASSM), established by the legislation of the USSR, the Ukrainian SSR and the constitutional provisions. The functions of supervising the activity of the republican judicial bodies were exercised by the Main Court of RASSM. It functioned based on a particular regulation, approved by the Central Executive Committee of Ukraine.
This Constitution did not contain provisions regarding the fundamental rights of citizens. Furthermore, if it is analyzed the content of art. 16 of the *French Declaration of the Rights of Man and of the Citizen of 1789* ("Any society in which the guarantee of rights is not ensured, nor the separation of powers determined, has no Constitutions"), the value of this constitution decreased considerably.


Fig.1. The Moldovan Autonomous Soviet Socialist Republic.

### 1.4.5. Constitution of the Moldovan Soviet Socialist Autonomous Republic of 1938.

The Soviet doctrine insistently promoted the idea of the socialism predominance, which contributed to the realization of political, economic and social transformations. These transformations determined the need of adopting a new Constitution of the

USSR. On December 5, 1936, the VIII Extraordinary General Congress of Soviets in the USSR adopted a new uninominal Constitution. The Constitution of 1936 essentially changed the structure and state of the administrative bodies. This structure was simplified and made more explicit. Soviets of all levels renounced at the large volume of this system. [44]

On January 30, 1937, the Constitution of Ukraine was adopted by the Fourteenth Extraordinary Congress of Soviets in Ukraine. Five chapters of that Constitution contained provisions regarding the structure, manner of establishment and attributions of the RASSM bodies. Immediately after the adoption of the Constitution of Soviet Ukraine, the making-process of a new Constitution began in the Autonomous Republic of Moldova. The Central Executive Committee of the Republic of Moldova formed the Constitutional Commission, which drafted the new constitution. In December 1927, the draft presented by the Commission was approved by the RASSM Central Executive Committee and published in the press for discussion. The VII Extraordinary Congress of Soviets in RASSM adopted the new Constitution on January 6, 1938.

The Constitution was structured in 11 chapters, which included 114 articles. The principles of Soviet constitutionalism determined the normative content. It maintained the continuity of the necessary provisions and principles concerning the previous constitution, fulfilling every single element needed for the subsequent consolidation of the mechanism of the dictatorship of the proletariat in the RASSM Constitution of 1925. The same was maintained for the introductory provisions of the USSR Constitution of 1936 and the Ukrainian Constitution of the SSR of 1937. Unlike the previous constitution, the Constitution of 1938 contained a separate chapter on fundamental rights and freedoms: the right to work, education, rest, social assistance and protection, freedom of speech, press, rallies and demonstrations, freedom of conscience, the right of association. It also enshrined equal rights of women and men, equality of citizens, regardless of nationality and race, inviolability of the person, inviolability of the domicile, the right to political asylum. Under the conditions of the Marxist political regime, however, these rights and freedoms remained, for the most part, formal.

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[44] "According to the 1936 Constitution, the organ of supreme power in the USSR became the Supreme Soviet of the USSR, which took over the powers exercised by the Congress of Union Soviets and the Union CEC." Ibid., cit., p.264.

### 1.4.6. Constitution of the Moldovan Soviet Socialist Republic of 1941.

During February 8 and 12, 1941, the meetings of the First Session of the Supreme Soviet of the MSSR (fig.2) took place. It was adopted, on February 10, the Constitution of the MSSR. Likewise, the Constitutions of the rest of the union republics, the Constitution of the MSSR was structured in 11 chapters, consisting of 125 articles. Regarding the fundamental rights and duties of the citizens, as well as the electoral system, the RASSM Constitution enshired "practically copied articles from the Constitution of Moldovan Autonomous Soviet Socialist Republic",[45] having mostly a declarative content.

Regarding the revision, the Constitution was flexible and could be amended by a 2/3 majority of the votes of the deputies of the Supreme Soviet. The formal character of the Constitution was proved by the repressions that at that time had become a communist method of solving national problems "in the name of their prosperity". The model of "socialism", elaborated by the centre and implanted in the content of the Constitution, was considered unique, perfect and obligatory. The normative content of the Constitution did not consider national factors of law configuration for the most part. The national character of constitutionalism at that stage did not find its place in the socialist process of state organization because the communist anti-democracy rejected any national specificity in the field of the state organization. These sovereign tendencies manifested themselves in the most pronounced and aggressive form in the republics that were included in the USSR during the pre-war period.

The repressions, the massive deportations of the population, of distinct social categories, which, in the vision of the promoters of constitutionalism and socialist state organization, did not incarnate in the exigencies of the "triumphant march" of the state through "socialist construction",[46] became essential components of the state mechanism elaborated and inserted in the text of the Constitution.

If in most of the USS Republics, towards the end of the 1930s the totalitarian system has been already constituted, in the newly annexed regions the constitutional transformations were faster. They were more demanding, the adjustment to the

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[45] I. Guceac, *Evolutia constituionalismului si a organizarii de stat in Repblica Moldova*, 2003, cit., p. 291.
[46] Ibid., cit., p.297.

totalitarian system being aggravated by the processes determined by the specifics of international and internal relations in the complicated anti-war and post-war period. Although in a democratic society, constitutionalism is a social phenomenon emanating from the very spirit and interests of society, in the MSSR, as in the whole Soviet space, it served the interests of the Communist Party. In order to control social leadership levers, called for the application of force, often unjustified.[47] The 1941 Constitution traditionally preserved the continuity of the Constitutions of the Ukrainian SSR and the Moldovan RASS. The MSSR Constitution adopted the principles of Soviet constitutionalism that strengthened the dictatorship of the party and the state while tolerating the absence of guarantees for the effective exercise of fundamental rights and freedoms inserted in the normative content of the Constitution.


Fig. 2. The Moldovan Soviet Socialist Republic.

[47] Ibid., p. 297.

### 1.4.7. Constitution of the Moldovan Soviet Socialist Republic of 1978.

The reform processes, launched in the USSR after the condemnation of the cult of Stalin's personality, forced the Soviet authorities to frame a new Constitution of the USSR. The draft constitution reflected "the evolution of democracy, socialism, the basic features of Soviet society".[48] The Constitutional Commission drafted and approved the draft of the new Constitution on May 23, 1977. The draft was also adopted by the Plenary CC of the CPSU, which carried out its work on May 24, 1977. Subsequently, the Presidium of the Supreme Soviet of the USSR adopted the Decree on the Constitution USSR. According to this Decree, the project was published in the press and was submitted for discussion.[49]

The discussion, led and directed by the Communist Party, focused on the project. It remained essentially a formality, an expression of passive democracy, even though 110 articles were amended, and a new article was introduced.[50] On October 3, 1977, the draft Constitution was approved with the amendments made, and on October 7, 1977, the Supreme Soviet unanimously adopted the new Constitution of the USSR.

"The adoption of the USSR Constitution determined the need to draft and adopt the MSSR Constitution because this republic "is based on the same objective social, economic and political factors, on the same radical transformations that took place in the life of the entire country and in each republic in the process of raising the Soviet society to the mature stage of socialism".[51] The drafting of the new Constitution occurred under the "direct leadership" of the CC of the CP of the MSSR. The elaboration of the new Constitution was initiated by the Decision of the Supreme Soviet on the preparation of the draft of the new Constitution of the MSSR, adopted on July 14, 1977. The Supreme Soviet formed the Constitutional Commission, composed of 45 members.

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[48] I. Guceac, *Evolutia constituionalismului si a organizarii de stat in Repblica Moldova*, 2003, cit., p. 299.
[49] This procedure was supposed to last from June to October 1977. The draft of the new USSR Constitution was examined in approximately 1.5 million working-class rallies, 450,000 open party rallies, more than 50,000 sessions of Soviets of various ranks attended by over 2.1 million deputies, 300 thousand who took the floor.
[50] V.Ivanov, Gh. Costachi, *Constitutia RRS Moldovenesti- triumf al democratiei socialiste*, 1983, p.14.
[51] Moldova Socialita, 15 aprilie 1978, cit., p.7.

After nine months of the commission's activity, the project was published in the press to be discussed by the people. The public debate lasted 30 days during which 14.8 thousand meetings and rallies were organized.

On April 11, 1978, the Constitutional Commission approved the draft constitution and sent it to the Presidium of the Supreme Soviet of the Republic. With the approval, the VIII Extraordinary Session was convened, which adopted on April 15, 1978, unanimously the Constitution of the MSSR. This Constitution had new chapters, and its normative content enshrined the rights, freedoms and duties of the citizen, determined the principles of organization and purposes of the socialist state (called the state "of the whole people").[52] However, these provisions were just decorative slogans.

For the first time in the history of Soviet constitutionalism, an interpretation of the notion of the political system and its constructive elements was attempted. The normative content of the constitution also provided a separate chapter dedicated to the rights of MSSR citizens. Nevertheless, fundamental rights and freedoms were not considered inalienable to the human being, most of them being considered natural. Fundamental rights did not have a social value in themselves; they were intended for global communist purposes. Some of the rights were substantially limited, and political rights had to be used with priority for the purposes of socialist construction. Within these rights, an increased priority was given not to civil rights and personal inviolability, but to socio-economic rights with the exception of the right to property. This constitution was applied in RSSM and, later, in the Republic of Moldova until the adoption of the new constitution of 1994.

### 1.5. The early acts after independence.

The foundations of the constitutionalism development in the Republic of Moldova were laid, starting with the adoption of acts with a significant historical value. The first of these acts was the Declaration on Sovereignty of June 23, 1990,[53] which stated that the Republic of Moldova is a sovereign state. This Declaration was a natural and necessary condition for the existence of the statehood of Moldova, source and carrier of

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[52] I. Guceac, *Evolutia constituionalismului si a organizarii de stat in Repblica Moldova*, 2003, cit., p. 301.
[53] *Declarația suveranității Republicii Sovietice Socialiste Moldova*, nr.148 din 23.06.90. În: Veștile, 1990, nr.8/192.

the people. By this act, overshadowed by the significance of the Declaration of Independence, it was decided that the sovereignty is exercised in the interest of the entire people by the supreme representative body and no person or social group can assume the right to exercise it. This Declaration proclaimed Moldova a unitary and indivisible state, and the land, subsoil, waters, forests and other natural resources located on the territory of SSR Moldova, as well as the entire economic, financial, technical-scientific potential, the values of national heritage being the exclusive and unconditional property and RSS Moldova. The act decided that the laws and other union normative acts should act in Moldova only after their ratification by the Parliament. Those acts in force that contradicted the sovereignty of Moldova were needed to be suspended. On the same day, the decision declaring the Ribbentrop-Molotov pact null and void were adopted.[54]

Furthermore, the Decree on State Power of July 27, 1990,[55] stated the supremacy of the Constitution and the laws of the Republic of Moldova were ensured with the separation of state power into legislative, executive and judicial powers. This act did not allow the cumulation of leadership positions in the bodies of state's power and state administration with any other position in state and cooperative organizations, in political parties and socio-political organizations and movements. In the act in question, the system of party leadership and other political leadership in state and law enforcement bodies, in state security bodies, in the military and militarized formations, in enterprises, institutions and organizations were abolished. As a result of the consequences of the past, the membership of judges and other workers in state bodies for the protection of the rule of law in political parties and socio-political movements were prohibited.

Among the acts that constitute the three pillars of constitutionalism in the Republic of Moldova, which is still in force at present, is included the Declaration of Independence of August 27, 1991. This act, according to the Decision of the Constitutional Court no.

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[54] Hotărârea Sovietului Suprem al Republicii Sovietice Socialiste Moldova cu privire la avizul Comisiei Sovietului Suprem al R.S.S. Moldova pentru aprecierea politico-juridică a Tratatului sovieto-german de neagresiune și a Proto- colului adițional secret din 23 august 1939, precum și a consecințelor lor pentru Basarabia și Bucovina de Nord, nr.149 din 23.06.90, in: Veștile, 1990, nr.6-7/186.

[55] Decretul cu privire la puterea de stat, nr.201 din 27.07.90, in: Veștile, 1990, nr.8/208.

36 of December 5, 2013,[56] is currently an integral part of the constitutionality block, having priority over the norms of the Constitution. Through the Declaration of Independence, the Republic of Moldova declared itself a sovereign, independent and democratic state. Only the Constitution, laws and other normative acts adopted by the legally constituted bodies of the Republic of Moldova could be applied on its entire territory.

As a result of these legislative and constitutional actions but also of the fact that it acceded to the Universal Declaration of Human Rights, on March 2, 1992, the Republic of Moldova became a member state of the UN with full rights. Following these factors, the Constitutional Commission formed in 1990, only on March 12, 1993, after stormy debates in Parliament, adopted a decision approving the draft developed as the basis of the new Constitution, while establishing its publication and submission of debates by the whole people.[57]

### 1.6. The Constitutionalism in the Republic of Moldova: the making process and adoption of the Constitution still in force nowadays.

Unlike the Constitutions of other states formed after the fall of the USSR and other socialist regimes, the current Constitution of the Republic of Moldova was adopted in - a legal framework, modified step by step after the declaration of sovereignty over the USSR in 1990.[58]

The Republic of Moldova has experienced significant political and socio-economical transformations and the during it a new democratic Constitution has been adopted.[59] These circumstances have influenced and led to a problematic constitution making-process; the aim was achieved in a considerable period of time. The making-process started with the first constitutional act: *The Declaration regarding the Sovereignty.*[60]

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[56] Hotărârea Curții Constituționale privind interpretarea articolului 13 alin.(1) din Constituție în corelație cu Preambulul Constituției și Declarația de Independență a Republicii Moldova (Sesizările nr.8b/2013 și 41b/2013), nr.36 din 05.12.2013. În: Monitorul Oficial al Republicii Moldova, 2013, nr.304-310/51.

[57] A. Arseni, *Drept constituțional și instituții politice: Tratat elementar*, TIPOGRAFIA CENTRALA, 2005, p. 168.

[58] V. Zaporojan, D. Crigan, *Metamorfoza adoptarii si revizuirii Constituiei Republicii Moldova*, in STUDIA UNIVERSITATIS MOLDAVIAE, nr.8 (128), 2019, p.75.

[59] The Constitution of Republic of Moldova adopted in 1994.

[60] *Declarația suveranității Republicii Sovietice Socialiste Moldova*, nr.148 din 23.06.90. În: Veștile, 1990, nr.8/192.

The actual Constitution of the Republic of Moldova was adopted on July 29, 1994, in a legal framework modified step by step after the *Declaration of Sovereignty* over the USSR in 1990. In the period from the *Declaration of Sovereignty* and later *Declaration of Independence*,[61] until the moment of the adoption of the current Constitution, in the Republic of Moldova, the Constitution of the Moldovan Soviet Socialist Republic of 1978 was in force. These constitutional acts have influenced the form of government. The Constitution in force at that time has undergone several revisions,[62] leading to the abolition of the provisions regarding the role of "leader and guide" of the communist party.[63] The new conditions allowed "the institution of a multiparty political system; enshrining the principles of the market economy; changing the forms and status of the property; the essential modification of the structure of the state mechanism, the institution of the Head of State in the person of the President of the Republic is founded, the reorganization of the Supreme Soviet and the Soviet of Ministers occurred, including the local self-administration".[64]

Having been established a new state order, in the Republic of Moldova it has not been chosen the way of abrogation entirely of the socialist Constitution of 1978. On the one hand, it was applied a frequent and wide modification of the existing Constitution, and on the other hand, a modification of the legislation in force during the whole period of elaboration of the draft of the new Constitution from 1990 to 1994.[65] The attempt of reanimation of the Constitution of 1978 was not sufficient for solving the new social tasks. The needs and social realities of that period changed, and a new constitution was necessary.

On June 16, 1990, by the Decision of the Supreme Soviet of the MSSR, the Commission for the elaboration of the draft of the new Constitution was formed to its elaboration.[66] Only on March 12 1993, after several debates in the Parliament, the Constitutional Commission has adopted a decision approving the draft elaborated. It

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[61] *Lege privind Declarația de Independență a Republicii Moldova*, nr.691 din 27.08.91, În: Monitor, 1991, nr.11- 12/103.

[62] The Constitution of Moldovan Soviet Socialist Republic adopted in 1978.

[63] I. Guceac, *Evolutia Consitutionalismului in Republica Moldova*, 2001, cit., p. 314.

[64] Ibid., cit., p. 303-335.

[65] V. Zaporojan, D. Crigan, *Metamorfoza adoptarii si revizuirii Constituiei Republicii Moldova*, in STUDIA UNIVERSITATIS MOLDAVIAE, nr.8 (128), 2019, p.75.

[66] *Legi, hotarari, si alte acte adoptate la Sesiunea intai a Sovietului Suprem al RSS Moldova*, Chisinau, 1990, Hotararea Sovietului Suprem nr.118 -XII din 16 iunie 1990.

was the basis of the new constitution establishing, at the same time, its publication and the suspension of the debates by the people. It was planned to organize and hold an international practical-scientific conference, after which the Parliament would have been adopted in the second reading the constitution and would have been submitted it to the country's referendum.

