# JUDICIAL ACTIVITY OF THE CONSTITUTIONAL COURT DURING THE STATE OF EMERGENCY AND THE STATE OF ALERT

**I. The state of emergency (16 March - 14 May 2020)** was declared throughout Romania, by successive decrees of the President of Romania, due to the escalation of the international epidemiological situation caused by the spread of the SARS-CoV-2 coronavirus.

*Administrative measures*. With regard to the conduct of court proceedings during the state of emergency, the Plenum of the Constitutional Court, in accordance with the relevant internal rules, adopted a series of administrative measures specific to the prevention of the spread of the SARS-CoV-2 coronavirus, concerning, in particular, public access to the institution's premises, opening hours with the public and reduced physical presence of staff at the Court's premises.

With regard to the conduct of court proceedings during the state of emergency, the Plenum of the Constitutional Court decided, successively, to postpone the March 2020 hearings for April and then May 2020, with the corresponding resumption of the summoning procedures, including by posting on the Court's website. The parties were informed on the new hearing dates and asked to access their electronic file on the institution's website. These measures were announced on the Court's website, and were also reported by the media.

During that period, priority was given to the speedy drafting of decisions previously delivered by the Court, as well as to the drafting of reports in cases before the Constitutional Court, so that after the end of the state of emergency the number of court hearings would be increased accordingly in order to ensure that all cases for which a hearing could not be established during the state of emergency would be dealt with.

During that period, the Constitutional Court dealt only with urgent cases, namely referrals concerning measures adopted under the state of emergency decreed, as well as referrals relating to the review of laws prior to promulgation. On 6 May 2020 and 13 May 2020, public hearings were held through video conferencing, broadcast live on the Court's website www.ccr.ro, during which Court ruled on two exceptions of unconstitutionality raised directly by the Advocate of the People, relating to provisions in legislative acts governing the state of emergency and the state of alert respectively.

During that period, the Court, in 4 court hearings (public and for adjudication), handed down 7 decisions, by which it settled 8 case.

**II. The state of alert** was declared **as of 15 May 2020**, and was valid also on the reference date, i.e. 30 June 2020.

*The administrative measures*were maintained accordingly, in accordance with the applicable regulations in force. Since 26 May 2020, the Constitutional Court has resumed the

normal holding of public court hearings, but in videoconferencing, in compliance with all the hygiene and health and social distancing rules ordered by the authorities and implemented by the Constitutional Court, with a maximum of 10 persons being physically present in the court hall, including the President of the Court, the assistant-magistrate designated in the cases scheduled for the respective hearing, the representative of the Public Ministry, representatives of the parties (lawyers, legal advisers, etc.), the technical support team.

During that period, trial activity was particularly intense, as also the cases postponed during the state of emergency were settled during that period. Thus, between **15 May and 30 June 2020**, a total of 24 hearings took place, in which a total of 373 decisions were handed down, by which 568 cases were settled.

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# SUMMARY OF THE CASES DELIVERED BY THE CONSTITUTIONAL COURT IN THE 1st SEMESTER OF 2020[2]

In the period from 1 January 2020 to 30 June 2020, the Constitutional Court resolved 821 cases, issuing 529 decisions, as follows:

– 19 decisions were issued by means of the *a priori* constitutional review, i.e. in the exercise of the power provided for in Article 146 (a) of the Constitution – constitutional review of laws before promulgation;

– 502 decisions were issued by means of the *a posteriori* constitutional review, i.e. in the exercise of the power provided for in Article 146 (d) of the Constitution – settlement of exceptions of unconstitutionality of laws and ordinances.

– 1 decision was issued in the exercise of the power provided for in Article 146 (c) of the Constitution – constitutional review of the standing orders of the Parliament, upon referral by one of the Presidents of the two Chambers, by a parliamentary group or by a number of at least fifty Deputies or of at least twenty-five Senators;

– 4 decisions were issued in the exercise of the power provided for in Article 146 (e) of the Constitution – settlement of legal disputes of a constitutional nature between public authorities;

– 3 decisions were issued in the exercise of the power provided for in Article 146 (l) of the Constitution – settlement of other referrals set forth by the organic law of the Court.

**Solutions pronounced:**

the above decisions, the following solutions were pronounced:

– 31 solutions of admission of the objection/exception/referral/request;

– 348 solutions of dismissal as unfounded of the objection/exception/referral/ request;

– 100 solutions of dismissal as inadmissible or dismissal as having become inadmissible of the objection/exception/referral;

– 50 mixed solutions - dismissal as inadmissible/ having become inadmissible/unfounded/ admission in part, as applicable, of the exception/referral of unconstitutionality.

***Authors of referrals***

The authors of the objections/exceptions/referrals/requests settled in the reference period are as follows:

– 4 referrals belong to the President of Romania;
– 15 referrals belong to MPs or to the presidents of the two Chambers of Parliament;
– 789 referrals belong to courts/parties to the proceedings.

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## I. Decisions issued within the *a priori* constitutional review

### 1. The constitutional review of laws prior to their promulgation [Article 146 (a) of the Constitution]

**It stems from the very essence of contractual freedom that the contracting parties take risks during the execution of the loan agreement, risks which will never be in a perfect balance, but will incline either in favour of the debtor or the creditor. If any contractual imbalance became a case of hardship, all loan agreements would be affected by hardship, leading to an unprecedented disruption of the contractual relationships. The legislator is competent to regulate cases of legal hardship in the form of absolute presumptions.**

**Keywords:** *right of private property, quality of the law, principle of proportionality, economic freedom, effects of the decisions with reservation of interpretation, free access to justice, observance of laws, opinion*

**Summary**

**I. As grounds for the objection of unconstitutionality**, the authors of the referral argued that the purpose of the impugned law, according to the explanatory statement, was to extend the scope of Law No 77/2016 also to the loans granted through the "Prima casă" (First dwelling – T.N.) program, approved by Emergency Ordinance Government No 60/2009. Given that, through the amendments adopted by the Senate, as the first Chamber referred to, the initial legislative proposal was turned into a new one, different in terms of title and content, both the opinion of the Economic and Social Council and the opinion of the Legislative Council, referring to the original form of the legislative proposal, became devoid of purpose. The lack of the opinion of the Economic and Social Council leads to the unconstitutionality of the legislative proposal adopted in this way.

Also, the impugned law violates the provisions of Article 1 (3) and (5) of the Constitution, by the fact that the explanatory statement refers to the initial text of the legislative proposal, and not to the form of the law adopted by Parliament, and is not accompanied by an impact study.

The impugned legal provisions establish a series of absolute presumptions of unpredictability in the legal relationships between creditors and debtors. According to the Decision of the Constitutional Court No 623 of 25 October 2016, hardship has a judicial nature and cannot be exempt from the review of courts of law.

It was also argued that the new legal provisions were contrary to the principle of non-retroactivity of civil law, insofar as it applied to all agreements signed prior to the entry into force of Law No 77/2016.

Moreover, it was argued that the establishment, by the legislator, of certain presumptions of hardship, was devoid of legal logic, given that objective facts can be proved by any means of proof. Hardship can also be generated by subjective causes, related

exclusively to the debtor. The *datio in solutum* procedure is thus left to the discretion of the consumer, and the court of law performs only a formal verification. The special presumption of hardship is contrary to the constitutional provisions contained in Article 1 (3), regarding the rule of law, by violating the principle of predictability of the legal norm.

Thus, according to the authors of the referral, the creditor does not have access to the means of proof necessary to overturn the legal presumption of meeting the conditions of admissibility of the notification of *datio in solutum* made by the debtor. Also, the provisions of Article 7 ($1^1$) of the impugned law introduce a genuine procedure prior to the filing of the challenge, without establishing a term for its completion by the creditor. Whereas the 10-day deadline for filing the challenge is maintained, objectively speaking there is no longer the possibility to effectively complete the mandatory preliminary procedure, which could lead to the dismissal of the challenge as inadmissible, thus violating the provisions of Article 21 of the Constitution.

**II. By examining the objection of unconstitutionality**, the Court ruled that, although both the Chamber of Deputies and the Senate departed from the form proposed by the initiator of the legislative proposal, Article 79 and Article 141 with reference to Article 1 (3) and (5) of the Constitution were not affected.

The Court noted that the opinions of the Legislative Council and of the Economic and Social Council had been sought; therefore, the constitutional principle of compliance with the law during the parliamentary law-making procedures had not been disregarded. The obligation to request such opinions refers to a phase prior to the parliamentary debate. There is no obligation to seek the opinion of the Economic and Social Council whenever a legislative proposal is amended.

