

*Decision no. 672  
of 20 October 2021*

*regarding the referral of unconstitutionality of Decision no. 5/2020 of the Parliament of Romania for the approval of the state of alert and the measures established by Government Decision no. 394/2020 regarding the declaration of the state of alert and the measures that apply during its duration to prevent and combat the effects of the COVID-19 pandemic*

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## **Summary**

**I. As grounds for the unconstitutionality referral**, the authors argued that Parliament Decision no. 5/2020 approving the state of alert and the measures established by Government Decision no. 394/2020 regarding the declaration of the state of alert and the measures that are applied during it to prevent and combat the effects of COVID-19 violate the constitutional provisions of Article 1 (4) and (5) which enshrine the principle of separation and balance of powers in the state, and the principle of legality and the supremacy of the Constitution, from Article 108 which regulates the acts of the Government and of Article 147 (1) and (4) which enshrines the effects of the decisions of the Constitutional Court.

**II. Examining the criticisms of unconstitutionality**, The Court found, from the analysis of the preamble of the Decision of the Parliament of Romania no. 5/2020, that it was adopted pursuant to Article 4 (3) and (4) of Law no. 55/2020 regarding some measures to prevent and combat the effects of the COVID-19 pandemic. With this decision, the state of alert established throughout the country, according to the provisions of Article 4 (1) of Law no. 55/2020, by the Government of Romania, was approved by the decision. With the approval of the measure, the Parliament amended the Government's decision under certain aspects. After the adoption of this act of Parliament, as a result of a constitutionality review, by Decision no. 457 of 25 June 2020, the Constitutional Court found the unconstitutionality of Article 4 (3) and (4) of Law no. 55/2020 which established the power of Parliament to approve the state of alert adopted by the Government, in full or with amendments. To pronounce this solution, the Court started from the constitutional framework that configures the role and relations between the Parliament and the Government, as well as the legal regime of their acts. Bearing in mind, on the one hand, that the relations between the Parliament and the Government are ruled by the principle of the separation and balance of powers in the state, expressly enshrined by the provisions of Article 1 (4) of the Constitution, and, on the other hand, that the constitutional regime of the Government's decisions is established by the provisions of Article 108 (2) and (4) of the Constitution, which are corroborated with those of Article 126 (6) which enshrines the judicial control of administrative acts of public authorities, through administrative litigation, as well as with those of Article 52, which entitle the person injured in his right or in a legitimate interest by a public authority, through an administrative act or by the non-resolution of a request within the legal term, to obtain the recognition of the claimed right or legitimate interest, the annulment of the act and repairing of the damage, the Court found that the Government's decisions are normative or individual administrative acts, an expression of the original powers of the Government, provided in the Constitution, typical for its role as a public authority of the executive branch. The organization of the execution of laws through decisions is an exclusive attribute of the Government, and can never be a power of the Parliament, which, moreover, adopted the main law/normative act. According to its constitutional regime, the Government's decision intervenes when the execution of some provisions of the law calls for the establishment

of subsequent measures or rules. As a result, the Government's decisions are always adopted on the basis of and with a view to the execution of the laws, aiming at their implementation or fulfillment. When a decision of the Government violates the law or adds to the provisions of the law, it can be challenged in the administrative court according to Article 52 and Article 126 (6) of the Constitution, and the provisions contained in the special law on the matter, Law no. 554/2004 on administrative litigation, with subsequent amendments and additions.

Examining the texts subject to constitutional review, the Court found that, after the Parliament authorizes the Government to adopt a decision in the execution of Law no. 55/2020, it requires it to return to it, in order to approve the measures for the execution of the law, in full or with amendments. A new institution appears thus configured, through the criticized legal texts, namely that of the Government's decision approved/amended by the Parliament. However, under the conditions in which the state of alert is an exclusive creation of the legislator, based on its legislative prerogatives, this institution must comply - based on Article 1 (5) of the Constitution which enshrines respect for the Constitution and its supremacy - with the constitutional framework of reference, namely, in the present case, to the constitutional regime that governs the relations between the Parliament and the Government and their acts. As a result, to the extent that the legislator established that the state of alert is enshrined by a decision of the Government, it established powers of the Government in relation to the state of alert and the acts that the Government adopts in the exercise of said powers, all these can only be within the limits of the Constitution. Under this aspect, the Constitutional Court found that the constitutional norms do not distinguish regarding the Government's decisions according to their object. Thus, in the absence of a derogatory constitutional regime for the Government's decisions establishing the state of alert, such an exceptional regime cannot be conferred through infra-constitutional acts. As a result, the Government's decision establishing the state of alert can only be a normative administrative act, therefore a secondary regulatory act that enforces a primary regulatory act. Unlike the normative acts adopted by legislative delegation, regarding the decisions of the Government, the constituent legislator did not establish any approval by the Parliament, which is why the intervention of the latter authority in the sphere of the mentioned category of administrative acts constitutes an obvious deviation from its established constitutional prerogatives from Article 61 (1) of the Constitution, in the sense of the cumulation of some prerogatives of the executive branch. As a result, the "approval" or "amendment" by the Parliament of the measures adopted by the Government by decision is without constitutional basis and distorts the legal regime of the Government's decisions, as acts of law enforcement, enshrined in Article 108 of the Constitution.