Contrary to the society's expectations, the 1990 Parliament of the 12th legislature dissolved itself due to conditions of the emergence in the eastern of Republic of Moldova of a self-proclaimed separatist region,[67] as well as the fact that Transnistrian and Comrat deputies boycotted legislative sessions.[68]

Following the 1994 parliamentary elections, other political forces won the majority of votes. As a result, a new Commission was created in April 1994 to draft and complete the text of the Constitution. On July 7, 1994, it was adopted the Law regarding the procedure of Constitution adoption.[69] A new Constitution was adopted on July 29,1994, without publishing it in the mass sources. It was promulgated after three days by the President, and it entered in force on August 27, 1994. On the same date, the Constitution of 1978 was abrogated. The laws and normative acts which were in contrast with the new Constitution were also abrogated.[70]

The decisions not to publish the Constitution draft in the mass sources of information and the promulgation of the Constitution by the President without a previous approbation through the referendum there remain two unanswered questions. The new Constitutional Commission has mainly resumed the text of the draft Constitution elaborated in 1993. However, it did not comply with Parliament's 1990 request to approve the adopted Constitution by a referendum. Approval by people through a referendum is a well-known practice and contributes to the legitimation and acceptance of the Constitution. Thus, in the Republic of Moldova, the degree of legitimacy was reduced, and the obligation to approve the subsequent constitutional revision by

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[67] Transnistria.

[68] V. Zaporojan, D. Crigan, *Metamorfoza adoptarii si revizuirii Constituiei Republicii Moldova*, in STUDIA UNIVERSITATIS MOLDAVIAE, nr.8 (128), 2019, p.77.

[69] *Legea privind procedura de adoptare a Constituției Republicii Moldova*, nr.175 din 07.07.94. Nepublicată. Intrată în vigoare la 07.07.1994. http://weblex.md/item/view/iddbtype/1/id/bbaa0035b98b17ac32b4c0bd57c592b9.

[70] The Constitution of Moldovan Soviet Socialist Republic adopted in 1978.

referendum has already been imposed by law. The Constitution of the Republic of Moldova would have become much more rigid in terms of the adoption procedure.[71] The relatively long delay in adopting the new Constitution can be explained by the qualitatively new socio-economic and political conditions to the Soviet ones. Compared to the previous Constitution's amendments, a new socio-economic formation was required to be introduced in the constitutional regulations, the political system of the Republic of Moldova being subject to very important functional redistributions. Developed in conditions of political crisis, as in the other socialist republics that have declared their independence, the Republic of Moldova has accepted a compromised content. The adoption of the Constitution satisfied the expectations of society and generated a series of activities oriented towards the achievement of the rule of law.

### 1.7. Internal and external influences.

The Republic of Moldova has a particular history, the territory of this country being for 200 years ruled by different powers. The history of the Constitution of the Republic of Moldova has a mature chronology. The constitutional development of the Republic of Moldova is a phenomenon inextricably linked to the process of formation of the linguistic, territorial and psychological community, constituted in an economic and cultural unit, and later state. Today it is known by the international community as the Republic of Moldova. "The constitutional history of a state begins either with the moment or with the birth of the state, or with the completion of the constitutionalist process, or with the completion of the first objective political regime".[72]
The reality of society has influenced the constitution making-process at that time, which was in the process of a radical change: from a totalitarian system to a democratic one. The Republic of Moldova lived a situation familiar to other states that have declared

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[71] "Thus, having from the approval of the Constitution until now 11 revision laws, we could model that in this period we would have had 11 referendums approving the laws revision of the Constitution. Possibly, if at that moment at least the President insisted on this procedure, we would have had, as in Romania and in other states, a much smaller number of constitutional revisions, which would have led to the firm observance of the principle of stability of the Constitution." Cit. V. Zaporojan, D. Crigan, *Metamorfoza adoptarii si revizuirii Constituiei Republicii Moldova*, in STUDIA UNIVERSITATIS MOLDAVIAE, nr.8 (128), 2019, p.77.
[72] M. Prelot, *Institutions politiques et droit constitutionnel*, DALLOZ,1984, cit., p.295.

their independence. The elaboration of the “Fundamental Law” was conditioned by the atmosphere that dominated in the Commonwealth of Independent States.[73]
On May 27-28, 1993, the Conference entitled “The Draft Constitution of the Republic of Moldova” was held in Chisinau with the participation of many world-renowned scholars, including the "patriarch" of French constitutional law Jacques Cadart. The Constitution draft has been examined and meticulously analyzed, making concrete observations and proposals. Other international bodies such as the Council of Europe, Venice Commission and the University of the Sorbonne have made favourable opinions regarding the Constitution draft.
Internally, the Constitution project has been inspired by several Constitutions which already existed. In particular, the Romanian Constitution has been taken as reference for drafting the current Constitution. In turn, the Romanian Constitution is inspired by the old French Constitution. The draft has not been completed due to pressure exercised by Transnistria and Comrat deputies, who were boycotting the seats of parliament. In order to overcome this political crisis, early parliamentary elections took place and subsequently a new Commission was appointed to draft the Constitution. This new Commission took over almost entirely the content of the old draft of the Constitution and it was adopted without being subject to a referendum.
The current Constitution is the result of a compromise of a divided society, where a territorial conflict occured, and the war could not be avoided.[74] Also, this territory passed from one regime to another and experienced situations of subjugation and denationalization. Thus, the current Constitution is fragile, and some even say that it would be necessary to elaborate a new Constitution.[75]

### 1.8. The Constitution as the Supreme Law.

The attribution of the term “Supreme Law” to the Constitution starts from the so-called theory of “step construction”,[76] opened by Hans Kelsen in the work *Pure*

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[73] I. Guceac, *Evolutia Consitutionalismului in Republica Moldova*, 2001, p.125
[74] The Transnistria war 1990-1992.
[75] C. Cojocaru, https://moldova.europalibera.org/a/corina-cojocaru-aș-pleda-pentru-modificarea-constituției-începând-de-la-primul-articol-până-la-ultimul-articol-/30076909.html
[76] H. Kelsen, *Pure Doctrine of Law*, UNIVERSITY OF CALIFORNIA PRESS, 1967, cit. p.271.

*Doctrine of Law*. According to this theory, one of the peculiarities of law is to "regulate its production". It happens by the fact that a legal norm determines "only the procedure by which another norm is produced".[77] Kelsen admits that it can determine to some degree the content of the rule to be "produced".[78]

Thus, the norm that regulates the production process acquires the value of a higher norm, and the norm that results from this process is a lower one. This axiom ensures a system of legal norms hierarchized in several layers. This construction's unity is ensured by the relationship of independence conditioned by the fact that "the validity of a norm, produced according to another norm, is based on the latter norm, whose production is in turn owned by another norm".[79]

Speaking of the concept of state order, Kelsen considers the constitution to be "the highest step in terms of positive law".[80] In support of this idea, the author brings several arguments. Thus, he considers that the production of some general legal norms, regulated by the constitution in the material sense, acquires within the state law order the character of the legislation. The regulation of this process by constitution presupposes, as is natural, "the determination of the body or bodies empowered to produce the norms of general law, i.e. the laws and provisions".[81] The written constitution has the character of objectively binding legal norms if the laws and dispositions issued following it are considered obligatory legal norms. Consequently, the basic norm - being the constitution in the sense of the logic of law - establishes not only the act of the legislator but also the habit formed by the behaviour of the subjects to the rule of law produced by constitutional means as a state of fact.

Regardless of how the supremacy of the constitution is defined, it is important to remember that this quality of the fundamental law implies a series of legal consequences valid for the entire legal system, being able, first of all, to ensure social stability and legal and social order in the state.

The constitution is the fundamental normative act, which enjoys supremacy concerning all other organic, ordinary laws and normative acts subordinated to the law.[82] This

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[77] Ibid., cit, p.271.
[78] Ibid.
[79] Ibid., cit., p.272.
[80] Ibid., cit., p.272.
[81] Ibid., cit., p.273.
[82] I. Guceac, *Evolutia Consitutionalismului in Republica Moldova*, 2001, cit. p. 369.

condition establishes the constitution as a "Law of laws" is determinant to the fact that through the constitution establishes the organization of the society and the legal bases of the state, enshrines the rights, fundamental freedoms of the people and the citizen and establishes their legal guarantees of insurance.

The Constitution of the Republic of Moldova inserts the principle of the rule of law, raising the constitution to the rank of the supreme law of the state. No law, no other legal act, which contradicts the provisions of the constitution, has legal force, is enshrined in Article 7 of the Fundamental Law.[83] Ensuring the constitution must not remain a simple constitutional principle but is necessary for the establishment and creation of the conditions for the realization of a system of guarantees, which would allow it to manifest itself as a normative act with supreme legal force. Within this system of guarantees, a system of sanctions applicable in case of violation of the constitutional norms by one of the constituted powers must take its place.

Three specific legal guarantees ensure the supremacy of the constitution, namely: the general control of the application of the constitution, the fundamental duty to respect the constitution and the control of the constitutionality of the laws.[84] It is unanimously recognized that the surest guarantee of the supremacy of the constitution is the control of the "constitutionality of laws".[85]

Controlling the constitutionality of laws, as a logical result of constitutionalism, is an activity of verifying the conformity of laws with the constitution. Considering the control of the constitutionality of laws as a legal institution of constitutional law, it can be seen that it includes the rules regarding the competent bodies to perform this verification, the verification procedure, the measures that can be taken after this verification. Verifying the conformity of the laws with the constitution is known under various names: the sanction of expression,[86] the guarantee of the supremacy of the constitution,[87] the sanction of constitutional violations,[88] etc. Particularly this notion is approached by M. Mogunova from Russia, who uses the notion of "legal protection of

[83] Constitutia Republic Moldova, art.7.
[84] I. Muraru, *Drept constitutional si institutii politice*, BUCURESTI,1993, p73.
[85] I. Guceac, *Evolutia Consitutionalismului in Republica Moldova*, 2001, cit., p.54.
[86] G. Burdeau.
[87] A. Hauriou.
[88] M. Prelot.

the Constitution".[89] In one of his works the author clarifies the legal protection of the constitution as "all means and procedures by which it is ensured the strict observance of the constitutional legality regime, the correspondence of all normative acts adopted by the public authorities with the fundamental law, the observance of the principle of non-adoption or abrogation of the adopted unconstitutional normative acts or some norms within them".[90] Regardless of the title it bears, the control of the constitutionality of laws remains one of the essential issues with various theoretical aspects regarding the supremacy of the constitution.

This control tool is vital because the legislator is also prone to error, the constitution itself has its shortcomings, the lack of control of the constitutionality of laws creates conditions for legal instability, assigning exclusively the right to assess the constitutionality of laws, it would confuse the judge with the party the process. The impossibility of establishing and the absence of constitutionality of laws is also argued: "the hierarchy of state bodies contradicts the principle of separation of state powers; the control of the laws cannot be admitted, this being the expression of the sovereign will of the holder of the state power; it cannot be admitted that anybody controls the parliament, which represents the people and bears responsibility only before it; the parliament itself carries out this control, in the process of drafting and adopting laws, which no longer has to be exercised by another body".[91] Such a practice is accepted in the Grand Duchy of Luxembourg, Finland, Sweden, the Netherlands.

In the legal doctrine, the constitutionality of laws is considered a part of the principle of legality. It admits that the elaboration of normative acts is carried out by the competent bodies, according to a procedure established in advance. It should be in compliance with the provisions of the normative acts issued by the state bodies, which occupy a higher hierarchical position without the issuers. In this order of ideas, the organic law and normative acts subordinated to the law, in order to respect the conditions of legality, must correspond to the constitution. The constitutionality of the law is, therefore, the requirement of the legality of the law, i.e. the law must be adopted in compliance with the provisions of the constitutional norms. The notion of constitutionality may be

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[89] Т.В. Сенькова, А.П. Грахоцкий, *Конституционное право зарубежных стран*, ГОМЕЛЬ, 1999, cit., p.74.

[90] Ibid., p.74.

[91] L. Deleanu, *Sanctionea suprematiei constituttiei*, DREPTUL,1991, nr.7-8, cit., p.21-23.

appreciated as the validity of a law or a legal act depending on the conformity of the content or with what the constitution of a country provides.

Another problem lies in knowing whether the control of the constitutionality of laws includes only the law in the sense of a legal act of the parliament or means other normative acts. It is argued that in any constitutional system should be subject to verification of compliance with the constitution only acts issued by parliament because the organs of state administration, being executive bodies, issue normative acts only in law enforcement. The control of their legality is done by ordinary means of control, including through administrative litigation.[92]

The existing Constitutions of many states in the world enshrine the primacy of international law over the national one. This situation imposes the need to submit to the control of constitutionality and international treaties in order to determine the conformity of national norms with international norms. In some cases, the drafts of international treaties are subject to the control of the constitutionality of laws. In other cases, the signed international treaties which have not yet been subject to the control of the constitutionality of laws, are subject to control.[93]

According to the legal logic, the unconstitutional law must be annulled, given the fact that by virtue of the supremacy of the constitution it cannot oblige any state body to apply it, nor any citizen to submit to it.

### 1.9. Conclusions.

The constitution is a fundamental normative act that enjoys supremacy over all other norms and regulates the principles, organization and functioning of public authorities and the relations between them. It adjusts the relations between these authorities and citizens enshrines and guarantees the fundamental rights and freedoms of the people.

It can be stated in the Republic of Moldova's history one may find both classical European constitutionalism and socialist constitutionalism. Classical European constitutionalism was applied on the territory of the today's Republic of Moldova, following the return of Bessarabia to Romania (1918-1940), through the Romanian

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92 I. Muraru, *Drept constitutional si institutii politice*, BUCURESTI,1991, p.25-26.

93 I. Guceac, *Evolutia Consitutionalismului in Republica Moldova*, 2001, p. 56.

constitutions of 1866, 1923, 1938, inspired by the most democratic constitutions known at that time. The socialist constitutionalism manifested itself during the Soviet regime, when the statehood of the Moldovan RASS and the Moldovan SSR were the expression of the Marxist-Leninist theory, promoted by the Communist Party. The socialist constitution cannot be included in the category of the conventional constitutions, whose normative content is determined by secular constitutional tradition.

The people of the Republic of Moldova have not fully lived historical experience of democracy and have not benefited from a democratic leadership. However, regarding the content of the Constitution of the Republic of Moldova in force, it can be said that the very conception of the fundamental law has changed, abandoning the socialist principles, and the return to some classical principles is obvious.

Since its independence, the Republic of Moldova is committed to following democratic principles. The EU has been supporting it throughout the Eastern Partnership and European Neighbourhood Policy. EU and the Republic of Moldova signed The Association Agreement in 2014. Its assistance and support of democratic reforms have delivered tangible benefits to Moldovan citizens. During the Covid-19 pandemic, the EU reacted immediately and responded to the urgent needs of the country.

## SECOND CHAPTER
## THE EMERGENCY CLAUSE REGULATION DURING THE COVID-19 PANDEMIC.

**Contents: 1.1.** Introduction. **- 1.2.** Definition of state of emergency. **-1.3.** Two models of emergency: monist and dualist. **- 1.4.** Schmittian concept of emergency. **- 1.5.** Declaration of state of emergency. **- 1.6.** Nature of emergency: the condition of necessity, concreteness and urgency. **- 1.7.** Limits of the state of emergency or constitutional minimum. **- 1.8.** Judicial control over the state of exception. **- 1.9.** Principles of democracy, the rule of law and separation of powers. **- 2.1.** State of emergency foreseen by Moldovan Constitution. **- 2.2.** The regime of the state of emergency, siege and war in the Republic of Moldova. **- 2.3.** Modification of Law no. 12/2004 regarding the regime of the State of emergency, siege and war law and the Parliament's Decision no. 55 of 17 March 2020. **- 2.4.** State of emergency in public health. **- 2.5.** Conclusion.

### 1.1. Introduction.

The Covid-19 pandemic has created a situation in which numerous countries around the world have been "forced" to declare a state of emergency to deal with it, so the Republic of Moldova did for the first time in its history. The enormous extent of the challenges posed by the pandemic required remarkable democratic resilience in order to avoid that emergency powers curtail fundamental rights and conflict with the rule of law. On the other hand, States are expected to anticipate the relevant dangers, be proactive and take any measures they deem appropriate in advance, by application of the "precautionary principle".[94]

[94] The precise power or duty, even if implicit, of resorting to exceptional law for fear of counteracting fear and restoring serenity to citizens. The state must draw up a functionally precautionary policy, aimed at preventing the citizen from feeling only at its initial stage, when it has not yet turned into damage to the safety of people and the integrity of the constitutional structure. G. De Minico, *Costituzione: emrgenza e terrorismo*, JOVENE, 2016, p.61.

The constitutional models, different or even similar in some countries, have shown how they implement different ways of dealing with emergencies. The history and cultural factors have an essential role in this situation.[95]
Under a state of emergency, some individual rights and liberties are usually suspended. The separation of powers is curtailed in favour of the executive or even a single person such as the head of state or government and, by implication, to the detriment of parliament and the courts. States of emergency are critically important from a human rights perspective because the suspension of legal order often paves the way for systematic human rights violations.