As regards hardship, it does not concern the protection of the debtor as a consumer, but the legal protection provided to contractors, both creditors and debtors, whether they are professionals or consumers. Instead, the conditions for invoking hardship, the procedure for ascertaining it and the specific measures for balancing the loan agreements provided for in Law No 77/2016 represent measures aimed at protecting the debtor.

Regarding the pleas of unconstitutionality related to the lack of an impact study, the Court ruled that Article 30 of Law No 24/2000 had no constitutional value and could not represent a norm of reference during the constitutional review. In fact, an impact study was not carried out when Law No 77/2016 was adopted either.

As regards the pleas of unconstitutionality related to the regulation, by law, of certain situations in which hardship would operate by law, the Court noted that, in its case-law, it had made the application of hardship to loan agreements conditional upon the judicial nature thereof. However, this hypothesis took into account the fact that, by regulating the *datio in solutum* mechanism, all loan agreements signed both before and after the adoption of Law No 77/2016, under conditions of faulty legal criteria, could be considered unforeseen by default. The Court established, by Decision No 623 of 25 October 2016, that hardship must be examined in a real and effective manner by the courts of law, which does not mean that the legislator cannot provide criteria for individualizing hardship. If it were accepted that only the courts of law would have jurisdiction to set such criteria, Parliament's power to

legislate would be unacceptably limited. On the contrary, a regulatory provision, mandatory for all subjects of law, can help the courts of law to objectively administer the evidence of the case, by relating to clear legal benchmarks.

Given that the presumptions contained in the examined law are regulated in favour of the debtor, the creditor has only the right to prove that the debtor of the obligation does not meet the conditions applicable to the case of hardship invoked. Once these conditions are met, the creditor cannot prove that there is no hardship in the loan agreement.

The Court found that, of the four cases of legal hardship regulated in the form of absolute presumptions, three capitalize on fixed and objective landmarks [those in points (a) to (c)], and the fourth [that in point (d)] brings into discussion a relatively mobile, subjective and interpretable element, respectively any contractual imbalance, assessed as such by the parties or by the court of law, as the case may be.

In point 2 of the Sole Article [with reference to Article 4 ($1^1$) (a)] of the impugned law, the legislator qualifies as hardship the case where the exchange rate for the loan currency has exceeded by at least 20% the exchange rate on the date when the loan agreement was signed. According to Government Emergency Ordinance No 52/2016, in case of a 20% fluctuation in the exchange rate, the consumer is only informed/warned about this, through a notification with a preventive role, and has the possibility of converting the loan currency into an alternative currency. According to the impugned law, this fluctuation was qualified as a case of hardship, which would make it mandatory to adapt or terminate the agreement and would entail legal consequences of a legal nature distinct from those of Government Emergency Ordinance No 52/2016. These legal consequences are not complementary but are incompatible with each other. However, the establishment of mutually exclusive legal consequences, regarding the same situation, reveals a contradiction in the conception of the legislator and cannot be accepted.

The Court noted that the above-mentioned hardship was an interference, by the State, in the agreed loan agreement, which referred to the creditor's right to property. To justify this interference, the Court carried out the proportionality test developed in its case-law.

The impugned measure has a legitimate purpose, as it aims to balance the benefits of the parties and restore the social utility of the loan agreement. The legislative solution examined is appropriate, as it can lead to the fulfilment of the legitimate aim pursued, and it is necessary to create a unitary legal framework regarding the determination of the scope of hardship and its uniform application to all the categories of persons covered by the law. However, from the perspective of the 20% fluctuation in the exchange rate, by reference to the date when the loan was taken out, the fair balance between the creditor's interest and the debtor's interest is not observed. The foreign exchange risk of an agreement concluded in a foreign currency is part of the main object of the loan agreement, and the gain made represents an asset safeguarded by the provisions of Article 44 of the Constitution. It is true that a significant fluctuation in the exchange rate of the loan currency can represent a case of hardship, but it must have certain constancy over time and reflect a major imbalance between the benefits of the parties. The impugned legislative solution does not meet these conditions, as it only targets a moderate fluctuation in the loan currency.

Thus, the Court found that the measure in question was not proportional to the legitimate aim pursued, therefore representing a violation of Article 44 and Article 147 (4) of the Constitution, following failure to comply with the constitutional requirements regarding the relationship between the right to private property and hardship, established by Decision No 623 of 25 October 2016.

In point 2 [with reference to Article 4 ($1^1$) (b)] of the Sole Article of the law, the legislator qualifies as a case of hardship the situation where the debtor's degree of indebtedness exceeds by at least 20% the maximum level of the degree of indebtedness established by the National Bank of Romania (B.N.R.).

The impugned text does not reflect a case of hardship, given that decreases or increases in the debtor's degree of indebtedness may represent a normal fluctuation as various ordinary fluctuations related to the debtor's income during the performance of the loan agreement occur. Furthermore, during the performance of the agreement, even in the case of a constant income of the debtor, the National Bank of Romania can significantly reduce the degree of indebtedness, which would automatically generate hardship under the new regulation. Also, there may be cases when the debtor successively concludes other loan agreements. According to the Court, hardship is determined by the action of an external element on a contractual clause, which leads to a continuous and not momentary imbalance between the benefits of the parties to the loan agreement.

Consequently, the measure examined represents an interference, by the State, in the right to property of the creditor. The text subject to review has no legitimate aim, because it does not seek to identify and remedy a contractual imbalance, but transfers the risk of the loan agreement, in a significant and unacceptable manner, to the creditor, which leads to a deprivation of property of the latter.

In point 2 [with reference to Article 4 ($1^1$) (c)] of the Sole Article of the law, the legislator qualifies as hardship the case where the debtor has been subject to a forced execution by the sale of the immovable property used for residential purposes.

The Court noted that the impugned rule had not specified whether the immovable property subject to forced execution was the mortgaged property, used for residential purposes, or a different one. Therefore, such a regulation is not clear, accurate and foreseeable, in violation of Article 1 (5) of the Constitution, in its component on the quality of laws.

Besides, both the forced execution of the mortgaged property and its sale by public auction may be due either to unforeseeable situations or to ordinary situations inherent in the performance of a loan agreement. The creditor is also discouraged from capitalizing on the purpose of the mortgage, so that he will delay as much as possible the sale of the respective immovable property at public auction, which can lead to a long period of legal uncertainty.

In point 2 [with reference to Article 4 ($1^1$) (d)] of the Sole Article of the law, the legislator qualifies as hardship "other cases of contractual imbalance". Therefore, any contractual imbalance becomes a case of hardship.

The text subject to review questions the very property right and economic freedom. It stems from the very essence of contractual freedom that the contracting parties take risks during the execution of the loan agreement, risks which will never be in a perfect balance, but will incline either in favour of the debtor or the creditor. Due to this legal provision, all

loan agreements would be affected by hardship, leading to an unprecedented disruption of the contractual relationships.

The Court held that point 3 of the Sole Article of the law did not violate Article 21 (3) of the Constitution, because, if a legal presumption of hardship was regulated, it would be invoked by the subject of law able to justify an interest in benefiting from it – in this case, by the debtor. Considering that all the legal presumptions of hardship have been found to be unconstitutional, this means that there is no longer a presumed hardship within the meaning of Article 4 (3). Consequently, following the ascertaining of the unconstitutionality of point 2 of the Sole Article of the law, this text no longer meets the requirements of quality of the law, being contrary to Article 1 (5) of the Constitution.

The Court found that point 6 [with reference to Article 7 ($1^1$)] of the Sole Article of the law was contrary to Article 1 (5) and to Article 21 of the Constitution, because it is not possible to reconcile the possibility of filing a challenge with the obligation to formulate a proposal to restore the utility of the contract, in all the cases where the notification has been submitted, since the time-limits are not correlated.

According to this legal provision, the consumer sends to the creditor a notification informing the latter about her/his decision to transfer the right to property over the immovable property, in order to settle the debt arising from the mortgage agreement. The first day of convening for the purpose of discussing the notification of *datio in solutum* must be set for a period longer than 30 days off, but without exceeding 90 days. After receiving the notification, but before submitting the challenge, the creditor is bound to address to the debtor a proposal by which to try to restore the social utility of the loan agreement. The challenge is submitted within 10 days from the receipt of the notification. Therefore, either the proposal is a formal one and the debtor's response is not awaited, because there is a risk of missing the deadline for filing the challenge, or, if the response is awaited or if the proposal is made on the first day of convening established by the notification, the time-limit for filing the challenge is missed.