On the other hand, the Court found that since a parliamentary control of the Government's decisions in the sense of approving/rejecting/amending them does not appear among the mechanisms of constitutional rank established to regulate relations between public authorities within the regime of separation and balance of powers in the state, and the decisions of the Government constitute - as stated - the expression of the original powers of the Government, executive in nature, by approving/amending the measures adopted by decisions of the Government, the Parliament ends up cumulating the legislative and executive functions, a situation incompatible with the principle of separation and the balance of powers in the state, enshrined in Article 1 (4) of the Constitution. The interference of the Parliament on a specific act of the Government, intended for the implementation of the law, signifies an interference of the legislative power in the secondary regulatory power for the execution of the laws, which belongs exclusively to the Government. And, the Parliament cannot exercise its power of legislative authority in a discretionary manner, at any time and under any conditions, by adopting laws to create the framework in which to encroach on the constitutional powers that belong, exclusively, to other branches of the state.

Starting from the distinction between parliamentary control over the executive and judicial control over the public administration, regulated by Article 21, Article 52 and Article 126 (6) of the Constitution, the Court held that, precisely in consideration of the legal nature of the Government's decisions, the constituent legislator provided the control powers of the courts over them. That being the case, the parliamentary control thus configured by the constituent legislator cannot extend over the normative content of the Government's decisions, in the sense of approving, amending or rejecting them. Such an intervention radically changes the meaning attributed by the constituent legislator to the concept of parliamentary control, as well as the traditional legal nature of the Government's decisions, which take on the characteristics of administrative acts regarding relations with the Parliament, with consequences in terms of access to justice for challenging them.

Therefore, the Court found that the approval and amendment made by the Parliament regarding the normative content of the Government's decision regarding the establishment of the state of alert impermissibly adds on to the constitutional texts that regulate the relations between the two public authorities and violates the provisions that concern the judicial control of administrative acts issued by public authorities. Thus appears a decision of the Government amended and supplemented by a decision of the Parliament, a hybrid act without any constitutional basis, created only by a confusion of powers regarding the Parliament and the Government and ignoring the principles that govern the relations between these authorities, and having an uncertain legal regime from the perspective of the incidence of Article 126 (6) of the Constitution, with the consequence of violating the provisions of Article 21 and Article 52 of the Constitution, which enshrine free access to justice and the rights of the person injured by a public authority.

Considering the arguments and the solution adopted by Decision no. 457 of 25 June 2020, the Court held that Decision no. 5/2020 of the Parliament of Romania for the approval of the state of alert and the measures instituted by Government Decision no. 394/2020 on the state of alert and the measures that are applied during it to prevent and combat the effects of the COVID-19 pandemic, based on a legal provision declared unconstitutional, is itself without a constitutional foundation. The finding of the unconstitutionality of the legal provisions that formed the basis for the adoption of the normative act of the Parliament [Article 4 (3) and (4) of Law no. 55/2020] deprives of its effects the subsequent normative act [Decision of the Parliament of Romania no. 5/2020], which ceased to produce legal effects, by virtue of the provisions of Article 147 (1) and (4) of the Constitution, from the date of publication in the Official Gazette of Romania of Decision no. 457 of 25 June 2020 of the Constitutional Court, violating the provisions contained in Article 1 (4) and Article 108 of the Constitution. Thus, by virtue of the principle *resoluto iure dantis, resolvitur ius accipientis*, since the decision of the Parliament is an act subsequent to the law, given for its execution, the finding of the unconstitutionality of the main act is reflected directly on the secondary act, depriving the latter of legal effects.

The Court stated that the unconstitutionality of Decision No. 5/2020 of the Parliament of Romania has no consequence on the existence of Government Decision No. 394/2020 regarding the declaration of the state of alert and the measures that are applied during it to prevent and combat the effects of the COVID-19 pandemic, a stand-alone normative act, adopted in the execution of the provisions of Article 4 (1) of Law no. 55/2020 and which continues to produce legal effects in the form un-modified by the provisions of the Decision of the Romanian Parliament no. 5/2020.

**III. For all these reasons**, unanimously, the Court upheld the referral of unconstitutionality and found that Decision of the Romanian Parliament no. 5/2020 for the approval of the state of alert and the measures established by Government Decision no.

394/2020 regarding the declaration of the state of alert and the measures that apply during its duration to prevent and combat the effects of the COVID-19 pandemic is unconstitutional.