### 1.2. Definition of state of emergency.

In everyday language, the word "emergency indicates an unexpected circumstance, an accident, a fortuitous event, a state of danger, a critical situation that requires urgent and immediate intervention".[96] Its etymology comes from the Latin verb *emergĕre*, der. of *mergĕre* meaning a concrete action in which something arises out or up, come forth, come up, come out, rise.[97]
The term "emergency" is an "open" concept of law. The state of emergency includes natural facts as well as human conduct which can be invoked as a result. There is an unclear definition of the state of emergency, and there are two reasons because of that: "different legislators use different terms states of emergency, states of exception, states of siege, et cetera paribus), and many legislations do not have a precise legal definition of what constitutes an emergency, while some constitutions have no legal definition at all".[98] Thus, this is to maintain the legal system flexible in order also to accommodate unforeseen situations having characteristics common to those of the open clause.
Usually, states of emergency have a common characteristic: they deal with cases where the nature of a situation requires the restructuring of state functions in order to mitigate

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[95] J. Cornell, A. Salminen, *Emergency laws in comparative constitutional law*, GERMAN LAW JOURNAL, 2019, p. 233-249. For national examples, see amongst others https://verfassungsblog.de/category/debates/covid-19-and-states-of-emergency-debates/.
[96] G. Marazzita, *L'emergenza costituzionale*, GIUFFRE', 2003, cit., p. 14.
[97] https://www.etymonline.com/word/Emerge
[98] A. Zwitter, *The rule of law in time of crisis: A Legal Theory on the State of Emergency in the Liberal Democracy*, JOURNAL ACHIVES FOR PHILOSOPHY OF LAW AND SOCIAL PHIOSOPHY, VOL. 98, 1, 2012, cit., p.96.

the situation's negative effect on the state and its citizenry more effectively and more efficiently. The existence of legal regulations on states of emergency is to ensure the survival of a state and its citizenry. Furthermore, it serves to bring the situation back to normal by temporarily changing the structure of state functions in favour of efficiency and effectiveness.[99]

"The state of emergency enables the government to take extraordinary measures in its life-and-death struggle for survival. These apocalyptic scenarios suggest considerable caution in limiting the scope of emergency powers on that occasions-hopefully rare-when they are legitimately deployed.[100] For example, Article 16 of the French Constitution of the Fifth Republic authorizes the President "[to] take [] the measures required by these circumstances, "and refuses to declare anything off-limits during the struggle for survival".[101]

States of emergency also challenge states' commitment to the rule of law. While the rule of law has been defined variously, most scholars agree that the concept requires, at a minimum, public institutions that decide disputes impartially and non-arbitrarily according to pre-established legal principles.[102] Emergencies may compromise legal order by generating political pressures to augment executive power at the expense of legislative and judicial institutions. Some commentators have lamented that courts often dial down the intensity of judicial review during emergencies in deference to the executive branch, enabling the executive to sidestep ordinary legal restraints.[103] Once legal restraints are relaxed or abandoned, emergency powers can become permanently entrenched, facilitating the further abuse of public powers long after the crisis has passed.

### 1.3. Two models of emergency: monist and dualist.

There have been developed two models of emergency: the monist and dualist. The monist model aim is to avoid the establishment of a totalitarian regime. The source of

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[99] Ibid., p.97.

[100] B. Ackerman, *The Emergency Constitution,* YALE LAW JOURNAL, 113(5):1029-1091, 2004.

[101] French Constitution of the Fifth Republic.

[102] T.R.S. Allan, *Constitutional Justice: a liberal theory of the rule of law,* OXFORD UNIVERSITY PRESS, 2001, p.56.

[103] D. Dyzenhaus, *The constitution of law: legality in a time of emergency,* CAMBRIGE UNIVERSITY PRESS, 2006, p.17.

emergency power can be found in an explicit or implicit provision of the legal system that contemplates it. Therefore it takes root in the pre-existing juridical order and immediately presents itself with the attributes proper to derived power: it exists if and within the limits in which the original order provides for it.[104] It can be defined as a power *"in order"*.[105] "It is a hypothesis of *potestas* that moves in continuity with the constitutional architecture in which it is inserted and which can be suspended in part and for a defined time, and then allow it to return to its initial condition: institutional regularity".[106] Following the monist model, the emergency power is only a parenthesis of exceptional law which is closed as soon as the legal system has a favourable condition to return to normality.

"For the dualist idea, the emergency power arises from an *extra ordinem* source, which as such is externally located to the legal order and resolves itself into an unexpected and extraordinary situation that breaks the orderly course of events. It requires that the state draws up an immediate, adequate and atypical regulatory response, not to be sought among the remedies named, intended for regular episodes of life".[107]

This construction of the state of emergency is called dualist because it places the need alongside the Constitution, the source, which is placed parallel to the first and flows alongside with the same active and passive force. Therefore, necessity can do everything, and no principle or constitutional value will be able to resist it, since the respect of the pre-existing law, as well as of the constitutional one, is not required. Thus, the order is transformed from the position it was in before the emergency happened to new dimensions. In this case, the emergency state function is dynamic. It means that once the emergency has ceased, the legal system may not return to its original state but remain different: "whether better or worse will depend on how the emergency was addressed by whoever ran it".[108]

In this case, there could be a rupture with the constitutional architecture on which one intervenes. The emergency power introduces a new legal order which can be considered illegal if it were compared with the previous one. It is legitimate only because the new

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[104] G. Agamben, *Stato di eccezione*, BOLLATI BORINGHIERI,2003, pp. 21-32.
[105] G. De Minico, *Costituzione: emrgenza e terrorismo*, JOVENE, 2016, cit., p. 21.
[106] Ibid., cit., p. 21.
[107] G. De Minico, *Costituzione: emrgenza e terrorismo*, 2016, cit., pp. 15-16.
[108] ibid., cit., p.18.

legitimacy parameter has been changed, being introduced by itself. A new political-constitutional framework is introduced. “The need can be temporarily withdrawn from the law, but the law must retract when the empire of the first cease. Without this restraint and these limitations, which is derived from the same nature, there is no longer any way to distinguish the real need from the arbitrary and unconstitutional confusion of powers”.[109]

The dualist thesis with the intent to defend democracy may create the favorable conditions for the establishment of a totalitarian regime.[110] The exceptional situation leads to the concentration of powers in the hands of a supreme ruler of the state, thus recalling the head of state as “custodian of Constitution”.[111] Once the emergency ceased, it would no longer be possible to return to the original legal order because such profound and irreversible exceptions would have occurred that it would not be possible to restore the previous constitutional architecture. Thus, a path would be opened towards a totalitarian regime at the expense of democracy. It follows that “we gradually move away from freedom and the division of powers to relentlessly approach the “Schmittian” constitutional dictatorship; transition towards the establishment of a totalitarian regime”.[112]

There is evidence that the emergency clause has been thought within dualist characteristics but in fact, operating as if it followed the monist archetype. In the case of the United Kingdom, the emergency is theoretically constructed according to the dualist scheme, but it has been revealed that the monist practice is followed. When an emergency arises, the *Cabinet* has practically unlimited powers, and this *broad delegation* is such that once the emergency ends, a Bill of indemnity will be needed to

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[109] S. Romano, *Sui decreti-legge e lo stato d’assedio in occasione del terremoto di Messina e Reggio-Calabria,* in Scritti Minori, Vol.1, *Driritto Costituzionale*, GIUFFRE’, cit., p. 263.

[110] Also, the thought of C.L. Rossiter, *Constitutional Dictatorship. Crisis Government in the Modern Democracies*, HARCOURT BRACE, 1948, ended up coinciding with the protected democracy of Schmitt's memory. The author is well aware that the state of exception has historically become the rule: “in the atomic era in which the world is now entering, the use of constitutive emergency powers is likely to become the rule and not the exception” (p.297); yet it does not renounce the dangerous guarantee represented by the fact that "no sacrifice is too great for our democracy, let alone the temporary sacrifice of democracy itself" (p.314).

[111] C. Schmitt, *Il custode della costitutzione,* GiIUFFRE’, 1981. Also, from a historical-constitutional point of view, Schmitt brought back the state of exception, in which Germany came to be under the presidency of Hindenburg, to the paradigm he designed of a President invested by the supreme and indeclinable role of “guardian of the constitution”.

[112]G. De Minico, *Costituzione: emergenza e terrorismo*,2016, cit., p.21.

remedy the otherwise unlawful acts. “Yet in practice, Cabinets have limited themselves in concentrating all sorts of power in their own hands, thus requiring Parliament's ex-post validations less substantial than they would have needed if they had availed themselves of a *plenitudo potestatis*”.[113]

An example on the opposite front is the art. 48 of the Weimar Constitution. It is a rationalization of the emergency clause which however did not help to avoid Hitler's dictatorship. Agamben interpreted this article as the “coup legalization”.[114] Hitler suspended freedoms for twelve years without ever revoking the act. In this way, a rule designed and written to protect democracy from the danger of an emergency was used to liquidate democracy itself.

An institution should be evaluated based on its concrete operations and not based on its abstract belonging. Moreover, if it effectively secures constitutional order.

### 1.4. Schmittian concept of emergency.

The emergency, therefore, forces to reflect on the limits of the law and the modifiability of the system in crises. Tools that allow to overcome it without resorting to exceptional measures external to the system, or situations of a complete anomaly, with serious interference with fundamental rights. When the emergency affects the legal system, it must first be understood whether the exception which it brings with it obliges an external projection to the legal system which, affecting the latter, could also change its nature; or whether this can be decided at all inside the ordinary system. In other words, there is a need to choose between an absolute state of exception and a relative state of exception.

Carl Schmitt grasps precisely this political dimension of the emergency when he claims that “the problem of those who decide on this power, that is the case not regulated by

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113 Ibid., cit., p. 23.

114 G. Agamben, *Stato di eccezione*, BOLLATI BORINGHIERI, 2003, cit., p. 24-26.

law, becomes the problem of sovereignty",[115] from which follows the corollary according to which "ruler is who decides on the exception".[116]

For *decisionism*, an emergency is an absolute exception where the state continues to exist while the law is lacking, and the decision is what remains to wait for the rule to be restored.[117]

The exception cannot be factually circumscribed and made compliant with a pre-established law, because no exhaustive definition can be given since the limits and external borders are not clear. However, it is still part of a legal paradigm other than anarchy and chaos. There is still order in it, which is regulated through two forms of government. One is the commission dictatorship, which suspends constitutional law in order to operate through rules of law enforcement which are themselves constitutional and aimed at restoring order. Another is the sovereign dictatorship which, on the contrary, aims to create a state of affairs that allows replacing the Constitution.[118] The figure of the sovereign itself, in the state of exception, lies outside the ordinarily valid legal order and yet belongs to it.[119]

Although the proposed final landing is that of legitimizing the dictatorship, the call to sovereignty is not insignificant. For today's democracies, especially, it allows to the

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[115] C. Schmitt, *La dittatura: dalle origini dell'idea moderna di sovranità alla lotta di classe proletaria,* LATERZA, 1975, p. 204.

[116] C. Schmitt, *Le categorie del politico,* IL MULINO, 1972, p. 33. The author believes that "the exception is more interesting than the normal case since the latter does not prove anything, the exception proves everything; not only does it confirm the rule: the rule itself lives only in the exception" (p. 41)

[117] ibid., p. 39. It follows from this that the State has a clear superiority over the validity of the legal rule, because the decision, freeing itself from the strict limits set by law, becomes absolute. "In case of normality the decision is reduced to a minimum, in the same way in case of exception the norm is canceled. However, even the exceptional case remains accessible to legal knowledge, since both elements, the rule as the decision, remain within the legal data". Consequently, in the exception, the decision remains, as the prerequisite for applying the law and therefore considering the legal order is that there is order. "Sovereignty is not a monopoly on sanction or power, but a legal monopoly on decision".

[118] Carl Schmitt: *la sfida dell'eccezione,* LATERZA, 1986, p. 63. In particular, it is emphasized that in the commissioner's dictatorship the dictator, on the one hand, must be appointed only in the event of a serious threat and for the time strictly necessary to overcome it and, on the other hand, it can suspend the Constitution or the ordinary law, but cannot abrogate them. The duty of the dictator commissioner is to overcome the danger and reinvigorate the legal foundations that had been put at risk. The suspension of the Constitution, in this case, can only be read as a protection mechanism.

[119] In the formulation of his theory on the state of exception, Carl Schmitt had in mind the formulation of art. 48 of the Constitution of the Weimar Republic which, in the event of an emergency, transferred to the President all the powers necessary for the restoration of the order, including those of using force and that of suspending fundamental rights. In fact, a system of checks and balances against the powers of the President and the government was completely lacking, the weight of the parliament was irrelevant and there was the total absence of judicial control. See, for further information G. Marazitta, cit., p. 119.

preservation, not of the state *tout court* but a particular form of state and balance between powers.[120]

The state of exception, on the other hand, could also be read as a *quid* that cannot be regulated by law because it is the mean by which law itself is suspended, creating with this mechanism a suitable valve to filter violence in the system. This is what emerges from the brocard "*necessitas non habet legem, sed ipsa sibi facit legem*" which founds the theory of Santi Romano. According to this theory, the necessity must be considered precisely the source of law, the only one capable of allowing the legal system to adapt to challenges posed by reality. By applying it to the crises of the state, it can be deduced that even illegal acts, since put in place *contra ius*, can be justified and considered legitimate if based on necessity. It would by be prevalent concerning the law, both from a logical and historical point of view. It would also replace the current legal norm, by the instances of factual reality.[121]

It should not be forgotten, however, that necessity is not an objective concept, but it is implying a moral judgment and a subjective evaluation, both on the presence of necessity and on the unsuitability of the rule to face a new fact. It claims the identification of a "sovereign". The latter therefore assume responsibility for the effects related to the introduction of the derogations from the ordinary regime, which could also be distorted to the point of modifying the same balance of power and governance of the system.

### 1.5. Declaration of state of emergency

Two types of emergency powers exist: constitutional and extra-constitutional. In the first case, emergency powers are based on the written Constitution or an organic or ordinary law enacted following the Constitution; the state officially proclaims a state of emergency and, usually, enacts emergency measures. In the latter case, executive authorities act – and are considered to be entitled to act – in an emergency based on

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120 Ibid., p. 21.

121 S. Romano, *Sui decreti-legge e lo stato di assedio in occasione del terremoto di Messina e di Reggio Calabria*, 1950, p. 364. The author specifies that "there are rules that cannot be written, or it is not appropriate for them to be written; there are others, which cannot be determined except when the eventuality to which they are to serve occurs".

unwritten constitutional principles in order to overcome the emergency. The state enacts emergency measures without officially proclaiming a state of emergency.

The first form of state of emergency may be considered a *de jure* one, the second a *de facto* one. The latter form does not necessarily constitute a violation of international law. The absence of a formal declaration may, however, preclude States from resorting to specific measures (e.g. under the ICCPR, a derogation from human rights can only take place "in time of public emergency …the existence of which is officially proclaimed", Article 4(1)). A system of *de jure* constitutional emergency powers can provide better guarantees for fundamental rights, democracy and the rule of law, and better serve the principle of legal certainty, deriving from there. In its 1995 Report on Emergency Powers, the Venice Commission expressed a preference for the *de jure* form, recommending that "*de facto* state of emergency should be avoided, and the emergency rule should be officially declared".[122]

The declaration of a state of emergency is subject to the rules enshrined in the domestic legal order. The rules must be specific, accessible and prospective. Within the system of written emergency powers, the necessary provisions on the state of emergency and emergency powers should be included in the Constitution. It should include a clear indication of which rights can be suspended and which rights do not permit derogation and should be respected in all circumstances.

The Venice Commission has previously indicated that "/t/he emergencies capable of giving rise to the declaration of states of emergency should clearly be defined and delimited by the constitution".[123] This is necessary because emergency powers usually restrict basic constitutional principles, such as fundamental rights, democracy and the rule of law. It is up to each state to decide whether one or several emergency regimes will be recognized. If several emergency regimes exist, the differences between them should be clearly set in the legal rule. The state should always opt for the least radical regime available in the given circumstances.

If the emergency concerns only a particular territory, the declaration includes a territorial limitation. It also indicates the grounds for the state of emergency and enlists the exceptional powers which can be resorted to. The measures which will subsequently

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[122] Venice Commission, CDL-STD (1995)012, *Emergency Powers*, 1995, cit., p. 30.
[123] Ibid.

be authorized do not need to be enlisted in a single legal act and, obviously, they may change over time. There is a need for an explanatory report attached to the original declaration as well as to any legal act introducing the emergency measure, that should specify the factual and legal grounds on which the measures are enacted.

The emergency regime is laid down in more detail in a separate law, preferably an organic law, if the constitutional system includes such a level.[124] The law usually includes provisions on the exceptional circumstances where a state of emergency can be declared; a proclamation of a state of emergency; activation of the use of emergency powers; application of emergency powers; parliamentary control of proclaiming and terminating a state of emergency and of legal regulations issued by the executive during such a state; judicial control of specific emergency measures.

It is crucial that the law on the regime of a state of emergency is adopted in advance, during regular times. Such a law usually covers various kinds of emergency and includes provisions on powers which are relevant only in certain kinds of emergency. Therefore, it is crucial that in the declaration of the state of emergency or in a separate decree, also to be submitted to Parliament for approval. The powers are enumerated which can be applied in the emergency. The same goes for their territorial scope of application. The principle of necessity requires that emergency powers can only be activated for such measures which are considered necessary for overcoming the emergency but fall outside the powers established by ordinary legislation.

Not only should the law on the regime of emergency states be adopted under normal conditions. In order to avoid excesses and time-pressures, even emergency decrees and other emergency measures should, to the extent possible, be drafted in advance. This allows for a proper, unhurried, discussion of the balances which should be drawn between competing interests. Nonetheless, it may not be excluded that an emergency presents unpredictable challenges. For example, many states have felt the need and chosen to legislate primarily for the situation caused by the Coronavirus epidemic, including several states which provide, either in their Constitution or in ordinary legislation, for wide-ranging emergency measures.[125] It seems to indicate that few if any

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[124] *First Opinion on the Draft Amendments to the Constitut*ion (Chapters 1 to 7 and 10) of the Republic of Armenia, Section 93.