Regarding the pleas brought to point 7 [with reference to the first sentence of Article 7 (4)] of the Sole Article of the law, the temporary suspension of the payments resulting from the loan agreement is a measure with a moderate degree of intrusion on the creditor's right to property, because it has a provisional nature, and the claim can be executed in full if the court of law upholds the challenge filed.

**III. For all these reasons,** unanimously, the Court upheld the objection of unconstitutionality and found that the provisions of point 2 [with reference to Article 4 ($1^1$)], point 3 [with reference to Article 4 (3) and (4)], point 6 [with reference to Article 7 ($1^1$)], point 8 [with reference to Article 7 ($5^1$)] and point 9 [with reference to the second sentence of Article 8 (5)] of the Sole Article of the Law amending and supplementing Law No 77/2016 concerning the *datio in solutum* of certain immovable properties in order to settle the obligations resulting from loans were unconstitutional. Still unanimously, the Court dismissed as groundless the objection of unconstitutionality concerning the provisions of point 2 [with reference to Article 4 ($1^3$)] and point 7 [with reference to Article 7 (4)] of the Sole Article of the same law and found them to be constitutional in relation to the pleas filed.

*Decision No 731 of 6 November 2019 on the objection of unconstitutionality of the provisions of point 2 [with reference to Article 4 ($1^1$) and ($1^3$)], point 3 [with reference to Article 4 (3) and (4)], point 6 [with reference to Article 7 ($1^1$)], point 7 [with reference to Article 7 (4)], point 8 [with reference to Article 7 ($5^1$)] and point 9 [with reference to the second sentence of Article 8 (5)] of the Sole Article of the Law amending and supplementing Law No 77/2016 concerning the datio in solutum of certain immovable properties in order to settle the obligations resulting from loans, published in the Official Gazette of Romania, Part I, No 59 of 29 January 2020*

**The procedure of assumption of responsibility, by the Government, with respect to a draft law must refer to a situation which, without being extraordinary, requires a solution that cannot be postponed.Given that there is a time interval of more than 6 months between the date of assumption of responsibility and the date from which the first organizational measures in the law would be effectively applied, the law in question is adopted on the basis of a series of elements of expediency, the urgency of the measure being invoked artificially.**

**Keywords:** *assumption of responsibility by the Government, sole legislative authority, principle of separation and balance of State powers, referendum*

**Summary**

**I. As grounds for the objection of unconstitutionality,** it was argued that the impugned law violated Article 114 of the Constitution, with reference to the conditions under which the Government can assume its responsibility with respect to a draft law. According to Decision of the Constitutional Court No 1557 of 18 November 2009, the simplified law-making method, by assuming responsibility, can be used only when the adoption of a draft law in the ordinary or emergency procedure is no longer possible, which was not the case with the law subject to constitutional review.

The law in question concerns the approval of Government Emergency Ordinance No 7/2019, by which the Government imposed a temporary solution deemed necessary for the National Institute of Magistracy to prepare future magistrates according to the provisions of Law No 242/2018 amending and supplementing Law No 303/2004 on the statute of judges and prosecutors.

Although the law was subject to Parliament's debate, the representatives of the Ministry of Justice understood to promote, by the assumption of responsibility, by the Government, a procedure that eliminated the participation of MPs and professional associations from the debates in the Parliament's plenary and within the specialized committees. This unjustified and excessive approach of the Government could generate serious dysfunctions in the functioning of the justice system in Romania.

The urgency argument cannot be retained. Currently, the initial professional training of judges and prosecutors, the graduation exam from the National Institute of Magistracy, the

traineeship and the exam of professional competence for trainee judges and prosecutors are carried out according to the provisions of Government Emergency Ordinance No 7/2019, which will produce full effects by the completion of the parliamentary procedure for its approval or rejection. The changes proposed through the assumption of responsibility are to be applied towards the end of 2020 or even in 2021. According to the case-law of the Constitutional Court, the assumption of responsibility, by the Government, with respect to a draft law aims that it be adopted in conditions of maximum swiftness. Such a regulation aims to establish urgent measures in an area of the utmost importance, and their application must be immediate. The consequences of the assumption of responsibility can be very serious, as the draft law proposed in such a procedure can be adopted without debates, without explanations, and the Government can simply reject any amendment. In the procedure for the adoption of emergency ordinances, they enter into force only after their submission for debate in the Chamber of Deputies or the Senate. Thus, any errors may be corrected.

It was stated that the assumption of responsibility, by the Government, with respect to a draft law could not be done at any time, in any way and under any conditions, because this law-making method represents an exception. Otherwise, the relationship between the State powers is undermined and the legislative role of Parliament is reduced to annihilation, contrary to Article 61 (1) of the Constitution.

The national referendum of 26 May 2019 was also mentioned, through which the people objected to the adoption, by the Government, of certain regulatory acts without debate, in a non-transparent manner. In a State governed by the rule of law, it is not acceptable that the will of the people, expressed by a large majority, be ignored by the elected representatives of the people.

**II. By examining the objection of unconstitutionality**, the Court stated that, regarding the referendum of 26 May 2019, it referred to the prohibition of the adoption, by the Government, of emergency ordinances in the field of judicial organisation, not to the assumption of responsibility, by the Government. Moreover, the effects of a consultative referendum are political in nature, not legal. Therefore, ignoring it entails the political responsibility, not the legal one, of those involved. The Court cannot examine the constitutionality of the law subject to analysis with reference to Article 2 (1) of the Constitution in the light of the political effects of a consultative referendum, because the Court's analysis is of a legal nature.

In its case-law, the Court stated that the Government could assume its political responsibility for any kind of draft law, excluding the laws for the revision of the Constitution, for which there is a special procedure. The Court also held that Parliament was the sole legislative authority in the country, but the establishment of other methods of law-making, namely the assumption of the responsibility, by the Government, and legislative delegation, did not affect the "legislative monopoly of Parliament", as long as these methods are used as provided for by the Constitution. At the same time, the Court ruled that the Government could assume its responsibility, regardless of the stage of the legislative procedure, especially if this was necessary to counter the opposition's obstructive acts during the legislative debates.

The Court listed the criteria set by Article 114 of the Constitution for the assumption of responsibility, by the Government, through Decision No 1655 of 28 December 2010, published in the Official Gazette of Romania, Part I, No 51 of 20 January 2011. These are:

1) the existence of an urgency in adopting the measures contained in the law for which the Government assumed its responsibility;
2) the need for the regulation in question to be adopted as soon as possible;
3) the importance of the regulated field;
4) the immediate implementation of the law in question.

The assessment of the constitutionality of the assumption of the Government's responsibility for a draft law must take into account the stage of the parliamentary procedure (early or advanced), the consistency of the parliamentary debates concerning it, the legislative solutions discussed, etc. In the present case, there were no amendments to the draft Law approving the emergency ordinance, but only a postponement of its discussion during another parliamentary session.

In principle, the Government can assume its responsibility with respect to a law, even if a draft Law approving an emergency ordinance with a similar content is subject to the parliamentary procedure, provided that this complies with the four criteria indicated in the case-law of the Court.

The Government's decision to assume its responsibility cannot be motivated exclusively by elements of expediency, but by the urgency of regulating the field concerned. This is directly related to the avoidance of an imminent or current situation of danger which cannot be overcome by recourse to the usual legislative procedures. It is true that the procedure of assumption of responsibility, by the Government, does not imply the existence of an extraordinary situation to be solved, because in such a case emergency ordinances are used. But it must refer to a situation which, without being extraordinary, requires a solution that cannot be postponed. Such an approach is necessary because the assumption of responsibility, by the Government, implies avoiding the parliamentary debate, therefore limiting the role of Parliament as the sole legislative authority of the country.

Regarding the criterion of urgency, the measures taken through the procedure of assumption of responsibility, by the Government, are motivated in the explanatory statement of the law by the fact that the circumstances having justified the adoption of Government Emergency Ordinance No 7/2019 still subsist. In other words, more than 1 year after the entry into force of Law No 242/2018, its provisions cannot be applied due to administrative aspects still unresolved. The Government preferred to assume its responsibility for a draft law given that there was a time interval of more than 6 months between the date of assumption of responsibility and the date from which the first organizational measures regarding the admission to the National Institute of Magistracy would apply effectively. Therefore, the impugned law was adopted based on elements of expediency, and the urgency of the measure was artificially invoked.