[125] On March 23, 2020, the French legislature adopted a law allowing the executive branch to declare a state of emergency for health-related crises. This law adds several provisions to the nation's Public Health

states have felt that their existing emergency laws are adequate for the present emergency. However, they and have choose to create a new type of special emergency law or have complimented their existing laws dealing with infectious diseases with additional powers. The peacetime threat to the nation which can be assumed to be the "standard" trigger for emergency powers is "widespread civil unrest". One shared feature between this threat and the present epidemic is the need to restrict public assemblies. However, the present epidemic poses different threats, and so requires different powers.[126]

In the majority of European states, drastic measures have been taken, aimed at limiting the spread of the disease. These drastic measures have, in turn, triggered an economic crisis, which has required other emergency powers (financial measures). The emergency is thus a "complex" emergency, consisting of different threats, and so requiring additional types of measures not usual in the civil unrest situation.

Framing ordinary legislation on infectious diseases so flexibly as to be able to cover all the possible measures necessary to deal with a pandemic on the scale of the present Corona-pandemic carries the danger of bringing about a long-lasting or even permanent emergency.[127]

### 1.6. The nature of emergency: the condition of necessity, concreteness and urgency.

The state of emergency is a condition in which a legal state is facing different situations than is typically used. The word "emergency" seems to be unclear and

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Code, allowing the executive to declare a "state of health emergency" (état d'urgence sanitaire). The Norwegian parliament chose not to trigger a state of emergency, but instead adopted a special law allowing the government to derogate, by means of ordinances, from the requirements of a large number of other laws.

126 *Opinion on the amendments to the Constitution* adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, para. 73: "The differentiation of different kinds of states of emergency is a common solution in many countries, and a positive one: different types of states of emergency need the utilisation of different means". CDL-AD(2017)005, Turkey.

127 *Opinion on Emergency Decree Laws N°s667-676* adopted following the failed coup of 15 July 2016, CDL-AD (2016)037, Turkey, "the longer the emergency regime lasts, the further the state is likely to move away from the objective criteria that may have validated the use of emergency powers in the first place. The longer the situation persists, the lesser justification there is for treating a situation as exceptional in nature with the consequence that it cannot be addressed by application of normal legal tools" (para. 41).

problematic because there are multiple types of emergencies. They all need a legal cover. The theoretical definition of an emergency should be structural-functional.[128] In order to address more effectively and more efficiently, some state structures have to change temporarily. The legal order of a state is needed to be changed; otherwise, the state of emergency cannot operate. Moreover, it is not excluded some threats may appear towards the state as such, its political design and functions, or its citizens. In order to face this eventual threat, the state needs to change its structure. The conditions of necessity lie in need to change the state structures out of a need for urgency and concreteness.

Whenever a threat appears such as the Covid-19 pandemic, it does not justify a state of emergency because of the lack of urgency and concreteness. Concreteness is closely related to urgency. Both phenomena force the state to act, and they reveal how the normal state functions may not be appropriate or unable to deal with the problem effectively. The urgency and concreteness are temporal elements. "However, urgency describes a need for speedy action (a question of efficiency), while concreteness relates to its precisely defined beginning and end".[129] A concrete pandemic can introduce a state of emergency. "But only if short-term pre-emption and its concrete prediction are possible (and long-term prevention is not possible, as this would otherwise require normal legislation), can a disaster then constitute the emergency for which a state of exception can be induced".[130] The declaration of the Covid-19 pandemic is a perfect example of what constitutes an emergency because the threat to public health globally is urgent to deal with.

A situation that poses a concrete threat does not, however, necessarily constitute an emergency. Not every situation diverging from the state of normalcy results in a state of exception. The term "state of exception" does not sufficiently describe how circumstances must be situated in order to allow the decree that installs emergency powers. For the sake of clarity, a reflection should be done on the term "state of

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[128] A. Zwitter, *The rule of law in time of crisis: A Legal Theory on the State of Emergency in the Liberal Democracy,* cit. p.97.

[129] ibid., cit., p.98. For example, a terrorist attack is always possible, but only a concrete terrorist attack can trigger a state of emergency, because a lack of concreteness leads to an absence of urgency. A terrorist attack will also not constitute an emergency that the government can deal with, due to its unpredictability in nature; it will in fact cause the emergency, namely public insecurity and unrest.

[130] Ibid., cit., p.98.

emergency". The situation must be of such magnitude and such gravity that it appears to be impossible for the state to respond to the crisis without changing its structure in favour of effectiveness and efficiency on an ad hoc basis.

The "state of emergency" is hence triggered by an emergency regarding the effectiveness of the executive branch, whose duty it is to protect the citizens directly, and the efficiency of speedy decision-making of the legislative. The emergency must be so urgent that the legislative cannot prepare for future situation pre-emptively. This has to do with the fact that, if particular urgency is missing, appropriate channels of standard governance are still available and able to cope with such a situation in the usual way. Emergencies are, therefore, situations that hit the states in an unforeseen, unforeseeable, or unpreventable way when applying state functions of times of normalcy.

### 1.7. The limits of the state of emergency or the constitutional minimum.

The state of exception must find not only a foundation but, above all, a limit in the mandatory rules of the same legal system. Moreover, the term "exception" itself presupposes the existence of a rule, or rather a set of rules, which still maintain their vigilance.[131] "On the level of the general theory, we can say that the legal emergency manifests itself in an exceptional discipline which is contextually legitimated-limited by the current system".[132]

To which extent it is possible to suspend and or derogate from ordinary law, without departing from the current legal system is a question that should be answered. In this regard, it is necessary to distinguish two orders of limits that exceptional law encounters.

One order arises from a juridical concept of necessity, intended as a criterion for modifying the order in extraordinary times. In this case, internal limits of a state of exception must exist between the exceptional regime and the extraordinary fact that

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[131] The exception in itself presupposes, moreover, the maintenance of a law normally in force and therefore, in adherence to the legal systematics of the liberal era, presupposes the maintenance of the ordinary system of acts. The exception is conceptually an alternative to what is normal and can live only under the dominance of ordinary law. V. Angiolini, *Necessità e emergenza nel diritto pubblico*, cit., p. 1126.

[132] G. Marazzita, *L'emergenza costituzionale: definizioni e modelli*, GIUFFRE', 2003, cit., p. 237.

justifies it, as they are attributable to the relationship of strict adequacy and instrumentality. To face the emergency, it is not allowed to suspend and or derogate the current law beyond what is strictly necessary. This order is articulated in a series of prohibitions that norms and acts extraordinarily necessarily meet:

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1. *Time limit*: they cannot have permanent efficacy, but are intrinsically provisional: if the emergency premise is by its nature temporary, the resulting legal response must also be chronologically delimited;
2. *Spatial limit:* they cannot be effective beyond the territory directly involved in the emergency, or not beyond the spatial area identified in the declaration of the state of emergency;
3. *Object limit:* they cannot have an effect on concrete cases other than those directly affected by the emergency;
4. *Content limit:* they cannot affirm interests and values other than those generally recognized by current law: the exceptional state that connotes the relative emergency is, in fact, the reaffirmation, with extraordinary means, of common interests and values”.[133]

The second order of limits is purely normative that the state encounters. In this case, the external or formal limits of the state of exception are noted because they are not based on the relationship between the components of the emergency model. These limits are based on the relationship between the extraordinary subsystem and the overall legal system. “They are the condition for affirming the legitimate nature of the emergency discipline or its traceability to the current regulations”. The emergency measures must be appropriate to the surrounding. They cannot derogate and or suspend ordinary rules that the legal system assumes, expressly or implicitly, as inviolable.

This second-order of limits is made up of two subspecies: expressed limits and implicit limits. The limits expressed are both the provisions prepared in regular times. Both given possible emergencies and the provisions issued during the emergency should be based on extraordinary competencies already activated. These limits cannot be derogated or suspended. They consist of a series of prohibitions which the exceptional powers may encounter:

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[133] Ibid., cit., p. 238-239.

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1. *Subjective limit:* they cannot be exercised by subjects other than those appointed by the attribution rules;
2. *Limit of procedure:* they cannot be exercised according to procedures different from those governed by the attribution rules;
3. *Limit of competence:* no competences (administrative, jurisdictional or regulatory) can be exercised greater, by nature, effectiveness and content, than those expressly attributed”.[134]

Except for some situations, exceptional power is not predetermined in all its aspects by the rules attributable to extraordinary jurisdiction, and some aspects may be implicit. The implicit aspects, or further, limits to exceptional power, which - differently - would be insufficiently delimited, until it could suspend and derogate the Constitution as a whole.[135] “It is necessary to look for the limits that the norm attributing extraordinary powers proves to presuppose in other constitutional provisions”.[136]

It is necessary to refer to the Constitution and laws in force in a specific place and at a specific time. The legal emergency cannot be defined in its borders in abstract terms but presupposes the knowledge of positive law. It is equivalent to saying that every legal system has a particular state of exception.[137]

### 1.8. Judicial control over the state of exception.

The activity of the bodies holding emergency skills is subject to judicial, as well as political control. The power of exception is a functionalized one, that is, conditioned by the aim of coping with overcoming the emergency: the ultimate goal is precise to make oneself no longer necessary.[138] Consequently, bodies responsible for the judicial

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[134] G. Marazzita, *L’emergenza costituzionale: definizioni e modelli*, 2003, cit., p. 240.

[135] By limits we mean limits to emergency activity set by implicit rules. The implicit norms are those norms which, although not formulated, constitute justification of the explicit norms, in the sense that these are derivable from those by some logical or quasi-logical procedure. R. Guastini, *Lezioni Sul linguaggio giuridico,*GIAPPICHELLI, 1985, pp. 11-12.

[136] G. Marazzita, *L’emergenza costituzionale: definizioni e modelli*, 2003, cit., p. 241.

[137] In this sense, Pinna adds that if by state of exception we mean not only the “extreme condition studied by decision-making”, but also that *status* where the provisional deviation of the normal rules concerns only a part of the system itself then the emergency is a phenomenon “as varied as the constitutional systems”; different states of exception correspond to orders that have different “identities”. P. Pinna, *L’emergenza nell’ordinamento costituzionale italiano,* GIUFFRE’,1988, cit., pp. 71-72.

[138] G. Marazzita, *L’emergenza costituzionale: definizioni e modelli*, 2003, p. 244.

function should sanction violations of the limits of the state of exception if they are not respected. There are no general reasons capable of revoking in doubt the possibility of having recourse to the judge - constitutional or ordinary - to declare the illegitimacy of both the rules attributing emergency powers and the state of exception or individual provisions that compose it.[139]

Each of the limits identified in the previous paragraph represents a condition of the legitimacy of exceptional law, which can be applied during judicial review. "Starting from the prohibitions that every state of exception necessarily encounters, i.e. arising from the principle of strict instrumentality and adequacy between the emergency and the state of exception (internal limits), we can, for example, assume the jurisdictional annulment of the decree proclaiming the state emergency based on a certain law without establishing the time of termination (time limit) or the territorial context (spatial limit); it would be for the Constitutional Court to declare the illegality of the decree-law governing concrete cases different from those directly affected by the emergency (limit of the object) or aiming, in a manifest way, to affirm interests and values different from those already recognized by law in force (content limit)".[140]

The principle of equality represents the parameter for judging the limits understood as reasonableness-adequacy of exceptional measures to the emergency. It is important to clarify that the varied and changing forms that this criterion has assumed in the constitutive jurisprudence induce to recall the importance of the self-restraint activity, as well as the utility of a codification of the different judging techniques. In addition, a codification that would be the work of the case-law of the Constitutional Court would be preferable. The judge will be able to sanction only emergency measures which manifestly lack any justification in the extraordinary situation.

### 1.9. Principles of democracy, the rule of law and the separation of powers.

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[139] The Republican experience offers two main examples of judicial control over states of emergency. First of all, the constitutional jurisprudence which has syndicated the governmental power of urgent decree with reference to both formal and substantive defects. Secondly, mention should be made of the intervention of the administrative judge on the matter of ordinance. Lastly, reference may also be made to the completely peculiar case of judicial control by the judge of the laws on the so-called emergency legislation. P. Pinna, *L'emergenza nell'ordinamento costituzionale italiano,*1988, pp. 71-72.

[140] G. Marazzita, *L'emergenza costituzionale: definizioni e modelli*, 2003, cit., p. 245.

Having established that states of emergency only exist in *de facto* liberal democracies and are therefore bound to the rule of law; the next analytical step will be to come from the democratic principle to the principle of the rule of law and the doctrine of separation of powers. The internationally agreed legal minimum standards are essential for defining the principles in the sense of a greatest common denominator. After inquiring how to derive the rule of law from the democratic principle, the term "the rule of law" has to be elaborated as a point of divergence between different legal traditions. This process is necessary in order to allow general conclusions that are not only of relevancy to a specific legal tradition but for liberal states in general.

*Principle of Democracy*

The principle of democracy has been subject to a long tradition of scholarly writing. It deems essential to look briefly at what the principle of democracy enshrines and how it manifested in international law. The term "democracy" translates "government by the people", which essentially means that the governed participate in the government.[141] Essential to the principle of democracy is nowadays that anyone governed has the same influence on the government. This absolute equality is naturally restricted in practice.[142] Taking as a minimum requirement the standards of political participation as granted by the International Covenant on Civil and Political Rights (ICCPR), the core norm to political participation Article 25 ICCPR states:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
> (c) To have access, on general terms of equality, to public service in his country". [143]

Regarding the democratic principle, the primary duty of the state is holding elections and ensuring that every citizen may participate and make use of his or her right to equal

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[141] H. Kelsen, *Foundations of Democracy*, UNIVERSITY OF CHICAGO PRESS,1955, p. 31.
[142] Ibid.
[143] International Covenant on Civil and Political Right, Art. 25.

and free suffrage held by secret ballot. The obligation of guaranteeing "the free expression of the will of the electors" prohibits the state from manipulating the elections in any way and demands that the state accepts the result of the elections. Therefore, the Committee on Civil and Political rights interpret the duties of states as follows:

> "An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and under established laws which are compatible with the Covenant. States should take measures to guarantee the requirement of the secrecy of the vote during elections, including absentee voting, where such a system exists. This implies that voters should be protected from any form of compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. Waiver of these rights is incompatible with article 25 of the Covenant".[144]

The principle of democracy, although the formal laws that establish the principle in the constitutional reality are derogable for the times of crisis, does not disappear because it is as a principle above the *lex generalis*. If a state, whose political identity is claimed to be democratic, does not do all in its power to reestablish democratic normality, then it ceases to be a *de facto* democracy. It moves away from resembling the ideal liberal democracy and moves closer to become an "authoritarian democracy".[145]

Therefore, although the formal laws that realize a political system might be partially or even fully derogated, the identity thesis could be formulated that way: a state's identity depends on its behaviour, any act of a democracy should be based on the democratic principle. This is possible also in times of crises, even if the nature of emergencies requires different mechanisms than in times of normalcy. In the areas where the executive acquires emergency powers in the form of legislative power, the continuation of the democratic principle will help to explain how control mechanisms should be designed.

*The Rule of Law and the Separation of Powers*

Whether the rule of law is directly or indirectly enshrined or even if it results from the mere fact of the existence of a law, there is a significant difference between

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144 CCPR General Comment No. 25 (1996), para. 20.

145 On the term "authoritarian democracy" introduced by H. Kelsen, *Foundations of Democracy*, 1955, see chapter 4.

authoritarian regimes and liberal states. Although both expect their laws should be followed, the difference is substantial. It lies in the legitimacy of the political will expressed in the law and the capability of an authoritarian regime to change the law any time it wishes. The political will is the element which so closely intertwines the democracy and the rule of law. It is the will of the majority that gives the law legitimacy in a liberal democracy; and the coercion by the material force that gives power to the law in an authoritarian regime.

Furthermore, the rule of law in the sense of the Universal Declaration means that all people are equal before the law - equality before the law. These ideas behind the formulation of the Universal Declaration were intended to protect people from a state's arbitrary interference into their lives.

Most authoritarian regimes fail to fulfil both criteria of the rule of law: the supremacy of law and equality before the law; or, at least, the supremacy of the law. Equality before the law is anchored in Article 26 ICCPR, which also formalizes the inclusion of equal protection by the law in this principle. Generally, Article 26 is referred to in conjunction with Articles 2 (1) and 3 in the context of non-discrimination. Equality before the law in the analysis of the *travaux préparatoires* and in a grammatical and systematic interpretation concedes not only a prohibition of discrimination between individuals, as enshrined in Article 2 ICCPR, but also a much broader right to equality.[146]

This right to equality prohibits any arbitrary application of law and arbitrary decision of courts independently from the grounds listed in Article 2 para. 1. This difference between equality and non-discrimination was emphasized throughout the history of the development of the ICCPR, even though the difference became more and more blurred with time. This norm, therefore, entails a positive duty for the state not only to avoid any arbitrary law but also to prohibit the arbitrary application of law and to enact laws which prohibit discrimination.[147]

In international law, the concept of the rule of law has become a buzzword for development, peacekeeping, good governance. In the preparatory document following

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[146] Some scholars no longer make any distinction between non-discrimination and equality before the law. This does not do justice to the idea of the rule of law anchored in the aspect of equality. S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights - Cases, Materials, and Commentary*, OXFORD UNIVERSITY PRESS, 2000, p. 518-571.