The Government also pointed out that the adoption of the law had been motivated by the fact that no major delays likely to affect the procedures could occur in the organization of the admission exam at the National Institute of Magistracy. It is unacceptable to invoke such factual aspects from the perspective of the constitutional relations between the

authorities. The legislator cannot be put in the situation of adopting, in 2019, a law to be applied in 2020, because the Superior Council of Magistracy has not yet adopted the decision to organize the admission exam at the National Institute of Magistracy for 2019. Moreover, the impugned law does not contain any measure likely to avoid, in the future, such unfair behaviour on the part of the members of the Superior Council of Magistracy. The fact that the secondary legislation for the implementation of Law No 242/2018 has not yet been adopted does not generate the framers' obligation to extend the period of application of this law. The law is not subordinated to an instrument of secondary legislation, respectively to a regulation of the Superior Council of Magistracy. On the contrary, the administrative act is the one that organizes the enforcement of the law.

The Court found that, in this case, the urgency was not given by the need to prolong a regulatory act with chronologically limited application (Government Emergency Ordinance No 7/2019), but by the need to apply Law No 242/2018, by overcoming the administrative difficulties encountered.

At the same time, it cannot be argued that the impugned law was adopted in due time so as to ensure the possibility for public authorities to take the necessary measures to implement it, because this law does not bring new elements to the situation existing in 2019, so it does not generate major implementation challenges.

The mentioned budgetary aspects cannot be invoked to justify the urgency, as they were foreseeable, the expenses being generated by the implementation of a law adopted in 2018.

Since no effective steps have been taken for the implementation of Law No 242/2018 and this measure has been resorted to directly, it means that the urgency has only been proclaimed, without it actually existing.

In its viewpoint, the Government considered that the political structure of Parliament did not allow for the adoption of the draft law in the ordinary or urgent procedure. Such a claim cannot be taken into account, as it was used in the case-law of the Constitutional Court when the Government assumed its responsibility with respect to laws with a complex regulatory content, and not in the case of simple time extensions of the application of a series of legal provisions (this law has only one article).

It results that the Government's decision to assume its responsibility does not reflect a regulatory urgency, but rather the assumption of an opportunity, to prolong certain temporary measures ordered by Government Emergency Ordinance No 7/2019. It was not necessary to adopt such a measure with maximum swiftness, being possible for it to be eventually adopted only as the "major challenges" generated by Law No 242/2018 could not be overcome.

With regard to the importance of the regulated field, the Court ruled that, in principle, the field of justice was one in which the Government could assume its responsibility.

Regarding the criterion of the immediate application of the law in question, the Court noted that it did not apply immediately, but after about 6 to 9 months.

In conclusion, the Court found that the impugned law violated Article 114 and Article 61 (1) of the Constitution, by excessively limiting the role of Parliament. Thus, there is also a violation of the constitutional principle of the balance of powers [Article 1 (4) of the

Constitution], since one of the State powers, i.e. the Executive, undertook a prominent role in the law-making activity, by excessively using a law-making procedure which, by its nature, is an exceptional one.

**III. For all these reasons,** unanimously, the Court upheld the objection of unconstitutionality and found that the Law on certain measures applicable in 2020 referring to the admission exam at the National Institute of Magistracy, the initial training of judges and prosecutors, the graduation exam from the National Institute of Magistracy, the traineeship and the exam of professional competence for trainee judges and prosecutors was unconstitutional.

*Decision No 28 of 29 January 2020 on the objection of unconstitutionality of the Law on certain measures applicable in 2020 referring to the admission exam at the National Institute of Magistracy, the initial training of judges and prosecutors, the graduation exam from the National Institute of Magistracy, the traineeship and the exam of professional competence for trainee judges and prosecutors, published in the Official Gazette of Romania, Part I, No 165 of 28 February 2020*

**The procedure of assumption of responsibility, by the Government, with respect to draft law must forthwith solve a situation that requires urgent measures. The law in question cannot be adopted only to impose a legislative solution other than the one in the parliamentary procedure. The assumption of responsibility, by the Government, in a controversial field, without a good reason, calls into question not only the non-observance of the provisions of Article 114 of the Constitution, but also the violation of the obligation of constitutional loyalty that must characterize the relationships between public authorities.**

**Keywords:** *assumption of responsibility by the Government, sole legislative authority, principle of separation and balance of State powers, Economic and Social Council, legal certainty*

**Summary**

**I. As grounds for the objection of unconstitutionality,** it was indicated that the Draft Law approving Government Emergency Ordinance No 51/2019 amending and supplementing certain regulatory acts in the field of transport of passengers proposed the removal of county road passenger transport from the category of public services, which would be carried out on a commercial basis, in compliance with Government Ordinance No 27/2011 on road transport, as subsequently amended and supplemented.

Distinct from this draft regulatory act subject to parliamentary debate, the Government assumed responsibility for the draft Law amending and supplementing a series of regulatory acts in the field of transport of passengers, proposing the repeal of the provisions of Government Emergency Ordinance No 51/2019, so that paid road passenger transport through regular services at county level entered the scope of public services. It was argued

that this act violated the provisions of Article 1 (5) of the Constitution, as the obligation to request the opinion of the Economic and Social Council was ignored.

The provisions of Article 61 of the Constitution, regarding the sole legislative authority represented by Parliament, were also invoked. Assumption of responsibility, by the Government, is not only a measure to circumvent the rules of the legislative procedure, but also an ultra-fast way of adopting a law, generated by exceptional circumstances. On this occasion, not only the rules strictly provided for by the Constitution regarding the adoption of the draft law must be observed, but also the regulatory object, which must be limited to the analysis of a single matter. Amendments or supplements to several laws in force, which have been adopted separately by Parliament, cannot be made through the same draft law. Legislative urgency cannot be determined by the state of the existing legislation, by its amendment or repeal, but by the absence of legal regulations in a certain field of human activity.

In this case, urgency cannot be retained as a ground for making amendments by assuming responsibility because the provisions of Government Emergency Ordinance No 51/2019, which produce full effects by the completion of the parliamentary procedure for its approval or rejection, currently apply. Moreover, the fact that the Government cannot interrupt a legislative process has already been established by Decision of the Constitutional Court No 1431 of 3 November 2010.

**II. By examining the objection of unconstitutionality,** the Court ruled that the Government could not assume responsibility for a draft law in a discretionary manner, at any time and under any conditions. Otherwise, it would become a public legislative authority, competing with Parliament in terms of law-making prerogative.

In its case-law, the Court listed the following criteria imposed by Article 114 of the Constitution for the assumption of responsibility, by the Government:

1) the existence of an urgency in adopting the measures contained in the law for which the Government assumed its responsibility;
2) the need for the regulation in question to be adopted as soon as possible;
3) the importance of the regulated field;
4) the immediate implementation of the law in question.

By examining the legislative context in which the Government assumed responsibility for the impugned draft law, the Court found that Parliament and, respectively, the Government had adopted, in a relatively short period of time (approximately 1 year), in its field of regulation, a series of regulatory acts that had enshrined different or even contrary legislative solutions, a situation brought to the attention of the Constitutional Court by an exception of unconstitutionality formulated by the Advocate of the People. This was dismissed as inadmissible by Decision No 785 of 28 November 2019, published in the Official Gazette of Romania, Part I, No 114 of 14 February 2020, on the grounds that aspects of regulatory expediency had been invoked, which do not fall under the jurisdiction of the Constitutional Court. However, the Court noted that the referral filed by the Advocate of the People was likely to draw attention to an important matter for local communities and society in general. The set of regulations that followed one another in the field and that were unclear, contradictory, as well as the confusing situation at local level generated by

them is a problem that falls under the competence of the legislator and of the central and local authorities.

This situation continues to exist at the time of the present objection. The Government assumed responsibility with respect to a draft law enshrining a legislative solution contrary to the one that the same Government promoted a few months before and which was also motivated by invoking the urgency of legislative measures in the field. Moreover, the law approving the previous regulatory act (Government Emergency Ordinance No 51/2019) was, at the time of the assumption of responsibility, undergoing the legislative procedure, within the specialized committees of the Chamber of Deputies, after being approved, as subsequently amended, by the Senate, as the first Chamber referred to.

In the explanatory statement of the law, the Government claimed that "under Government Emergency Ordinance No 51/2019, the economic operators requested the extension of their licenses only on the profitable routes, while the unprofitable ones remained uncovered. It is necessary to adopt this law, as a matter of urgency, in order to include county passenger transport in the scope of public services, so as to ensure access to education for students from vulnerable backgrounds, respectively for students residing in localities that are not included on the cost-effective routes for the operators providing road passenger transport services. These negative consequences are passed on to other categories of vulnerable categories (the elderly, people with disabilities)".

In theory, this motivation could support the idea of an urgency of the measures in question. However, it makes no reference to any study or document substantiating these conclusions.

With regard to the condition related to the immediate application of the law in question, the Court found that, strictly speaking, the law applied forthwith. However, the content of the explanatory statement indicates the following: "in order to ensure a transitional period so as to give county councils the possibility to apply Regulation No 1370/2007, the time-limit of 31 December 2020 is proposed, maximum date by which public service contracts must be concluded, period in which paid road passenger transport through regular services at county level is carried out on the basis of the current route licenses, issued pursuant to Article X of Government Emergency Ordinance No 51/2019".

Therefore, there is no justification for a legislative intervention through assumption of responsibility, as there is no immediate solution to a situation that requires urgent action. Thus, the impugned law appears as having been adopted only to impose a legislative solution other than the one in the parliamentary procedure.

The assumption of responsibility, by the Government, in a controversial field, without a good reason, calls into question not only the non-observance of the provisions of Article 114 of the Constitution, but also the violation of the obligation of constitutional loyalty that must characterize the relationships between public authorities, within a framework of separation and balance of powers in a State governed by the rule of law.

Therefore, the Court found that the pleas filed by the authors of the referral with reference to Article 1 (4), Article 61 and Article 114 of the Constitution were well grounded.

It was also argued that the impugned law violated the constitutional provisions contained in Article 1 (5) on the principle of legal certainty, in the component regarding the

quality of laws, given that the opinion of the Economic and Social Council was not requested while preparing it.

The Government did not provide proof of the request for that opinion and did not refer to this plea in the viewpoint submitted.

The Court stated that obtaining such an opinion was not mandatory, as the legislative procedure could not be obstructed by the passivity of the authorities bound to issue it. However, in this case, it turns out that such an opinion was not requested, although the impugned regulatory act covers a sphere of complex social relations, which regulate economic policies, social protection, civil rights and freedoms.

Consequently the absence of the request for the opinion of the Economic and Social Council supports the extrinsic unconstitutionality of the law, with reference to the provisions of Article 1 (3) and (5), read in conjunction with those of Article 141 of the Constitution.

**III. For all these reasons,** unanimously, the Court upheld the objections of unconstitutionality and found that the Law amending and supplementing a series of regulatory acts in the field of transport of passengers was unconstitutional as a whole.

*Decision No 29 of 29 January 2020 on the objection of unconstitutionality of the provisions of the Law amending and supplementing a series of regulatory acts in the field of transport of passengers, published in the Official Gazette of Romania, Part I, No 128 of 19 February 2020*

**By intervening on the impugned law, through the regulations that introduce new elements compared to the matter proposed by the proponents, referring to categories of staff and salary increases that the Senate did not take into account, the Chamber of Deputies acted as the sole legislator, in violation of the constitutional provisions enshrining the principle of bicameralism.**

**The legislative proposal that affects the provisions of the State budget must be accompanied by proof of indication of the source of funding and by the request that Parliament be informed by the Government. Failure to comply with the obligation to request the financial statement naturally leads to the conclusion that the adoption of the law took into account an uncertain source of funding, which is contrary to the constitutional provisions on establishing the source of funding and on informing Parliament.**

**Keywords:** *principle of bicameralism, State budget, legislative initiative, source of funding, Parliament's information*

**Summary**

**I. As grounds for the objection of unconstitutionality,** it was argued that, by the way in which it was adopted, as well as by its regulatory content, the Law amending and supplementing Framework Law No 153/2017 on the remuneration of staff paid from public

funds violated the constitutional provisions of Article 61 (2) and Article 75 (1), of Article 138 (5) read in conjunction with those of Article 111 (1), as well as those of Article 16 (1).

Regarding the plea of unconstitutionality related to the provisions of Article 61 (1) and of Article 75 (1) of the Basic Law, it was indicated that the adoption of the Law amending and supplementing Framework Law No 153/2017 on the remuneration of staff paid from public funds had been made in violation of the principle of bicameralism, as the first Chamber referred to, i.e. the Senate, did not take up for debate the text and the solutions adopted by the Chamber of Deputies. Thus, on 19 November 2018, the law was dismissed by the Senate. Following the completion of the parliamentary procedure before the Chamber of Deputies, 11 amendments were accepted through the report of the Committee for Labour and Social Protection, and, both formally and in terms of content, the text adopted by the Chamber of Deputies departs from the will of the proponents, as these amendments have not been considered by the Senate either, which dismissed the legislative proposal. At the same time, the configuration of the law adopted by the two Chambers of Parliament was significantly different, the form of the proponent including a single Article, while the law adopted by the Chamber of Deputies had 4 Articles. Furthermore, changes were made both to the Framework Law No 153/2017 and to the annexes to this law and, at the same time, derogations from other regulatory acts not considered by the initiators were introduced.

As grounds for the plea of unconstitutionality related to the provisions of Article 138 (5), read in conjunction with those of Article 111 (1) of the Constitution, the Government showed that the law subject to constitutional review had amended and supplemented provisions of Framework Law No 153/2017, increasing the gross amount of salaries for the staff of the National Library of Romania, the Romanian Academy Library, museums of national importance and other museums, the Romanian Institute for Research on National Minorities and, at the same time, granting certain bonuses to the staff of the National Sanitary Veterinary and Food Safety Authority and its subordinate units. These regulations generated new expenditure from public funds necessary for the payment of the salaries increased by the provisions of this law. All these provisions give rise to financial expenditure likely to increase State budget expenditure.

The author of the referral reminded that, according to the provisions of Article 15 (1) of Law No 500/2002 on public finances, if measures that lead to the increase of budgetary expenditure are initiated, the financial statement with their financial effects on the consolidated general budget must be presented. However, the Government pointed out that the analysis of the legislative statement of the law subject to constitutional review revealed that the proponents had not specified the budgetary impact, the budgetary expenditure for the current year and the following years and the sources used to cover the expenditure generated by the legislative proposal.

Regarding the plea related to the provisions of Article 16 (1) of the Constitution, the Government argued that the provisions of Article IV of the Law amending and supplementing Framework Law No 153/2017 on the remuneration of staff paid from public funds were discriminatory. In this regard, it pointed out that the impugned text of law established an exception for the staff of the National Sanitary Veterinary and Food Safety Authority and its subordinate units, who hold positions and carry out their activity in

conditions that require the granting of specific bonuses, from the implementation of the provisions of Article 34 (2) of Government Emergency Ordinance No 114/2008, which limited the value of the bonuses to the level granted in December 2018. However, it was considered that such derogation was not based on an objective and reasonable justification.

**II. By examining the pleas of unconstitutionality,** the Court found that aspects of extrinsic unconstitutionality of the Law amending and supplementing Framework Law No 153/2017 on the remuneration of staff paid from public funds, as well as aspects of intrinsic unconstitutionality of the provisions of Article IV of this regulatory act had been invoked.

By examining the pleas of extrinsic unconstitutionality, the Court found that, starting from the objective proposed by the proponents of the law, i.e. of removing a series of pay inequities for certain categories of staff, the decision-making Chamber had extended the scope of these categories to other occupational families as well, while providing salary increases and the granting of salary rights that the proponents of the legislative proposal had not considered. Therefore, these supplements are not limited to the matter subject to debate in the Chamber of sober second thought, but establish new regulations, which were only subject to debate in the decision-making Chamber. These supplements resulted in the modification of the configuration of the regulatory act, its final structure including 4 different Articles, the first Article containing 4 points.

The Court considered that the intervention of the Chamber of Deputies on the Law amending and supplementing Framework Law No 153/2017 on the remuneration of staff paid from public funds had exceeded the margin within which the decision-making Chamber can amend or supplement the law adopted by the Chamber of sober second thought, thus giving expression to the cooperation of the two Chambers in the law-making process. The configuration of the regulatory act adopted by the Chamber of Deputies is significantly different from the one submitted to the Senate debate, and this fact does not result from a simple restructuring of the matter, but from the adoption of new regulations, which are not related and do not derive from the initial regulation.