[147] M. Nowak, *UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll - CCPR Kommentar*, ENGEL, 1989, p. 495-502.

the request of the General Assembly in Resolution 61/3932 the Secretary-General, Kofi Annan, presented the views of all Governments, which followed his invitation to comment on the subject matter "The rule of law at the national and international levels". Although Governments made submissions of different legal traditions, they all had in common at least the principles mentioned above, and many statements also emphasized the principle of the separation of powers as elementary to the rule of law.[148]

The idea of the separation of power as a constitutional arrangement dates back to the beginning of the enlightenment and the French Revolution. Immanuel Kant defined the republicanism as the political principle of the separation of executive powers from legislative. Considering that the first republic in history, the Roman Republic, did not know this doctrine yet and that constitutional monarchies such as the United Kingdom and the Netherlands know the separation of powers, this principle is rather less connected to the regime type than constitutes an expression of the rule of law in the form of checks and balances.[149]

Central features of states of emergency are: (a) the state expands its power vis-à-vis the rights of its citizen and (b) that legislative power is shifted to the executive power.[150] It is a central feature of authoritarian systems that the executive is at the same time the legislative organ.[151] As concluded above, authoritarian states do, therefore, not know the legal construction of a state of emergency.

### 2.1. State of emergency foreseen by the Moldovan Constitution.

A necessary precondition for declaring the state of emergency should be that the powers provided by ordinary legislation do not suffice for handling the situation. The regulation of the grounds for declaring a state of emergency is primarily the task of domestic law. Each country has its definition of the circumstances that might give rise

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148 Resolution adopted by the General Assembly, *The rule of law at the national and international levels, A/Res/61/39.*

149 One has to mention that not all states adhere to this doctrine equally strong. Particularly in New Zee land and Canada, due to its historical relation to Great Brittan and the representation of the Queen by the Governor-General, the separation in executive, legislature, is not as strong as in other legal traditions.

150 O. Gross and F. Aolâin, *Law in times of crisis: emergency powers in theory and practice*, CAMBRIGE UNIVERSITY PRESS, 2006, p.8.

151 In other words, political decision-making is in the hands of one (autocracy) or a few (oligarchy) with executive powers and not of a majority (democracy).

to a state of emergency. International law, however, imposes certain limits on this regulation. These limits stem from international treaties, especially human rights treaties, international customary law and general principles of international law (common legal institutions present in legal orders across the world). Although relatively broad discretion -margin of appreciation- is left to States in this area, this discretion is not unfettered. There is no close list of exceptional situations, which may trigger the declaration of the state of emergency. If, however, emergency measures entail derogation from human rights, then the exceptional situation needs to meet the definition of "*public emergency which threatens the life of a nation*".[152]

So far, States have mostly invoked ongoing armed conflicts, massive terrorist attacks, natural disasters and, more recently, pandemics, to justify such derogatory measures. Since the state of emergency is designed for exceptional situations, it should only be applied in case of threats which are exceptional and short-term. It should not, conversely, be applied in case of threats that are endemic to modern societies and can never be entirely eradicated.

While the idea behind the declaration of a state of emergency is a dichotomy between normalcy and the exception. In practice, there can be a spectrum between the powers used in the ordinary situation and those used in an emergency. All states can be assumed to have already statutes dealing with public health and epidemics, which grant extensive powers to the government. It may or may not be further delegated to health authorities to take drastic measures of containment. Ordinary disease containment powers in some states can be extensive. Thus, the need for declaring a state of emergency may be lower. The distinction between ordinary and emergency legislation, however, should not be diminished.

Not all constitutions regulate emergencies explicitly. The Constitution of Moldova establishes some abstract and general elements and boundaries. The Constitution delegates to organic law to realize a more precise definition.

Strong arguments favour the explicit regulation of emergency powers.[153] Such arguments primarily develop according to two different directions. The first direction tends towards recognizing an elevate probability that the executive will act timely and

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[152] Article 4 ICCPR and Article 15 ECHR

[153] O. Gross, *Constitutional and Emergency Regimes*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, 2012. p.13.

efficiently if the constitutional or ordinary legal framework provides boundaries and guidance. The second points is the challenge that comes with constitutional or legal recognition of states of emergency, especially the risk about the abuse and broadening of emergency powers.

As the Moldovan Constitution strives to enact only the constitutional grounds for possible exceptions to the constitution, the emergency law takes on a more material and detailed character. Although the constitution allows for a state of emergency, it does not define in great detail what constitutes an emergency or regulate questions related to competence, limits, or controls. Accordingly, organic law regulates all such aspects. More importantly, Moldovan constitutional law may restrict fundamental rights and freedoms during an internal emergency provided that such restrictions meet all the requirements stipulated in the constitution and ordinary laws. Such restrictions could even take the form of governmental decrees when parliament delegates such powers by statute. Moreover, the Moldovan constitution embark close connections between their understanding of internal emergencies and international obligations. In other words, all measures and provisions concerning states of emergency must conform to Moldova's international obligations.

The expressed emergency clause can prove appropriate to avoid the oscillations and interpretative ambiguities deriving from the absence of an ad hoc provision. It could provide the legal certainty which is extremely necessary for the face of an unpredictable and challenge to dominate situation such as a pandemic. It depends, however, on how it is written.

## 2.2. The regime of the state of emergency, siege and war law in the Republic of Moldova.

The Parliament may issue the declaration of the state of emergency. The primary option should be a declaration by Parliament or a declaration by the Executive which does not enter into force before the Parliament's approval. However, in particularly urgent cases, an immediate entry into force could be allowed. Even then, the declaration should be immediately submitted to Parliament, which can repeal it. It should not be

possible for the Executive to extend the state of emergency beyond a certain period without the involvement of the Parliament.

According to art. 66 lit. m) of the Constitution of the Republic of Moldova, of art. 12 of Law no. 212/2004 on the state of emergency, siege and war, having regard to the declaration by the World Health Organization of the coronavirus pandemic (COVID-19), and the establishment by the Extraordinary National Commission on Public Health of the national red code concerning the epidemiological situation of COVID-19 infection, the Parliament adopted the decision to declare the state of emergency.[154] During the state of emergency, the Commission for Exceptional Situations of the Republic of Moldova could issue provisions for the implementation of the following measures:

"1) the establishment of a special regime of entry and exit from the country;

2) the establishment of a special traffic regime on the territory of the country;

3) introduction of the quarantine regime and taking other mandatory sanitary-anti-epidemic measures;

4) establishing a special working regime for all entities;

5) prohibiting the holding of assemblies, public demonstrations and other mass actions;

6) ordering, if necessary, the rationalization of the consumption of food and other products of strict necessity;

7) coordinating the activity of the mass media regarding:

a) informing the population about the causes and proportions of the exceptional situation, about the measures taken to prevent the danger, liquidate the consequences of this situation and protect the population;

b) familiarization of the population with the rules of behaviour during the exceptional situation

c) introduction of special rules for the use of telecommunications;

8) modification of the procedure for appointment and dismissal of the heads of economic agents and public institutions;

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[154] Art. 1. - A state of emergency is declared on the entire territory of the Republic of Moldova for the period March 17 - May 15, 2020.

9) the prohibition of the resignation of the workers, except for the cases provided by the normative acts, for this period;

10) calling citizens to provide services in the public interest under the law;

11) carrying out, in the manner established by law, requisitions of goods in order to prevent and eliminate the consequences of situations that required the declaration of a state of emergency;

12) performing other actions necessary to prevent, reduce and eliminate the consequences of the coronavirus pandemic (COVID-19)".[155]

The provisions of the Commission for Exceptional Situations of the Republic of Moldova are binding and enforceable for the heads of central and local public administration authorities, economic agents, public institutions, as well as for citizens and other persons located on the territory of the Republic of Moldova. All provisions issued by the Commission for Exceptional Situations of the Republic of Moldova shall enter into force upon issuance. The Republic of Moldova Parliament has to inform, within three days, the Secretary-General of the UN and the Secretary-General of the Council of Europe about this decision and the reasons for its adoption.

The decision enters into force on the date of adoption, is immediately brought to the attention of the population through the mass media and is published in the Official Gazette of the Republic of Moldova.

### 2.3. Modification of the Law no. 12/2004 regarding the regime of the State of emergency, siege and war law and the Parliament's Decision no. 55 of 17 March 2020.

On March 17, 2020, the law regulating the regime of the state of emergency, siege and war in the Republic of Moldova was modified. In particular, the Parliament has introduced some changes in the section regarding the state of emergency. The article 4, para. 2 of this law before modification was stated: "During the state of emergency, siege or war, established in the country, it is not allowed to amend the Constitution, adopt, amend or repeal organic laws and electoral legislation, and conduct elections of central

155 Article 2. *LEGE Nr. 212 din 24-06-2004* privind regimul stării de urgenţă, de asediu şi de război. Publicat : 06-08-2004 în Monitorul Oficial Nr. 132-137 art. 696. MODIFICAT LP54 din 17.03.20, MO86/17.03.20 art.94; în vigoare 17.03.20.

and local public authorities and republican and local referendums".[156] The part which has been modified was "adopt, amend or abrogate organic laws and electoral legislation" meaning that during the state of emergency an organic law and the electoral legislation may be adopted, amended or abrogated.

> Regarding the section of the state of emergency, there were introducing an adding text "application of other necessary measures" or "exercise other necessary attributions" in the following articles:
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> 1) Article 20 regarding the Measures applicable during the state of emergency;
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> 2) Article 22 regarding the Duties of the Commission for Exceptional Situation of the Republic of Moldova during the state of emergency;
>
> 3) Article 24 regarding the Duties of the Civil Protection Service and Exceptional situations during the state emergency, The Service of Civil Protection and Exceptional Situations.[157]

During the same day of adoption of the law which modified the law regarding the state of emergency, the Parliament approved the draft Decision on declaring a state of emergency. It was declared "state of emergency" on the entire territory of the Republic of Moldova between March 17 and May 15, 2020, entering into force the same day.

### 2.4. State of emergency in public health

To combat the pandemic, the Moldovan State has decided to establish a state of emergency in public health, thus extending the state of emergency to only one sector. Since May 16, a state of public health emergency has been declared in the Republic of Moldova, which will last until July 15, 2020. Thus, some of the restrictions have expired at 24.00 of May 15, along with the state of emergency, while some measures are still in force.[158]

Some restrictions have been lifted, but most remain in effect shortly. The extraordinary of the National Extraordinary Public Health Commission will continue to have the

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[156] *LEGE Nr. 212 din 24-06-2004* privind regimul stării de urgenţă, de asediu şi de război. Publicat : 06-08-2004 în Monitorul Oficial Nr. 132-137 art. 696. MODIFICAT LP54 din 17.03.20, MO86/17.03.20 art.94; în vigoare 17.03.20.

[157] Ibid.

[158] *Hotărâre nr. 10* din 15 mai 2020, în temeiul art. 58 din Legea nr. 10/2009, (Monitorul Oficial, 2009, nr. 67, art. 183.

necessary powers to protect the lives and health of its citizens. The decisions of the Extraordinary National Commission of Public Health are executory for the central and local public administration authorities, for natural and legal persons, regardless of the field of activity and the legal form of organization.

**2.5. Conclusions.**

In the Republic of Moldova, as in other countries, a state of emergency was declared in response to the spread of COVID-19. Some concerns arisen as to the use – and potential abuse – of power in a time of crisis. Rule of law-compliant emergency powers has necessary in-built guarantees against abuse: the principles of necessity, proportionality and temporariness. Respect of these principles must be subject to effective, non-partisan parliamentary control and meaningful judicial control by independent courts.

The dichotomy between normalcy and exception which is at the basis of a declaration of the state of emergency does not necessarily entail. It does not need to require a dichotomy between effective action against the emergency and democratic constitutionalism, or between protection of public health and the rule of law.

The only permissible limitations to the Constitution during times of emergencies are those that the Constitution explicitly mentions. Impermissible limitations of the Constitution include changes to the separation of powers, State functions, and the primary responsibility of parliament as laid out by the Constitution. The Constitution does prohibit amending the Constitution during times of emergency.

While strategies to combat COVID-19 have limited democratic input and parliamentary oversight, the decisions made by governments now will inevitably have a lasting impact on their electoral systems (and prospects) in the years to come.

As a state of emergency can sometimes be used as a pretext for abuses, such as arbitrary detention, censorship, or other authoritarian measures, the desire for more determinate rules to constrain state discretion is legitimate. There are increasing concerns that the modification of the state of emergency law undermine democratic principles, eliminate dissent, and violate the principles of necessity and proportionality. Most problematic are

expansions of executive powers and repressive measures, which might continue after the national emergency in the respective countries.

## THIRD CHAPTER

## CONSTITUTIONAL REVIEW OF THE LAW AMENDING THE STATUTE ON THE STATE OF EMERGENCY, SIEGE AND WAR AND DECISION NO.55.

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### 1.1. The case brought before the Constitutional Court of the Republic of Moldova.

On March 23, 2020, a group of MPs addressed the Constitutional Court with a petition to check the constitutionality of some legal provisions. This petition was addressed in compliance with art. 25 letter g) of the Law no. 317-XIII of December 13, 1994, regarding the Constitutional Court and articles 38 paras. 1, letter g) and 39 of Code of Constitutional Jurisdiction no. 502-XIII of June 16, 1995.[159]

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[159] **Article 25 :** "Subjects with the right to notify : The right to refer it has : g) the deputy in the Parliament…", *Legea cu privire la Curtea Constituţională nr. 317-XIII din 13.12.1994;*
**Article 38:** Subjects with the right to notify
(1) The Constitutional Court exercises the constitutional jurisdiction at the notification made by: …g) the deputy in the Parliament…;
**Article 39:** Form and content of the notification
(1) The notification shall be submitted in writing in the Moldovan language.
(2) The notification must be motivated and include:
a) the name of the Constitutional Court as a notified court;
b) the name and address of the subject of the notification;
c) the object of the notification;
d) the circumstances on which the subject bases his requirements;
notification requirements;
f) other data regarding the object of the notification;

The object of this notification was constituted by paras: 2,3,4, and 5 of art. I of Law no. 54 of March 17, 2020, amending the Law no. 212/2004 regarding the regime of the state of emergency, siege and war.[160] The request of MPs was to verify the constitutionality of the following legal norms from Law no. 212/2004, in the wording "other actions required" of Law no. 54 of March 17, 2020: letter k) of art. 20, letter i) of art. 22, letter g) of art. 24 and letter j) of art.25. Besides, the same wording in article 2 para. 12) of the Parliament Decision no. 55 of March 17, 2020, on the declaration of the state of emergency.

In particular, the question posed to the Constitutional Court was:

> "1) To receive and examine the notification in an urgent regime. The examination delay examination could not be accepted, given the exceptional situation of application of the emergency regime and the effects already in progress;
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> 2) To suspend the action of points 2,3,4, and 5 of art. 1 of Law no. 54 of March 17, 2020, for the amendment of Law no. 212/2004 regarding the regime of the state of emergency, siege and war and point 12) of art. 2 of the Parliament Decision no. 55 of March 17, 2020, regarding the declaration of the state of emergency;
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> 3) To exercise the control of the constitutionality on the following provisions of Law no. 212/2004, in the wording of Law no. 54 of March 17, 2020:
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> letter k) of art.20;
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> letter i) of art. 22;
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> letter g) of art. 24;
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> letter j) of art. 25.[161]
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> 4) To exercise the control of the constitutionality on the phrase "other necessary actions" from point 12 art. 2 of the Parliament Decision no. 55 of March 17, 2020, regarding the declaration of the state of emergency".[162]

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g) the nomenclature of the attached documents;
h) the subject's signature, his code and his stamp.
*Legea Codul jurisdicţiei constituţionale nr. 502-XIII din 16.06.95.*

[160] *Law no. 54 of 17th March 2020*, in Official Gazette of the Republic of Moldova nr.86, art.94 of 17.03.2020.
[161] *Petition no. 47a/ 2020,* Constitutional Court of the Republic of Moldova.
[162] Ibid.

On March 17, 2020, the Parliament adopted the Law no.54 in order to amend Law no. 212/2004 regarding the regime of the state of emergency, siege and war. The argued that the law in question was debated with extreme urgency. There has not been any prior consultation and did not respect decisional transparency. It did not respect the procedures and deadlines provided in the Rules of Procedure of the Parliament. The law was voted in 2 readings at the same time. The art. 20 of the law on the regime of the state of emergency, siege and war, which provides for the measures applicable during the state of emergency was supplemented by a new letter k). It allowed "the application of other necessary measures". The same provision was introduced in articles 22 (attributions of the Commission for Exceptional Situations of the Republic of Moldova), in article 24 (attributions of the Civil Protection Service and Exceptional Situations) and article 25 (attributions of the Ministry of Interior).[163]

According to the petitioners, "all central authorities were granted unlimited attributions not provided by law. Moreover, previously, the list of attributions was an exhaustive and predictable one".[164] Immediately after the adoption of Law no. 54, the Decision of the Parliament no. 55 regarding the declaration of the establishment of the state of emergency was adopted on the same day.

According to article 2 of Decision no. 55, during an emergency state, the Commission for Exceptional Situations was entitled to issue provisions for the implementation of several measures, including point 12) to take other necessary actions to prevent, reduce and eliminate the consequences of coronavirus pandemic (COVID- 19). Point 12 of the Decision no.55 was adopted before the entry into force of Law no. 54, which allowed the extension of the list of measures that can be imposed in the emergency.

By adopting the contested norms of Law no.54 and Decision no.55 on March 17, 2020, which were the object of the examination in the petition, the Parliament of the Republic of Moldova defied the following fundamental constitutional principles and the express norms of the Supreme Law:

- Art. 23 of the Constitution - The right of every person to know his duties;

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[163] *Law no. 54 of 17th March 2020*, in Official Gazette of the Republic of Moldova no.86, art.94 of 17.03.2020.

[164] Ibid., cit.