Therefore, the Court found that the adoption of the Law amending and supplementing the Framework Law No 153/2017 on the remuneration of staff paid from public funds by the Chamber of Deputies had been made in violation of the constitutional principle of bicameralism.

Next, by analysing the plea of extrinsic unconstitutionality related to the constitutional provisions of Article 111 (1), the Court noted that, under the constitutional relationships between Parliament and Government, it was mandatory to request an information whenever the legislative initiative affects the provisions of the State budget. This obligation of Parliament is in line with the constitutional provisions of Article 138 (2), which stipulate that the Government has the exclusive competence to prepare the draft State budget and to submit it to Parliament for approval. Based on this competence, Parliament cannot pre-determine the modification of the budgetary expenditure without asking the Government for information in this respect. Given the imperative nature of this obligation to request the mentioned information, it follows that its non-compliance leads to the unconstitutionality of the adopted law.

By examining the legislative process, the Court found that the Senate's obligation, as the first Chamber referred to, to request an information from the Government on the Legislative proposal amending Framework Law No 153/2017, was made in violation of the provisions of Article 111 (1) of the Constitution, the addresses submitted to the Secretary-General of the Government, respectively to the minister responsible for the Relationship with Parliament being signed, contrary to the constitutional provisions indicated, as well as to the provisions of Article 92 (6) of the Senate's Standing Order, by the General-Secretary of the Senate and not by the President of this Chamber. Or, as ruled by the Constitutional Court by Decision No 331 of 21 May 2019, para. 46, the condition imposed by the constitutional standard represents a requirement for the validity of the act requesting the information, so that its non-compliance affects the very existence of the act.

Also, with regard to the amendments made to the legislative proposal in the Committee for Labour and Social Protection of the Chamber of Deputies, the Court found that, in violation of the same constitutional provisions, as well as of those of Article 91 (4) of the Standing Order of the Chamber Deputies, the chairman of the Committee for Labour and Social Protection had not requested an information from the Government, pursuant to Article 111 of the Constitution.

Therefore, the Court found that the adoption of the Law amending and supplementing Framework Law No 153/2017 on the remuneration of staff paid from public funds had been made in violation of the formal requirements referred to by Article 111 (1) of the Constitution.

By examining the pleas of extrinsic unconstitutionality formulated in relation to the constitutional provisions in Article 138 (5), the Court noted that the obligation to indicate the funding source for the approval of the budgetary expenditure, referred to by the constitutional rule, represented an aspect distinct from that of the lack of funds to support budgetary funding. Article 138 (5) of the Constitution requires the simultaneous establishment of both the budget allocation, which has the significance of an expenditure, and the source of financing, which has the significance of the income necessary to bear it, in order to avoid the negative consequences, economically and socially, of establishing a budgetary expenditure without coverage. Therefore, the constitutional rule does not refer to the concrete existence of sufficient financial resources at the time of adoption of the law, but to the fact that the respective expenditure should be fully foreseen in the State budget in order to be covered with certainty during the budget year.

Regarding the impact of the provisions imposing the request of the financial statement, the Court held that, as long as the legal provisions generated a financial impact on the State budget, the obligation to request the financial statement was incumbent upon all the proponents, pursuant to Article 15 (1) (a) of Law No 69/2010 on fiscal-budgetary responsibility.

Therefore, in order to comply with the constitutional procedure for adopting a regulatory act involving a budgetary expenditure, it is enough that the proponents of the regulatory act prove to have requested the financial statement from the Government, pursuant to Article 15 (2) of Law No 500/2002 expressly establishing that the Government will send to the Chamber of Deputies or the Senate, as the case may be, the financial statement, within 45 days from the date of receiving the request. Failure to send the financial statement within the legal time-limit by the public authority bound to prepare this

document cannot represent an impediment in the continuation of the law-making procedure. In this respect, the Court ruled that raising this competence of the Government to the level of constitutional rule implicitly admitted by Article 138 (5) of the Constitution would be equivalent to a purely discretionary condition in the sense that any law with budgetary implications could be adopted only if the Government prepared and forwarded to Parliament the financial statement. However, if the Government does not support the legislative initiative/does not agree with it and, therefore, does not send the financial statement, it cannot block the legislative process through an omissive attitude.

Another aspect refers to the fact that the financial statement provided for by Article 15 (2) of Law No 500/2002 should not be confused with the viewpoint issued by the Government according to Article 11 ($b^1$) of Law No 90/2001 [viewpoint issued as a result of the request formulated pursuant to Article 111 (1) of the Constitution – Ed.], the two documents generated by the Government having a different legal regime and, implicitly, different aims. Therefore, when a legislative proposal has budgetary implications, the Government must present both documents mentioned, therefore both the viewpoint and the financial statement.

With regard to the law subject to this constitutional review, the Court found that the legal and constitutional conditions for requesting the financial statement had not been met either by the proponents of the legislative proposal or by the Chamber of Parliament in which the amendments had been proposed and adopted. Failure to comply with the obligation to request the financial statement naturally leads to the conclusion that the adoption of the law took into account an uncertain, general source of funding, lacking objective and real nature; consequently, the constitutional provisions of Article 138 (5) on establishing the source of funding have been violated.

**III. For all these reasons,** unanimously, the Court upheld the objections of unconstitutionality and found that the Law amending and supplementing Framework Law No 153/2017 on the remuneration of staff paid from public funds was unconstitutional as a whole.

*Decision No 56 of 5 February 2020 on the objection of unconstitutionality of the Law amending and supplementing Framework Law No 153/2017 on the remuneration of staff paid from public funds, published in the Official Gazette of Romania, Part I, no. 199 of 12 March 2020*

**Failure to comply with the obligation of the law proponents to request the financial statement from the Government, according to Article 138 (5) of the Constitution, and with the obligation of the presidents of the two Chambers of Parliament or of the chairman of the Committee for Labour and Social Protection to request information from the Government, according to the provisions of Article 111 (1) of the Constitution, leads to the conclusion that there was no real dialogue between Parliament and the Government when adopting the law subject to review, and that Parliament decided to increase certain**

**budgetary expenditure based on an uncertain, general source of funding, lacking an objective and effective nature.**

**Keywords:** *State budget, legislative initiative, source of funding, Parliament's information*

**Summary**

**I. As grounds for the objection of unconstitutionality,** pleas of extrinsic unconstitutionality were filed, arguing that, by the way in which it was adopted, the Law supplementing Article 38 (3) of Framework Law No 153/2017 on the remuneration of staff paid from public funds violated the constitutional provisions of Article 61 (2), Article 75 (1), Article 111 (1) and Article 138 (5).

Regarding the plea of unconstitutionality related to the provisions of Article 61 (1) and of Article 75 (1) of the Basic Law, it was indicated that the adoption of the law subject to constitutional review had been made in violation of the principle of bicameralism, as the first Chamber referred to, i.e. the Senate, did not take up for debate the text and the solutions adopted by the Chamber of Deputies. Thus, on 20 March 2019, the law was dismissed by the Senate. Following the completion of the parliamentary procedure before the Chamber of Deputies, 3 amendments were accepted through the report of the Committee for Labour and Social Protection, and, both formally and in terms of content, the text adopted by the Chamber of Deputies departs from the will of the proponents, as these amendments have not been considered by the Senate either, which dismissed the legislative proposal. The accepted amendments represent major changes to the content of the original form of the legislative proposal.

As grounds for the plea of unconstitutionality, related to the provisions of Article 138 (5), read in conjunction with those of Article 111 (1) of the Constitution, it was indicated that, in the case of proposals to introduce legislative measures/policies/initiatives whose adoption entails an increase in the budgetary expenditures, the proponents were bound to present the financial statement provided for in Article 15 of Law No 500/2002, accompanied by the hypotheses and calculation methodology used, as well as a statement according to which the respective expenditure is compatible with the strategic priorities specified in the fiscal-budgetary strategy, with the annual budgetary law and with the expenditure ceilings presented in the fiscal-budgetary strategy. However, the Government points out that the analysis of the legislative statement of the law subject to constitutional review reveals that the proponents did not specify the budgetary impact, the budgetary expenditure for the current year and the following years and the sources used to cover the expenditure generated by the legislative proposal. Regarding the constitutional obligation of Parliament to request an information from the Government when the legislative initiative affects the provisions of the State budget, as well as regarding the obligation to establish the funding source for the budgetary expenditure, the Government also invoked the arguments retained by the Constitutional Court in Decision No 22 of 20 January 2016.