- Art. 54 of the Constitution - Restriction of the exercise of individual rights and freedoms.[165]

The completion of articles 20, 22, 24 and 25 of Law 221/2004 with phrases such as "application of other necessary measures" or "exercise other necessary attributions" remarkably defied the principle of clarity and accessibility of the law provided in art. 23 of the Constitution. The petition did not question the necessity of establishing a state of emergency and the right of the state to take all necessary measures to prevent and combat the consequences that generated the state of emergency. It is the right and obligation of the authorities to take such measures.

At the same time, when it comes to some exceptional measures that have as a consequence the restriction of some fundamental rights and freedoms, they must be as accurate and precise, predictable, expressly provided by law and argued as possible.[166] The emergency cannot be used to the premise to combat the consequences that have generated this situation to establish an unpredictable, imprecise legal framework, which can lead to severe abuses of law and unjustified restriction of human rights and freedoms.

In 2004, when the Law no. 212 regarding the state of emergency, siege and war, all the measures and restrictions allowed in emergencies have been expressly and exhaustively provided, in order not to leave room for extensive and abusive interpretation. These measures can be completed depending on the development of social relations and the needs of the time. No one can dispute this right. The Parliament could have assessed what measures might be needed in today's time, expressly describe them in law, so that they are transparent and predictable. Under such conditions, no objections could be found.

However, "if the Government and the Parliament promote and adopt a referral rule or a blank rule, they leave the whole society with the perception of future abuse".[167] This interpretation is a result of not having a well-established plan in time and not knowing precisely the measures to be imposed to overcome the emergency.

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165 Ibid.

166 S. Greer, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Council of Europe, 1997.

167 *Petition no. 47a/ 2020*, Constitutional Court of the Republic of Moldova, cit., p.4.

The reasons that generated the state of emergency in the Republic of Moldova are similar to the global ones. Many states in the region did the same. For example, Romania, through the Decree signed by the President of Romania on the establishment of the state of emergency on March 16, 2020, were established precisely the measures and restrictions of human rights, an exhaustive list with the list of responsible authorities without room for extension or interpretation.[168] Thus, citizens and the whole society were informed about the measures to be imposed, even if they are restrictive. In the Republic of Moldova, the procedure was different.

> "Without a legal basis, some restrictions were imposed. However, even in this case, the possibility of applying measures that no one knows about is extended, measures that can generate abuses and the unjustified seizure of fundamental human rights and freedoms. The phrases in these contested legislative acts - *the application of other necessary measures* or *the exercise of other necessary attributions* - exceed any limits of accessibility because they can be interpreted very broadly and very subjectively".[169]

Regarding the predictability and clarity of the law, the Moldovan Court's jurisprudence is already established.

> "Any normative act must respect the constitutional principles and norms, as well as the exigencies of the legislative theory, meant to ensure the clarity, predictability and accessibility of the act. The law must regulate in a unitary way a logical-legal connection between the dispositions it contains, and in the case of some legal institutions with a complex structure to provide the elements that distinguish their particularities.
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> The rule of law must be worded with sufficient precision to meet the clarity and accessibility criteria, enabling citizens to decide on their conduct and providing, depending on the circumstances of the case, the consequences of such conduct. Otherwise, people may claim to do not be aware their rights and obligations".[170]

Also, the contested norms introduced in Law no. 212, which extended the exhaustive list of measures restricting human rights in a state of emergency without establishing

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[168] *DECRET nr. 195 din 16 martie 2020*, available at: http://legislatie.just.ro/Public/DetaliiDocumentAfis/223831.
[169] *Petition no. 47a/ 2020,* Constitutional Court of the Republic of Moldova, cit., p.5.
[170] Ibid., cit., p.5.

precisely what these measures are, come in direct contradiction with art. 54 of the Supreme Law.[171]

The exercise of rights and freedoms may not be subject to restrictions other than those provided by law, which correspond to unanimously recognized norms of international law. Moreover, it is necessary to impede the disclosure of confidential information or guaranteeing the authority and impartiality of justice due to the interests of national security, territorial integrity, economic well-being, public order preventing mass disturbances and crimes, protection of the rights, freedoms and dignity of others. These provisions do not allow the restriction of the rights proclaimed in articles 20-24 of the Constitution. The restriction must be proportionate to the situation which determined it and cannot affect the existence of the right or freedom.

According to art. 5 of Law no. 212 on the regime of the state of emergency, siege and war, during a state of emergency, maybe restricted the exercise of individual rights or freedoms of citizens under art. 54 of the Constitution. It depends on the gravity of the situation. The restriction provided for in paragraph (1) should be following the obligations arising from international treaties on fundamental human rights to which the Republic of Moldova is a party and may not involve discrimination against persons or groups of persons on the grounds of race, nationality, language, religion, sex, political beliefs or social background.

The very notion of state of emergency established in art. 1 of the law defines as a set of measures with a political, economic, social character. Once established, these measures should be expressly provided by law, precise and predictable.[172] Only in these conditions will be observed art.54 of the Constitution, which expressly establishes that the rights and freedoms can be restricted only in the cases provided by law. However, by adopting Law no. 54, and subsequently the Decision no. 55, the Parliament admitted a norm by which the fundamental human rights and freedoms may be restricted by measures that are not provided by law. The phrases “other necessary measures” and “other necessary attributions” seriously violate the principle of predictability and accessibility. It additionally exceeds the limits provided by art. 54 of the Supreme Law.

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[171] According to art. 54 of the Constitution, no laws can be adopted in the Republic of Moldova that would suppress or diminish the fundamental rights and freedoms of man and citizen.

[172] *Law no.212/2004 of 24.06.2004*, available at: https://www.legis.md/cautare/getResults?doc_id=120832&lang=ro.

The art. 54 does not allow the establishment of other restrictions expressly not provided by law and which are strictly motivated and necessary.

Article 29, para. (2) of the Universal Declaration emphasizes that in the exercise of rights and freedoms, each person is subject only to the restrictions established by law for the sole purpose of ensuring recognition and respect for the fundamental rights and freedoms of others. The International Covenant on Civil and Political Rights also provides in several articles that "Rights may not be restricted unless they are provided for by law ...".[173]

The constituent legislator, by adopting art.54, enshrined the clear principle according to which an obtained constitutional right can no longer be suppressed or diminished by organic laws or other normative acts. The para. (3) of art.54 enshrines an imperative exception to the general norm, establishing that the restriction of the rights proclaimed in articles 20-24 is not allowed, i.e., access to justice, the presumption of innocence, non-retroactivity of the law, right to know law and duties (art. 23), the right to life.[174]

According to the petitioners, the Parliament of the Republic of Moldova, by adopting the contested acts, not only challenged para. (2) of art. 54 which imposes the need for any restriction to be provided by law, but also defied paragraph (3) which expressly provides that no restriction is allowed concerning the constitutional principle of accessibility and predictability of the law.

The jurisprudence of the ECtHR is also enshrined in this regard. The European Court of Human Rights concluded that when it comes to fundamental rights issues, if the executive's discretion knows no bounds, the law could violate the rule of law, one of the fundamental principles of a democratic society enshrined in the Constitution. Indeed, the existence of adequate and sufficient safeguards against abuses, including in particular the effective control procedures exercised by the judiciary, is all the more necessary as, under the pretext of defending democracy, such measures risk undermining it, even to destroy it.

According to art. 23 of the Constitution of the Republic of Moldova, a restriction may be considered "provided by law", according to art. 54 of the Constitution, only if it

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173 *International Covenant on Civil and Political Rights* sdopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

174 Art.54, para. (3), Constitution of Republic of Moldova, 1994.

contains sufficient precision allowing people to decide on their conduct and to providing, reasonably, depending on the circumstances of the case, the consequences of this conduct. In the case of *Rotaru v. Romania,*[175] the ECtHR recalled its settled case-law, according to which "provided by law" means not only a legal basis in domestic law but also the quality of the law: thus, the law must be accessible to the person concerned and be predictable in terms of its consequences. [176]

### 1.2. The Constitutional Court's Decision.

Having examined the request, the Constitutional Court noted that the authors of the petition were limited to a simple statement that the criticized provisions would be likely to cause serious harm to human rights and fundamental freedoms. Thus, the Court considered that, if an author of a complaint invokes the risk of affecting a field provided by article $25^1$ para. (2) point 1) of Law no. 317 of December 13, 1994, on the Constitutional Court and Article $7^1$ para. (2) point 1) of the Code of Constitutional Jurisdiction no. 502 of June 16,1995, the arguments must be brought regarding the intensity and possible damages and imminent and irreparable negative consequences of the risk.[177] Although the risk is abstract, it was needed for solid motivation in order to suspend the notified acts' actions. The mere invocation of the risk did not represent a sufficient and convincing motivation in order to suspend the action of the notified act. Therefore, the Constitutional Court considered it necessary to reject the request on the ground that it was unmotivated. For these reasons, based on art. 135 par. (1) lit. a) of the Constitution, Article $25^1$ of the Law on the Constitutional Court, Articles 6, 71, 61 and 64 of the Code of Constitutional Jurisdiction, the Constitutional Court decided to reject the notification regarding the suspension of the actions of the following legal provisions:

- points 2,3,4, and 5 of art. I of Law no. 54 of March 17, 2020, for the amendment of Law no. 212/2004 on the state of emergency, siege and war;

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[175] *Case of Rotaru v. Romania,* Application no. 28341/95, ECtHR Judgment of 04.05.2000.
[176] *Case of Amann v. Switzerland,* Application no. 27798/95, para. 50, ECtHR Judgement of 16.02.200.
[177] *Decision of the Petition nr. 47/a/20020,* Constitutional Court of the Republic of Moldova, 24.03.2020.

- articles 20 letter k), 22 lit. i), 24 lit.g) and 25 lit. j) of Law no. 212 of June 24, 2004, on the state of emergency, siege and war;
- the text of "other necessary actions" from Article 2 point 12) of Parliament Decision no. 55 of March 17, 2020, regarding the declaration of the state of emergency.

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

The Constitutional Court found that the level of accuracy of the legislation depends to a considerable extent on the content of the normative instruments in the issue.[178]
Thus, the predictability of the rules whose review of constitutionality has been requested therein referred to and was 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 (March 17, 2020), for 60 days (until May 15) throughout the territory of the Republic of Moldova, with the possibility of extending this period under art. 15 of Law 212/2004.[179]
According 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 Party. Laws and other normative legal acts enacted up to the declaration of the state thereof act insofar as they do not conflict with the law as mentioned above. 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.[180]
Similarly, the operating conditions of state bodies are subject to change in the event of the establishment of a state of emergency. Under art. 8, during the state of emergency,

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[178] *Hotărârea nr. 12* din 14.05.2018 privind excepţia de neconstituţionalitate a articolului 361 alin. (2) lit. c) din Codul penal (confecționarea, deținerea, vânzarea sau folosirea documentelor de importanță deosebită false) available at: http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=659&l=ro
[179] *HOTĂRÎRE Nr. 55* din 17-03-2020 privind declararea stării de urgență, Publicat : 17-03-2020 în Monitorul Oficial Nr. 86 art. 96, available at: https://www.legis.md/cautare/getResults?doc_id=120817&lang=ro
[180] *Law no.212/2004 of 24.06.2004*, available at: https://www.legis.md/cautare/getResults?doc_id=120832&lang=ro

some tasks of the local and central public administration are entrusted to the competent bodies provided for by Law 212/2004, in the manner determined by the Government. In contrast, the local and central public administration authorities only exercise those tasks, which have not been delegated to the competent bodies referred to in para. (1) also, should provide them with the necessary support.[181]

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), it can be concluded 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, may affect the human rights and fundamental freedoms. 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 the right to a system of health protection.

However, the measures applied therein must be proportionate to the intended purpose and avoid any arbitrary situation. They should have the purpose of protecting 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 declared.

### 1.4. International provisions the Republic of Moldova must respect in order to (constitutionally) limit human rights and freedoms.

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

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[181] Ibid.

guaranteeing certain fundamental rights. The regulation is identified within the provisions of the Constitution of the Republic of Moldova in art. 54 – Restriction on the exercise of individual 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. First of all, reference should be made to the Universal Declaration of Human Rights, namely art. 29 para. (2) showing the ability to restrict individual rights: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law, solely to secure 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".[182] In the semantics of this provision, the conjuncture in which certain limitations can be operated is emphasized. At the same time, reference is also made to the necessity of an expressed regulation, considering first of all the compliance with the principles of accessibility, clarity and predictability. The law within the meaning of this provision must provide exhaustive and precise 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".[183] ECHR offers the same textual approach 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.[184] It is emphasised the obligation of the state for providing 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. 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

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[182] Article 29 para. (2), Universal Declaration of Human Rights, 1948.
[183] Article 9, *Freedom of thought, conscience and religion,* European Convention on Human Rights, 1953.
[184] Ibid.

restricted. The exceptional nature imposes the requirement thereof on the one hand, but also by the specific purpose of the measure in emergencies, on the other hand, this being an aim, which cannot be achieved by ambiguous and unclear provisions.

The provisions of art. 4 paras. (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".[185] In the sense of this international norm, it is imperative to regulate the restriction by law but also to have specific reasoning for arguing a possible restriction of human rights and freedoms.

In the context of the petition submitted to the Constitutional Court, the wordings used by the legislator in the text of the law: "enforcement of other required measures" or "exercise other required tasks",[186] do not offer the subject of law an express guarantee on the respect of his rights and freedoms. In a state governed by the rule of law, the legal norm must always be interpreted prioritizing the freedom over authority. That is, always in favour 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 specific provisions on the restriction of rights are necessary). The law must meet certain conditions in order to operate the restriction of human rights constitutionally:

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

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185 Art. 4 paras. (1), art. 5 para. (2), art. 12 para. (3), arts. 18-19, art. 21, art. 22 para. (2), the International Covenant on Civil and Political Rights, 1966.

186 *Law no. 54 of 17th March 2020*, in Official Gazette of the Republic of Moldova nr.86, art.94 din 17.03.2020.

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.[187] Thus, to comply with the condition of predictability, the subject of law must reasonably expect that the rule could be changed. It is practically infeasible to analyse 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 harsh 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 individual 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.[188] In order to guarantee the citizens' rights and freedoms through the defence of national security, that restriction must be necessary to achieve the goal. In that sense, the restriction may not be operated unless it is necessary to achieve the aim.

It is challenged the opportunity for making certain amendments to the legislation relating to the exceptional situation at the 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 exact content and be expressly provided by law. The lack of precise legal rule 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

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187 *Written opinion* of Promo-LEX Association on the Request of the Constitutional Court of March 27th, 2020.

188 Ibid.

framework in such a sensitive period must be carried out in a transparent, predictable and unobtrusive manner, to remove, as far as possible, the eventuality of any arbitrary situation or the abuse of those called to apply the provisions. As a positive consequence, having rules with explicit content, it should also be analysed 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.[189]

### 1.5. Legality and conformation to the pre-existing legal order.

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".[190] 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 it.[191]

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. The provision of the norm of art. 20, as well as its character, should be considered to understand the legislator has provided a list of exhaustive measures intentionally. These measures can be applied depending on the situation that generated the establishment of the state of emergency. Similarly, the arts. 22, 24, 25 contained exhaustive lists of competences of the authorities during the state of emergency, and it is imperative to keep the strict and exhaustive regulation of the measures and tasks during this period.

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189 *Written opinion* of Promo-LEX Association on the Request of the Constitutional Court pf March 27th, 2020.

190 Ibid., cit. p.3.

191 *Law no.212/2004 of 24.06.2004*, available at: https://www.legis.md/cautare/getResults?doc_id=120832&lang=ro.

"*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. Supplementing the articles as mentioned above, 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".[192]

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. "The 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 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. Under art. 14 paras. (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 March 17, (4:25 pm), amendments to Law no. 212/ 2004 even if voted in Parliament, were not yet in force, considering the publication of both the Law no. 54/2020 and Decision 55/ 2020 in the Official Gazette no. 86 of March 17, 2020. According to Law 54/ 2020, the latter shall enter into force on the day of its publication (March 17, 2020).

b) Under art. 4 paras. (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

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192 *Written opinion* of Promo-LEX Association on the Request of the Constitutional Court pf March 27th, 2020, cit. p.5.

Moldova between March 17 – May 15, 2020. Thus, on March 17, 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 March 17, 2020, were allowed.[193]

### 1.6. Article 15 ECHR: the provision of a derogation clause.

The derogation clauses, present in most of the Charters that protect human rights at the international level, allow a state that is in an emergency to suspend some of the recognized rights. In fact, in certain situations, compliance with treaty obligations becomes difficult if not impossible. To demand that the state, even in emergencies, observe the same rules would be tantamount to exposing the treaty to frequent violations. The rationale for such rules would, therefore, be found in the theory of the state of necessity. Article 15 of the European Convention on Human Rights responds to the same need.

It is also considered that the derogation clause provided for in the above article covers the entire operational space of the *rebus sic stantibus* clause, making any reference to the latter illegitimate in order to justify the suspension of the Convention.[194] The clause aims to ensure that the States may not adduce a situation of war or other public danger as a legitimate reason for arbitrarily evading compliance with the Convention.