Concerning the plea of intrinsic unconstitutionality, it refers to the provisions of Article 16 (1) of the Constitution, the Government claiming that the derogation set by the impugned

law creates a privilege for the staff of the State Inspectorate for Road Transport Control (S.I.R.T.C.) and of the Romanian Naval Authority, contrary to Article 16 (1) of the Constitution. The granting of specific salary increases determines a discrimination with regard to the 3 other public institutions located at the same level of subordination, which benefit from the staged application of the law, the remuneration system provided for by the framework law being regulated based on the principle of financial sustainability, for establishing the level of remuneration of the budgetary staff, so as to ensure compliance with the staff expenditure ceilings of the general consolidated budget, established in accordance with the law.

**II. By examining the pleas of** extrinsic **unconstitutionality** formulated with reference to the constitutional provisions contained in Article 111 (1), the Court found that the constitutional text established, on the one hand, the obligation of the Government and of the other public administration bodies to present the information and documents necessary for conducting the law-making process and, on the other hand, the manner of obtaining such information, respectively upon the request of the Chamber of Deputies, of the Senate or of the parliamentary committees, through their chairmen. It results from these provisions that the framers wanted to enshrine the constitutional guarantee of cooperation between Parliament and the Government during the law-making process, by establishing mutual obligations for the two public authorities. The Court also noted that, under the constitutional relationships between Parliament and Government, it was mandatory to request information whenever the legislative initiative affects the provisions of the State budget. This obligation of Parliament is in line with the constitutional provisions of Article 138 (2), which stipulate that the Government has the exclusive competence to prepare the draft State budget and to submit it to Parliament for approval. Based on this competence, Parliament cannot pre-determine the modification of the budgetary expenditure without asking the Government for information in this respect. Given the imperative nature of this obligation to request the mentioned information, it follows that its non-compliance leads to the unconstitutionality of the adopted law.

The Court found that, pursuant to Article 15 (3) of Law No 500/2002, (i) the Senate, as the first Chamber referred to, through its President, had the obligation to request an information from the Government, through the President of the Chamber and, moreover, (ii) given that, during the debates within the committee of the Chamber of Deputies referred to on the substance, amendments were made to the provisions of the State budget or to the State social insurance budget, the chairman of that committee was bound to request a new, updated information from the Government.

Regarding the first aspect, the Court found that the information from the Government had been requested by the Senate, through the Secretary-General of the Chamber, in violation of the constitutional provisions contained in the first sentence of Article 111, expressly stating that the information and documents are requested by the Senate, through the President of the Chamber. The condition imposed by the constitutional standard represents a requirement for the validity of the act requesting the information, so that its non-compliance affects the very existence of the act. With regard to the second aspect, concerning the changes made during the legislative procedure, in its case-law, the Court

ruled that the introduction of provisions concerning the remuneration of budgetary staff, actually directly during the final debate of the draft law, after the adoption of the draft law by the first Chamber referred to, after going through the endorsement procedure, without an information of Parliament by the Government, escapes the constitutional framework established for drawing up the public budget; this is why the Government invoked in its referral the constitutional provisions of Article 111, regarding the information of Parliament, and of Article 138 (5), according to which no budgetary expenditure should be approved without establishing the source of financing. Moreover, the Court ruled that the mere participation of representatives of the Ministry of Public Finance in the works of the parliamentary committees that introduced the amendments, which later became texts of law, was not such as to meet the above-mentioned constitutional requirements.

By examining the pleas of extrinsic unconstitutionality formulated with reference to the constitutional provisions contained in Article 138 (5), the Court noted that the establishment of the source of funding and the insufficiency of the financial resources from the source thus established were two different aspects: the first one is related to the requirements of Article 138 (5) of the Constitution, and the second one is not of constitutional nature, being exclusively a matter of political opportunity, which concerns, in essence, the relationships between Parliament and the Government. Article 138 (5) of the Constitution requires the simultaneous establishment of both the budget allocation, which has the significance of an expenditure, and the source of financing, which has the significance of the income necessary to bear it, in order to avoid the negative consequences, economically and socially, of establishing a budgetary expenditure without coverage. Therefore, the constitutional rule does not refer to the concrete existence of sufficient financial resources at the time of adoption of the law, but to the fact that the respective expenditure should be fully foreseen in the State budget in order to be covered with certainty during the budget year.

The Court noted that, as it did not have the power to rule on the adequacy of the financial resources, this meant that it had only the prerogative to verify, by reference to Article 138 (5) of the Constitution, whether or not the source of funding for the budgetary expenditure had been indicated. Or, this verification can be performed only by reference to the legal provisions contained in Article 15 (1) and (2) of Law No 500/2002 on public finances and in Article 15 (1) (a) of Law No 69/2010 on fiscal-budgetary responsibility, setting the obligation to prepare the financial statement and giving it a complex nature, considering the financial effects on the consolidated general budget. As long as the legal provisions generated a financial impact on the State budget, the obligation to request the financial statement is incumbent upon all the proponents, pursuant to Article 15 (1) (a) of Law No 69/2010 on fiscal-budgetary responsibility. The Court recalled that it was not up to an MP to draw up the financial statement, but to the Government. Therefore, in order to comply with the constitutional procedure for adopting a regulatory act involving a budgetary expenditure, respectively Article 138 (5) of the Constitution, it is sufficient for the proponents of the regulatory act to prove that, under the legal provisions, previously mentioned, they requested the financial statement from the Government. Failure to send the financial statement within the legal time-limit by the public authority bound to prepare this document cannot represent an impediment in the continuation of the law-making procedure. In this

respect, in its case-law, the Court ruled that raising this competence of the Government to the level of constitutional rule implicitly admitted by Article 138 (5) of the Constitution would be equivalent to a purely discretionary condition in the sense that any law with budgetary implications could be adopted only if the Government prepared and forwarded to Parliament the financial statement. However, if the Government does not support the legislative initiative/does not agree with it and, therefore, does not send the financial statement, it cannot block the legislative process through an omissive attitude.

Another aspect refers to the fact that the financial statement provided for by Article 15 (2) of Law No 500/2002 should not be confused with the viewpoint issued by the Government according to Article 11 ($b^1$) of Law No 90/2001 [viewpoint issued as a result of the request formulated pursuant to Article 111 (1) of the Constitution – Ed.], the two documents generated by the Government having a different legal regime and, implicitly, different aims. Therefore, when a legislative proposal has budgetary implications, the Government must present both documents mentioned, therefore both the viewpoint and the financial statement.

Based on all the above, the Court found that, concerning the law subject to this constitutional review, the financial statement had not been requested during the law-making procedure either by the proponents of the legislative proposal or by the Chamber of Parliament in which the amendments had been proposed and adopted. Failure to comply with the obligation to request the financial statement naturally leads to the conclusion that the adoption of the law took into account an uncertain, general source of funding, lacking objective and real nature; consequently, the constitutional provisions of Article 138 (5) on establishing the source of funding have been violated.

In conclusion, given that the expenditure foreseen by the impugned legal texts weigh on the State budget, their adoption would have been possible only after establishing the funding source in accordance with the Basic Law and after requesting the Government to inform the Parliament. Failure to comply with the obligation of the law proponents to request the financial statement from the Government, according to Article 138 (5) of the Constitution, read in conjunction with Article 15 (2) of Law No 500/2002, and with the obligation of the presidents of the two Chambers of Parliament to request information from the Government, according to the provisions of Article 111 (1) of the Constitution, leads to the conclusion that the increase in certain budgetary expenditure was based on an uncertain, general source of funding, lacking an objective and effective nature.

**III. For all these reasons,** unanimously, the Court upheld the objection of unconstitutionality and found that the Law supplementing Article 38 (3) of Framework Law No 153/2017 on the remuneration of staff paid from public funds was unconstitutional as a whole.

*Decision No 58 of 12 February 2020 on the objection of unconstitutionality of the provisions of the Law supplementing Article 38 (3) of Framework Law No 153/2017 on the remuneration of staff paid from public funds, published in the Official Gazette of Romania, Part I, No 205 of 13 March 2020*

**By promoting a draft law containing regulations in a multitude of matters through assumption of responsibility by the Government, Article 114 (1) of the Constitution was violated. This constitutional text expressly states that a procedure of assumption of responsibility by the Government concerns a single draft law, and the reason for such a regulation lies in the fact that the said procedure is one that limits the legislative role of Parliament, so it must be carried out only under restrictive conditions.**

**Keywords:** *assumption of responsibility by the Government, sole legislative authority*

**Summary**

**I. As grounds for the objection of unconstitutionality,** it was argued that the impugned law violated Article 114 of the Constitution, given that it amends Government Emergency Ordinance No 114/2018 while the law approving it is in an advanced stage of the parliamentary procedure in the decision-making Chamber. This creates the premises for a legal conflict of a constitutional nature between the Government and Parliament, as the Government violated the competence of Parliament as the sole legislative authority. The legitimation of such an act could lead to an institutional deadlock, in the sense that it would become impossible for Parliament to legislate.