The rule in question therefore plays a crucial role in the system of protection of human rights. For this reason, it is assumed that it cannot be the subject of reservations by States and that those reservations are in fact incompatible with Article 57 of the Vienna Convention on the Law of Treaties, where it prohibits reservations of a general nature.[195]

Determining its content precisely is difficult because preparatory work is relatively sparse.[196] At the same time, preparatory work for Article 4 of the Covenant on Civil and Political Rights is proving more useful in order to better interpret its meaning. It is quite

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193 Ibid.
194 S. Bartole, P. De Sena, V. Zagrebelsky, *Commentario breve alla Convenzione europea dei diritti dell'uomo*, CEDAM, 2012, p.22.
195 Ibid., p.23.
196 Ibid.

clear, in fact, that the wording of Article 15 was inspired by this very provision, which plays an equivalent role in derogating.[197]

It is easy to see how the structure of the two articles is essentially the same. First, the circumstances in which the derogation from the obligations deriving from the covenant is justified are defined, and then the conditions under which a State may take measures in derogation, and finally, the nature of the notifications due.[198]

If a certain amount of freedom is left to the state as to the content of the derogation, but as regards the conditions justifying recourse to the special regime, it is required that it be faced with exceptional circumstances, such as a war or another danger that threatens the life of the nation.[199]

The wording is not very clear. The requirement of threatening the life of the nation must be proved even in case of war.

The extent of the danger threatening the nation must then be interpreted in a restrictive sense, as it is required to be current or at least imminent, concrete and such as to affect the population as a whole. This excludes the possibility of a last recourse to the derogation. The provision of the derogation clause may seem superfluous if it is considered that several rights limits are already in place, expressly aimed at dealing with exceptional events. It must be remembered that the Convention, on the one hand, enshrines certain rights of liberty and, on the other, establishes limits to those rights, which operate in particular situations. The waiver clause, therefore, is not the only tool available to states to deal with emergencies. The restrictions provided make it possible to restrict the scope of individual human rights sealed by the treaties.[200] This power, permitted by the Convention, may be exercised where national security, territorial integrity, public order, public morality or other individual rights are exercised find themselves threatened, and the application of ordinary rules would risk irreversibly endangering them.[201] Those just mentioned can be defined as ordinary remedies to an internal crisis, also called particulars. Remedies regulated by the principle of legality as

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197 European Commission of Human Rights, *Preparatory Work on Article 15 of the European Convention on Human Right*, Council of Europe, Strasbourg 22nd May 1956.

198 Ibid.

199 L. Zagato, *L'eccezione per motivi di emergenza nel diritto internazionale dei diritti umani*, GIUFFRE', 2006.

200 V. Eboli, *La tutela dei diritti umani negli Stati d'emergenza*, GIUFFRE', 2010, *cit.*, p. 5

201 A. Svensson, L. McCarthy, *The International Law of Human Rights and State of Excep*tion, *The Hague- Boston- London*, MARTIUS NIJHOFF PUBLISERS, 1998, p. 49.

strictly provided by law.[202] The difference to be emphasised between limitations and derogations relates to the particular gravity of the crisis concerning those situations in which the derogation may legitimately be used. The extraordinary nature of the emergency, in practice, legitimizes the state bodies to the introduction of a real regime of exception, of rules that differ from those ordinarily in force, even if only for a short period of time.[203] Respect for human rights in these cases is compromised in a much more incisive way than in the case of ordinary restrictions. The prejudice to the enjoyment of rights is so severe that it is necessary to require that the derogation clause be invoked only in exceptional emergencies, and only as an extreme ratio, at least in a state that is intended to be democratic.[204] In these cases, it is of fundamental importance to ask oneself about the opportunity to resolve the crisis through the use of ordinary instruments, more appropriate in this case than the adoption of *extra ordinem* measures, but excessive. The sacrifice of certain fundamental rights is considered legitimate in times of crisis, but only if the ordinary restrictions have not been sufficient to avert the danger to the life of the nation.

The derogation clause also raised further doubts. It was believed that this clause would give rise to problems of interpretation, but above all that it would lead to possible abuses at the time of its application. The reference to the notions of "national security" and "public order" was believed to be sufficient on its own to deal with emergencies in which the life of the nation could be threatened. It therefore seemed that the presence of limitations explicitly mentioned in the individual articles could be more suitable to prevent abuse, than the presence of an *ad hoc* clause.

Despite these opposing views, the emergencies in which the state is forced to impose restrictions on the enjoyment of certain fundamental rights and freedoms. In situations of "other dangers that threaten the life of the nation", it seems impossible to be able to demand from the State compliance with the obligations assumed with the treaty. The consequence that would derive could also be rather harmful to the safeguarding of collective security. Such cases would not be included in the particular limitations

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[202] V. Eboli, *La tutela dei diritti umani negli Stati d'emergenza*, 2010, cit., p. 9.

[203] R. Ergerc, *Les droit de l'homme à l'épreuve des circostances exceptionnelles*, études sur l'article 15 de la Convention européenne des droits de l'homme, BRUYLANT, 1987, p. 237.

[204] V. Eboli, *La tutela dei diritti umani negli Stati d'emergenza*, 2010, cit., p. 11.

contained in the individual articles, and a general clause would be insufficient to remedy them.

Another important issue when discussing the need for a derogation clause is the fact that it does not seem appropriate to relegate the decision to the state, leaving it free to decide how and how it will exercise the exception of its power, this precisely in order to prevent severe and possible abuse. It cannot be forgotten that the totalitarian systems established in the 1900s have used emergency powers to abolish fundamental human rights. From this point of view, on the other hand, Article 15 provides for an articulated control system, including jurisdictional, and more guaranteed, than that operating in cases of particular limits.

The existence of a public emergency and, to be more precise, of an "exceptional public danger", from which a threat to the existence of the entire nation derives, must be ascertained by an official act of the State concerned. The fact that the derogation must necessarily follow a formal and official state act, once again wants to avoid the possibility of arbitrarily failing to fulfil the obligations assumed.

The quality of the measures that a State can adopt in an emergency is those strictly necessary for the need of the specific case. The reference to this "narrow measure in which the situation demands it" reflects the principle of proportionality and acts as a limit in the choice of emergency measures.

A further limitation that States encounter in the same choice phase consists of the compatibility of the measures adopted, with the obligations deriving from international law. Concerning this second limit, the absence of conflict with other international obligations gives the standard a minimum standard value compared to the provisions contained in other instruments of international law.[205]

In the field of human rights, there are also a series of provisions that seem to be mandatory, provisions, therefore, which could not be derogated even in exceptional circumstances. These constitute the hardcore of the Convention; it is all those principles which seem to be of jus cogens.[206] Article 15 refers only to four rights, that of life

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[205] L. Zagato, *L'eccezione per motivi di emergenza nel diritto internazionale dei diritti umani*, 2006.

[206] R. Ergec, *Les droit de l'homme à l'épreuve des circostances exceptionnelles*, études sur l'article 15 de la Convention européenne des droits de l'homme,1987, p. 237.

(art.2), the prohibition of torture (art.3), the prohibition on reduction in slavery (art.4 par.1), the principle of *nullum crimen sine legem* (art.7).[207]

When a State decides to make use of Article 15 and therefore to derogate from some of the provisions contained in the Convention, the obligation is to officially notify the Secretary-General and the other States of the decision. Communicating on the one hand, which are the provisions to which it intends to derogate, on the other what are the reasons that led the State to this decision, and finally the date that marks the end of the derogation.

About this provision, it is realized that the choice to derogate from the rights established in the Convention is one of the most serious and complicated that States can reach. Furthermore, the fact that in the past exceptional powers have constituted an instrument through which to deny the protection of human rights, a simple notification of the decision is not considered sufficient. The state should instead illustrate, even without going into detail, the reasons that led to the decision to derogate.[208]

### 1.7. Amendment of Law in the light of "activation" of art. 15 of ECHR by the Republic of Moldova.

A Declaration was submitted by the Representation of the Republic of Moldova to the Council of Europe. According to the Declaration registered at the Secretariat of the Council of Europe based in Strasbourg under the no. FRA-CoE/352/169 of March 19, 2020, Council of Europe was also announced about the activation of art. 15 of the ECHR. The article allows specific derogations from the enforcement of the Convention, under conditions of the state of emergency caused by the COVID-19 pandemic. It was also announced the establishment of the state of emergency in the Republic of Moldova until May 15, 2020. The sequencing of recent strategic and legal measures raises several concerns:

a) March 17, 2020 – "article 20 is supplemented with the letter k) worded as follows: enforcement of other required measures". Article 22, para. (1) is supplemented with letter i) worded as follows: "exercise other required tasks".[209] Article 24 is

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[207] Ibid.
[208] Ibid.
[209] Attributions to the Commissions for Exceptional Situations in the Republic of Moldova.

supplemented with letter g) worded as follows: “exercise other required tasks”.[210] Article 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.[211]

b) March 17, 2020 – a state of emergency is declared in the Republic of Moldova under Parliament’s Decision no. 55 of 17.03.2020. 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 19, 2020 – The Secretariat General of the Council of Europe is informed about the activation of art. 15 of the ECHR allowing certain derogations from the enforcement of the Convention, under conditions of the state of emergency caused by the COVID-19 pandemic. The accumulation of these events could represent an imminent danger concerning the situation of respect for human rights in the Republic of Moldova. 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 individual 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 about the decision to use the provisions of art. 15.[212] This provision has been used in the past, butonly in exceptional circumstances.[213]

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[210] Attributions to the Civil Protection and Exceptional Situations.

[211] Attributions to the Minister of Interior.

[212] *Derogation in time of emergency*, April 2020, full list available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations.

[213] 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.

## 1.8. The discretion of states and the danger of geometrically variable protection of human rights: criticisms of the doctrine of the margin of appreciation.

The doctrine of the margin of appreciation takes a central position in the moment of European control over the derogation clause.

The concept of better position emerged within the jurisprudence, highlights the apical role of the State in assessments concerning emergencies. The Court recognizes a wide margin of appreciation and limits its control only to the proportionality and reasonableness of the measures taken. It can be noted that the intent is to take for granted the extent of the margin of appreciation and limit the investigation to the visible external profiles.[214]

Since the question relating to the determination of the seriousness of the danger is fundamental to legitimize the drug under Article 15, as already mentioned, but difficult to appreciate from the outside. It is more appropriate that the State in question takes this decision. It cannot be neglected the fact that very often the evaluations that are necessary in these cases would require the extension of the knowledge of certain secret elements also to the European bodies, this knowledge, however, is the exclusive prerogative of the States.

Although the theory in question proves essential in the European context, there are still numerous criticisms. First of all, the main reason for doubts about its opportunity is based on the vagueness and indeterminacy of its meaning and ambiguity. It seems to compromise the protection of rights human. Furthermore, the problem arises concerning compliance with the principle of legality, given the lack of a specific and precise meaning of the theory at the regulatory level. The doctrine would seem to introduce relativism and subjectivity into human rights norms, thus legitimizing a double standard, destroying that attempt at unity and uniformity that was attempted to achieve precisely through the Convention. In this regard, Judge De Meyer, in his separate opinion, in *Z v. Finland*, even advocates abandoning this theory.[215]

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[214] F. Donati, P. Milazzo, *La dottrina del margine di apprezzamento nella giurisprudenza della Corte europea dei Diritti dell'Uomo,* UNIVERSITA' DI FRIRENZE, Schema preliminare della relazione, Associazione Italiana dei Costituzionalisti, archivio.rivistaaic.it., 2003, p.55.

[215] *Case of Z v. Finland*- 22009/93, 25 February 1997, opinion of judge De Meyer, ECtHR.

The Court takes into consideration several elements to proceed to the decision in cases of derogations. Sometimes it considers these elements altogether, other times it examines them separately. For example, the interest protected by the Convention, to the merit of the objective pursued by the State, to the positive or negative nature of the state obligation, to the recurrence of specific external circumstances, to the attention to the guarantees put in place by the State, capable of mitigating the negative effects of the derogation measure.[216]

All these elements contribute to making the margin of appreciation of an instrument that can be easily modelled and adapted to the individual concrete case. In such a way, the scope of discretion will roughly be broad from time to time, depending on the set of these will be assessed elements. The Court manages to modulate the amplitude of the margin of appreciation and to fill the numerous with content indeterminate expressions that recur in the Convention.[217] If on the one hand adaptability to the concrete case is probably the reason for the existence of the margin of appreciation theory, on the other, it is also the source of the criticisms just mentioned.

It is not easy to trace the particular contours of the theory, nor to recognize a unitary tendency of jurisprudence,[218] the criticisms of those who affirm that the theory of the margin of appreciation has a fundamental defect: that of being potentially a tool with variable geometry.[219] The margin of appreciation would seem to present weaknesses regarding the possibility of manipulating the factors that determine their amplitude.[220] Among those factors that are taken into consideration by the judge are the "terminological" argument and the "European consensus". Both proved to be a source of inconsistency and exposed precisely to the danger of manipulation.[221]

As regards the first aspect, the coherence of the doctrine should be given by the terminological rigour employed by the Convention. The fact that Article 15 speaks of "strict measure" should be able to limit the use of the derogation only in the most severe

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216 F. Donati, P. Milazzo, *La dottrina del margine di apprezzamento nella giurisprudenza della Corte europea dei Diritti dell'Uomo,* 2003, p.67.
217 Ibid.
218 Ibid.
219 V.S. Drooghenbroeck, *La proportionnalité dans le droit de la Convention Européenne des Droits de l'Homme,*Bruylant Bruxelles, FACULTES UNIVERSITAIRES SAINT-LOUIS, 2001, p.33.
220 Ibid.
221 Ibid.

cases of the unsuitability of ordinary measures. However, the requirement has in fact been subject to different interpretations.

The theory in question is undoubtedly the most controversial work of the European judge, so much so that the doctrine started paying particular attention to it. Doubts may rise regarding its legitimacy, interpreting the theory exclusively in a way that the European bodies can escape from their duty to judge. Furthermore, devolution to the state appreciation of the safeguards of the rights that should be respected abandoning the theory as mentioned above would not be desirable or, to put it better, even if an abandonment were made, this would be merely formal, while its use in practice would remain. The variation in the degree of supervision is, in fact, a common phenomenon also in national courts. There is a highly probable consequence that, even in the absence of a doctrine of the margin of appreciation, the variations in the degree of scrutiny of the European bodies would occur in any case. The margin doctrine would, therefore, be preferable, albeit imperfect, to yield at least make explicit the considerations made by the judges at the time of the decision.[222]

On the other hand, a realistic view of the issue leads to ascertaining the impossibility of achieving total transparency in this type of jurisprudential decision.[223]

Given the malleability of the margin of appreciation, however, it seems impossible to be able to speak of a real doctrine.[224]

### 1.9. The ECtHR jurisdiction.

The ECtHR stated that the law accuracy-test requires the law indicates with sufficient precision its limits, in situations where it provides a certain margin of discretion.[225]

Some conclusions from the jurisprudence of the European Court of Human Rights:

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[222] P. Dijk, G.H.J. Hoff, *Theory and Practice of European Convention on Human Rights*, 3° ed., La Haye/Londres/Boston, Kluwer law International, 1998.p 46.

[223] V. S, Drooghenbroeck, *La proportionnalité dans le droit de la Convention Européenne des Droits de l'Homme*, 2001, cit., p.547.

[224] Ibid., cit., p.548.

[225] *Case of Silver and other v. UK*, Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75), ECtHR Judgement of 25.03.1983.

*"The pre-eminence of the law presupposes, among other things, the assurance of legality and legal certainty.*[226] *In this sense, article 23 paragraph (2) of the Constitution requires the adoption by the legislator of accessible and predictable laws.*

*The condition of accessibility presupposes that the recipients can know the legal texts. Any person must be able to have information on the legal rules applicable in a specific case.*[227] *The accessibility of the law considers bringing to public knowledge of the normative acts and their entry into force, which is done based on art. 76 of the Constitution, the law, is published in the Official Gazette.*

*In turn, the condition of predictability is met when the person can - if necessary, with adequate legal assistance - to foresee, to a reasonable extent in the circumstances of the case, the consequences that certain conduct may have.*[228] *At the same time, in order for the law to fulfil the exigency of predictability, it must specify with sufficient clarity the scope and the modalities of exercising the discretionary power of the authorities in the respective field, considering the legitimate aim pursued.*[229]

*When elaborating a normative act, the legislator must respect the norms of legislative technique in order for it to correspond to the quality requirements, i.e., accessibility and visibility. In particular, the legislative text must correspond to the principle of coherence. Thus, the law must ensure a logical-legal link between the provisions it contains and avoids legislative parallels, which generate uncertainty and legal insecurity. In the legislative process, it is forbidden to establish the same regulations in several articles or paragraphs from the same normative act or in two or more normative acts".*[230]

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226 *Report on the rule of law,* adopted by the Venice Commission at its 86th plenary session, 2011, Section 41.

227 *Case of Khlyustov v. Russia,* Application no. 28975/05, ECtHR Judgement of 11.10.2013.

228 *Case of Gestur Jonsson and Ragnar Halldor Hall v. Iceland,* Applications nos. 68273/14 and 68271/14, ECtHR Judgement of 30.10.2018; *Case of Berardi and Mularoni v. San Marino,* Applications nos. 24705/16 and 24818/16 ECtHR Judgement of 10.01.2019.

229 *Case of Sissanis v. Romania,* Application no. 23468/02, ECtHR Judgement of 25.01.2007.

230 Constitutional Court's DECISION No. 2 from 30-01-2018 regarding the exception of unconstitutionality of some provisions of art. 10 point 4 of Law no. 845-XII of January 3, 1992 on entrepreneurship and business.

Considering the constitutional norms and the jurisprudence of the Court, it can be established precisely that the phrases "application of other necessary measures" or "exercise other necessary attributions", especially if they are measures that restrict the fundamental human rights, do not pass the test of predictability, clarity. Moreover, the accessibility of the legal norm provided in art. 23 paragraph (1) of the Constitution of the Republic of Moldova and directly contradicts this constitutional norm. The same arguments are addressed in the case of point 12 of art. 2 of the Parliament decision no. 55 of March 17, 2020.

### 1.10. Practical considerations guided by the relevant ECtHR case-law.

In the Court's view, the scope of the concepts of predictability and accessibility depends on the context of the rule in question, the field it covers and the number and quality of its addressees.[231] 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, a judgment of January 20, 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". [232]

The ECtHR recalls that a "law", within the meaning of Article 10, section 2 of the Convention, is a rule formulated with sufficient precision allowing citizens to decide

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[231] *Case Groppera Radio AG and Others v. Switzerland*, ECtHR Judgment of 28 March 1990, paragraph 68.

[232] Case of *Sud Fondi SRL and Others v. Italy,* Application no. 75909/01, ECtHR Judgment of 20.1.2009.

their conduct and foreseeing, reasonably, depending on the circumstances of the case, the consequences that might result from a particular fact.[233] 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 its 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 consider ensuring these requirements. Thus, in cases such as The Sunday Times v. the United Kingdom of Great Britain and Northern Ireland (1979), Rekvényi v. Hungary (1999), Rotaru v. Romania (2000), Dammann 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".[234] 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.

### 1.11. "No derogation rule" and the limit of obligations deriving from international law.

The possibility granted to a State to break its obligations under the treaty in emergency circumstances, enshrined in the Convention, article 15, is certainly not without limits.

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233 *Case of Amihalachioaie v. Moldova*, Application no. 60115/00 para. 25, ECtHR Judgment of 20.04.2004.

234 *Case of The Sunday Times v. the United Kingdom of Great Britain and Northern Ireland*, Application no. 6538/74, ECtHR Judgement of 19.01.1974; *Case of Rekvényi v. Hungary*, Application no.25390/94, ECtHR Judgement of 20.05.1999; *Case of Rotaru v. Romania*, Application no. 28341/95, ECtHR Judgment of 04.05.2000; *Case of Damman v. Switzerland*, Application no. 77551/01, ECtHR Judgement of 25.04.2006.

Indeed, the State may temporarily suspend some of the fundamental rights, provided it does not cease to exist through this derogation, neither to international obligations nor to mandatory rights.

There are two types of human rights guaranteed by the Convention: those considered absolute rights, and those that can be waived or limited. The former, in particular, are not subject to derogation even in times of particular emergency.

A list of these rights is contained in the European Convention,[235] and in the Covenant on Civil and Political Rights,[236] and the Inter-American Convention.[237] Instead, it is entirely absent in the African Charter. The reason for this absence is to be found in the fact that, in this document, a derogation clause is also missing. The two issues are, in fact, closely related.

To date, it is believed that mandatory rights can be recognised as *jus cogens* norms. Due to a certain convergence of opinions has been reached on which rights are worthy of being considered absolute. It follows that excluding the case of the death penalty, a hypothesis on which there is a variety of opinions given the differences in national laws, these rights have now taken on an intangible character. It is therefore no longer possible, even though conventional clauses and not even in emergencies, to deny it the possibility of being admitted.[238]

The list of mandatory rights contained in Article 15 of the Convention, the one provided for in Article 4 of the Pact and the one in Article 27 of the Inter-American Convention,[239] are quite similar to each other even if not completely homogeneous. In particular, Article 4, as well as Article 27 of the Inter-American Convention, contain more detailed formulas than those provided for in the European Convention, which instead has an essential structure.[240]

Article 15 establishes in the second paragraph:

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235 Article 15, Section 2, European Convention on Human Rights.
236 Article 4, Covenant on Civil and Political Rights.
237 Article 27, Inter-American Convention.
238 R. Ergec, *Les droit de l'homme à l'épreuve des circostances exceptionnelles, études sur l'article 15 de la Convention européenne des droits de l'homme*, 1987, pag. 238.
239 Article 27, Inter-American Convention.
240 V. Eboli, *La tutela dei diritti umani negli Stati d'emergenza,* 2010, cit., p. 70.

> "The previous provision does not authorize any derogation from article 2, except in the case of death caused by legitimate acts of war, and to articles 3, 4 Section 1 and 7".[241]

To this provision must be added the mandatory rights identified by the Additional Protocols. Precisely Article 4 of Protocol No. 7 (*ne bis in idem principle*) and Article 3 of Protocol No. 6 relating to the abolition of the death penalty.[242] Hence, the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, the legality of crimes and penalties are considered inadmissible.[243]

This list of rights would be the *hardcore* of human rights. States, therefore, undertake to guarantee compliance even in the event of emergencies.[244] The clause assumes a guarantee meaning. In sum, some fundamental rights cannot be respected even in exceptional circumstances. The mandatory rights would, therefore, form a minimum standard of protection.[245]

However, it would be an error to consider only those rights that the Convention expressly establishes as such as mandatory. On the contrary, from the structure of the Convention, it is possible to deduce the possibility that the list is *de facto* expanded.[246] Article 15 of the Convention establishes in Section 1 that, the exercise of the derogation cannot conflict with other obligations deriving from international law.[247] Neither the Court nor the Commission has, however, clarified what is meant by "other obligations under international law". At the same time, both in the Lawless case and in the Ireland case v. The United Kingdom case, the Court held that government violations could not be found on this point.

A problematic question concerning the meaning to be attributed to the expression "other obligations under international law", consists in asking oneself whether one should refer to the obligations existing at the date of accession to the treaty, or whether those included later are included.

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241 Article 15, Section 2, ECHR.
242 Article 4, Protocol No. 7; Article 3, Protocol No. 6.
243 Article 7, ECHR.
244 V. Eboli, *La tutela dei diritti umani negli Stati d'emergenza*, 2010, *cit.*., p. 70.
245 Ibid.
246 R. Ergec, *Les droit de l'homme à l'épreuve des circostances exceptionnelles, études sur l'article 15 de la Convention européenne des droits de l'homme*, 1987, p. 294.
247 Article 15, Section 1, ECHR.

At first glance, it could be concluded by agreeing with the first hypothesis, considering that a State undertakes only to the extent that it knows exactly the extent of the obligations that concern it.[248] Moreover, in international law, there are cases in which the obligations that arise from the treaty are not predetermined at the time of signing, but can be specified later, through objective criteria. Compliance with other obligations under international law is inspired by the logic of offering a minimum standard of protection, which can be further strengthened by the obligations subsequently assumed.[249]

The obligations under international law referred to would be exclusively those which concern human rights and fundamental freedoms. It, therefore, refers to general instruments of international law that protect human rights, but also specific sectoral instruments such as, the Convention on the Rights of the Child.[250] The obligations imposed by humanitarian law instruments are also highlighted.

Article 15 does not specify the sources from which these international obligations would derive. However, it can be inferred that these are the three common types of sources: the treaty, custom and general principles of law.[251]

The main treaties that protect human rights generally include clauses through which, in certain emergencies,[252] States can derogate from the obligations assumed under the treaty. It is so at European level, with article 15 of the European Convention on Human Rights, but similar provisions are also included in the International Covenant on Civil and Political Rights, and the American Convention on Human Rights. The exemption clause presupposes the extraordinary nature of the emergency,[253] a crisis of exceptional gravity, in which the ordinary measures limiting the law were not sufficient. It is admitted in these circumstances that the right is not so much reduced in its scope, but instead literally suspended even if for a limited period. It follows the establishment of a extra-order regime.[254]

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[248] Ibid.

[249] R. Ergec, *Les droit de l'homme à l'épreuve des circostances exceptionnelles, études sur l'article 15 de la Convention européenne des droits de l'homme*,1987, p. 294.

[250]Convention on the Rights of the Child and Adolescent, approved by the United Nations General Assembly on November 20, 1989.

[251] H. Mosler, *Actes du cinquième Colloque international sur la Convention européenne des droits de l'homme*, Conseil de l'Europe, Francoforte, in Revue internationale de droit comparé, 1980, p. 391.

[252] V. Eboli, *La tutela dei diritti umani negli Stati d'emergenza*, 2010, p.10.

[253] Ibid.

[254] Ibid.

Once invoked, the derogation is susceptible to ex-post control by the bodies of the Convention, aimed first of all at verifying the existence of the exceptional situation legitimising the use of art. 15, then the proportionality of the measures implemented for the seriousness of the situation.

The phenomenon of terrorism, not surprisingly, has always occupied a central place in the cases relating to Article 15. For its specific features, States have always been considered by the States to be an exceptional threat to the life of the nation, and as such, addressed employing the derogating instrument.

In the face of the complex issues that the interpretation of Article 15 raises, it is useful to verify the meaning that the European supervisory bodies have attributed to Article 15 with the characteristics that the crisis must assume so that states can legitimately derogate. The position expressed by the Court regarding the invocation of reasons for derogation by the States will be analysed.

**1.12. Conclusions.**

Considering the factual situation and the jurisprudence established by the ECHR, the Constitutional Court of the Republic of Moldova, it can be noted that the Parliament adopted some legal norms that may lead to flagrant violation of international and constitutional principles. Furthermore, in order not to admit severe consequences for the fundamental human rights and freedoms, it should have been suspended the action of the contested legal norms: articles 2,3,4, and 5 of art. I of Law no. 54 of 17 March 17, 2020, amending the Law no. 212/2004 regarding the regime of the state of emergency, siege and war.

Considering the constitutional norms and the jurisprudence of the Court, it can be established precisely that the phrases “application of other necessary measures” or “exercise other necessary attributions”, especially if they are measures that restrict the fundamental human rights, do not pass the test of predictability, clarity. Moreover, the accessibility of the legal norm provided in art. 23 paragraph (1) of the Constitution of the Republic of Moldova and directly contradicts this constitutional norm. The same arguments are addressed in the case of point 12 of art. 2 of the Parliament decision no. 55 of March 17, 2020.

The very notion of the state of emergency established in art. 1 of the law defines as a set of measures with a political, economic and social character. Once established, these measures must be expressly provided by law, precise and predictable.[255] Only in these conditions will be observed art.54 of the Constitution, which expressly establishes that the rights and freedoms can be restricted only in the cases provided by law. However, by adopting Law no. 54, and subsequently the Decision no. 55, the Parliament admitted a norm by which the fundamental human rights and freedoms may be restricted by measures that are not provided by law. The phrases "other necessary measures" and "other necessary attributions" seriously violate the principle of predictability and accessibility. It additionally exceeds the limits provided by art. 54 of the Supreme Law. The art. 54 does not allow the establishment of other restrictions expressly not provided by law and which are strictly motivated and necessary.

The expressions used in the text of the law: "application of other necessary measures" and "exercise other necessary attributions", do not offer the subject of law an express guarantee on the observance of his rights and freedoms. Moreover, there is a complete lack of the possibility of knowing the duties in the content of the overlapping emergency with uncertain attributions offered to the authorities. Consequently, the general constitutional provisions on fundamental human rights and freedoms are considered.

In exceptional situations, it is suggested to the legislator to complete the legislative framework, depending on the social evolutions, with new, express provisions, meant to regulate the legal appearances of restriction as a defined right. The Parliament was not entitled to approve the amendments to the law on the day it is part of the state of emergency, and the President did not have the right to promulgate those amendments with the immediate implementation of these amendments starting with March 17, 2020. The derogation of the art. 15 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 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 certain hypothetical

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[255] *Law no.212/2004 of 24.06.2004*, available at: https://www.legis.md/cautare/getResults?doc_id=120832&lang=ro.

premises lead and could lead directly to the violation of human rights. In conjunction with the recently amended provisions using the same uncertain mechanism based on the regulation of unlimited powers “bestowed” upon the authorities, the situation regarding the respect of individual 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 gives cause for further concern. Most of the Council of Europe member countries did not rely on provisions of art. 15, even if among them there are countries with less democratic views.

## CONCLUSIONS

The elaborate consists of an analysis of the constitutionalism evolution in the Republic of Moldova and how it reflects on human rights and democratic principles during a state of emergency. Under a state of emergency, some individual rights and liberties are usually suspended. The separation of powers is curtailed in favour of the executive or even a single person such as the head of state or government and, by implication, to the detriment of parliament and the courts. States of emergency are critically important from a human rights perspective because the suspension of legal order often paves the way for systematic human rights violations. States of emergency also challenge states' commitment to the rule of law. The Republic of Moldova is characterised by being under different regimes during the last century. Along with different powers, the social-economic reality changed, and there was a need for an appropriate constitution. The territory of the Republic of Moldova had experienced several constitutions: from the one considered the most liberal at that time, being inspired by the Belgian constitution, up to experimenting with a socialist constitution in which human rights and freedoms were only formal and the separation of power did not exist. It can be said that on the Moldovan territory, two types of constitutionalism have been traced: European and socialist one. The classical European constitutionalism was applied on the territory of the today's Republic of Moldova, following the return of Bessarabia to Romania (1918-1940), through the Romanian constitutions of 1866, 1923, 1938, inspired by the most democratic constitutions known at that time. Subsequently, socialist constitutionalism manifested itself during the Soviet regime: when the statehood of the Moldovan RASS and the Moldovan SSR were the expression of the Marxist-Leninist theory, promoted by the Communist Party. The socialist constitutions cannot be included in the category of the conventional constitutions, whose normative content is determined by the secular constitutional tradition. People of the Republic of Moldova have not fully lived historical experience of democracy and have not benefited from a democratic leadership. However, regarding the content of the Republic of Moldova constitution in force, it can be said that the very conception of the fundamental law has changed. The socialist principles were abandoned, and the democratic one was consecrated in the current constitution. Being a state that has cultivated democratic

principles for relatively few years, the long Soviet influence is strongly present and weakens the state. Thus, principles as the rule of law, separation of power, fundamental rights and freedoms which during the Covid-19 pandemic have been under threat. For the first time in its history, the Republic of Moldova declared a state of emergency in order to deal with the pandemic. As the Moldovan constitution strives to enact only the very constitutional grounds for possible exceptions to the constitution, the emergency laws take on a more material and detailed character. Although the constitution allows for a state of emergency, it does not define in great detail what constitutes an emergency or regulate questions related to competence, limits, or controls. Accordingly, an organic law regulates all such aspects.

On March 17, 2020, the law regulating the state of emergency, siege and war was amended, introducing expressions as "the application of other necessary measures ", "the exercise of other necessary attributions". Also, article 4 of the same law has been modified, eliminating the part: "adopt, amend or abrogate organic laws and electoral legislation". It means that during the state of emergency, an organic law and the electoral legislation may be adopted, amended or abrogated.[256] On the same day, Parliament Decision no. 55 was issued, declaring the state of emergency. The modification of the law on the state of emergency, siege and war was contested at the Constitutional Court, but it was rejected due to insufficient motivation.

The expressions used in the text of the law: "application of other necessary measures" and "exercise other necessary attributions" do not offer the subject of law an express guarantee on the observance of his or her rights and freedoms. Moreover, there is a complete lack of the possibility of knowing the duties in the content of the overlapping emergency with uncertain attributions offered to the authorities. These expressions are contrary to the general constitutional provisions on fundamental human rights and freedoms.

The very notion of the state of emergency established in art. 1 of the law defines as a set of measures with a political, economic, social character. Once established, these measures should be expressly provided by law, precise and predictable. The phrases "other necessary measures" and "other necessary attributions" seriously violate the

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256 Art. 4 not amended: "During the state of emergency, siege or war, established in the country, it is not allowed to amend the Constitution, adopt, amend or repeal organic laws and electoral legislation, and conduct elections of central and local public authorities and republican and local referendums".

principle of predictability and accessibility. It exceeds any limits of accessibility because they can be interpreted very broadly and very subjectively. Emergency measures should respect certain general principles which aim to minimise the damage to fundamental rights, democracy and the rule of law. The measures are thus subject to the triple, general conditions of necessity, proportionality and temporariness.

It additionally exceeds the limits provided by art. 54 of the Supreme Law. The article does not allow the establishment of other restrictions expressly not provided by law and which are strictly motivated and necessary. The contested norms introduced in Law no. 212, which extended the exhaustive list of measures restricting human rights in a state of emergency without establishing precisely what these measures are, come in direct contradiction with art. 54 of the Supreme Law.

The restriction must be proportionate to the situation which determined it and cannot affect the existence of the right or freedom.

In exceptional situations, the legislator should complete the legislative framework, depending on the social evolutions, with new, express provisions, meant to regulate the legal appearances of restriction as a defined right. The parliament was not entitled to approve the amendments to the law on the day it is part of the state of emergency, and the President did not have the right to promulgate those amendments with the immediate implementation of these amendments starting with March 17, 2020.

Moreover, the derogation of the art. 15 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 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 certain hypothetical premises lead and could lead directly to the violation of human rights. In conjunction with the recently amended provisions using the same uncertain mechanism based on the regulation of unlimited powers “bestowed” upon the authorities, the situation regarding the respect of individual 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 gives cause for further concern. Most of the Council of Europe member countries did

not rely on provisions of art. 15, even if among them, there are countries with less democratic views.

State of emergency can sometimes be used as a pretext for abuses, such as arbitrary detention, censorship, or other authoritarian measures, the desire for more determinate rules to constrain state discretion is legitimate. There are increasing concerns that the modification of the state of emergency law undermine democratic principles, eliminate dissent, and violate the principles of necessity and proportionality. Most problematic are expansions of executive powers and repressive measures, which might continue after the national emergency in the respective countries.

To conclude, the characteristics of past Soviet constitutions still influence the democratic path of the Republic of Moldova, highlighting a fragile rule of law. Modifying the law of the state of emergence, siege and war and declaring it the same day is a concrete sign of not conforming to democratic principles.

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