Also, the impugned law amends and supplements more than 25 regulatory acts, which regulate various social fields. However, a regulation that is subject to the Government's assumption of liability must contain provisions that clearly refer to only one area.

Assumption of Government's responsibility with respect to a draft law is an extreme solution, which can be resorted to when, for the swift adoption of a draft, neither the emergency procedure nor the emergency ordinance procedure can provide the expected results. Legislative urgency cannot be determined by the amendment or repeal of the existing legislation, but by the absence of legal regulations in a certain field of human activity.

It was also indicated that prohibiting cumulation of retirement pensions paid from the public pension system with salary incomes paid from the State budget violates Article 16 (1), Article 41 (1), Article 44 (1) and Article 47 (2) of the Constitution.

**II. By examining the objection of unconstitutionality,** the Court ruled that, with regard to assumption of responsibility, by the Government, the risk of the Government falling compensated for the circumvention of the parliamentary legislative procedure. The Court ruled that the Government could assume its responsibility, regardless of the stage of the legislative procedure. The role of such a procedure is to counter the obstructionist acts of the Opposition during the legislative debates. This simplified way of legislating should be resorted to only when the adoption of the draft law in the ordinary procedure or in the emergency procedure is no longer possible or when the political structure of Parliament does not allow this. Furthermore, the assumption of responsibility, by the Government, on a draft law, aims to have it adopted as swiftly as possible, given that the content of the regulation aims to establish urgent measures in an area of the utmost importance, and their application must be immediate.

In its case-law, the Court listed the following criteria imposed by Article 114 of the Constitution for the assumption of responsibility, by the Government:

1) the existence of an urgency in adopting the measures contained in the law for which the Government assumed its responsibility;
2) the need for the regulation in question to be adopted as soon as possible;
3) the importance of the regulated field;
4) the immediate implementation of the law in question.

The Court ruled that no provision of the Basic Law prohibited a law from regulating several areas of social relations. Thus, the Government may choose, in a draft law which it submits to Parliament for adoption, either through the ordinary legislative procedure or by assumption of responsibility before Parliament, to propose the regulation of several areas by amending, supplementing or repealing several regulatory acts in force. The legislator can regulate, through a law, a complex group of social relations, in order to obtain a desirable result at the level of the entire society.

However, by examining the third criterion set by Article 114 of the Constitution for the assumption of responsibility, by the Government (the importance of the regulated field), the Court concluded that the draft law imposed had to limit itself to a single area.

Therefore, in order to establish that the Government has assumed its responsibility with respect to a single draft law, it is necessary to assess it both formally and substantially.

The Court noted that, formally, a single draft law had been adopted through the assumption of responsibility. However, when analysing the regulatory content of the Law on a series of fiscal and budgetary measures and amending and supplementing a series of regulatory acts, it is found that its title attests to the fact that the law covers the fiscal and budgetary area, as well as an unspecified number of areas in which a series of regulatory acts are amended and supplemented.

In principle, fiscal regulations aim at the legal framework regarding the mandatory taxes, fees and social contributions; the taxpayers who are bound to pay them; the method of calculation and payment thereof; the procedure for amending these taxes, fees and social contributions. Instead, budgetary regulations refer to the annual provision and approval of revenues and expenditure or, as the case may be, only of expenditure, depending on the funding system of public institutions. Therefore, fiscal regulations are closely related to the budgetary ones, without overlapping, each of the two areas maintaining its well-defined individuality.

At the same time, the Court noted that the fiscal field was subject to regulation by ordinary laws. These are submitted to the Senate, for debate and adoption, as the first Chamber referred to, and, subsequently, to the Chamber of Deputies, as the decision-making Chamber. Instead, the budgetary field refers to aspects related to the State budget and the State social insurance budget. The drafts of these budgets are drawn up only by the Government and they are approved by Parliament, in a joint sitting, with the vote of the majority of MPs. These aspects highlight the fact that the financial-budgetary measures aim at two distinct regulatory fields, so the adopted law does not have a single purpose.

Furthermore, the Court found that the impugned law repealed, amended and supplemented or prolonged the implementation of 23 regulatory acts. Legislative amendments

cover, by way of example, areas such as public investment, salaries of staff paid from public funds, parental leave and child allowance, public pension system, national local development program, traffic on public roads, privately managed pensions, electricity and natural gas, fiscal, administrative and budgetary areas, which leads to the conclusion that this regulatory act does not cover a single area of regulation. Thus, the regulatory act subject to analysis does not have a clear, unique and well-defined regulatory object. It does not modify a single regulatory act, but several provisions from various regulatory acts, heterogeneous in terms of regulatory object. Even if most of the amendments in the law subject to analysis concerned Government Emergency Ordinance No 114/2018, it can be stated that the other amendments and supplements in the law are not related and essential to it.

However, a law can cover only one field of regulation, as well as fields directly related to it. This is also stated by the provisions of Article 14 of Law No 24/2000 on the norms of legislative technique for drawing up regulatory acts, republished in the Official Gazette of Romania, Part I, No 260 of 21 April 2010, which establish that regulations of the same level and having the same object are usually included in a single regulatory act, and a regulatory act may include regulations from other related matters only insofar as these are essential to the achievement of the purpose pursued by the respective act.

Amending and supplementing such a significant number of regulatory acts cannot be achieved by a single law, a law that is not even an attempt to codify the matter, but one that expresses different legislative options in heterogeneous fields. A draft law must target homogeneous social relations. A different scenario would lead to the inadmissible situation where such a draft law regulated various social relations connected or not, and where the law thus adopted did not reflect regulatory unity and a single purpose.

Consequently, the Court found that, by promoting a draft law containing regulations in a multitude of matters through assumption of responsibility by the Government, Article 114 (1) of the Constitution had been violated. This constitutional text expressly states that a procedure of assumption of responsibility by the Government concerns a single draft law, and the reason for such a regulation lies in the fact that the said procedure is one that limits the legislative role of Parliament, so it must be carried out only under restrictive conditions. Or in this case, the Government did nothing but convert a series of draft laws that would have targeted those more than 20 regulatory acts amended/supplemented/prolonged into a single one precisely in order to comply, formally, with Article 114 (1) of the Constitution. But such a draft laws evades both the letter and the purpose of the constitutional text and, thus, the law adopted through the procedure of assumption of responsibility, by the Government, is unconstitutional.

**III. For all these reasons,** by a majority vote, the Court upheld the objection of unconstitutionality and found that the Law on a series of fiscal and budgetary measures and amending and supplementing a series of regulatory acts was unconstitutional.

*Decision No 61 of 12 February 2020 on the objection of unconstitutionality of the Law on a series of fiscal and budgetary measures and amending and supplementing a series of regulatory acts, published in the Official Gazette of Romania, Part I, No 482 of 5 June 2020*

**The absence of a thorough reasoning of regulatory acts is contrary to the requirements of clarity of the law and legal certainty. The repeal of a series of provisions on service pensions contained in several laws, referring to numerous professional statutes, essentially different, without proposing any solution or legislative rule to replace these provisions, is contrary to the principle of predictability and does not provide the person adequate protection against arbitrariness. Moreover, the law contradicts the decisions of the Constitutional Court by which the latter emphasized that service pensions were not a privilege.**

**Keywords:** *service pensions, obligatory nature of the decisions of the Constitutional Court, clarity of the law, predictability of the law, rule of law, principle of bicameralism, equal rights, establishing the legal status of Deputies and Senators, establishing their emoluments and other rights, organic law*

**Summary**

**I. As grounds for the objections of unconstitutionality,** the non-observance of the order of referral of the Chambers of Parliamentary was invoked. The law that is the subject-matter of the referral was submitted to the Senate, for debate and adoption, as the first Chamber referred to, and the Chamber of Deputies was the decision-making Chamber. This order of referral is contrary to the provisions of Article 65 (2) (j) of the Constitution, according to which the establishment of "the legal status of Deputies and Senators, their emoluments and other rights" is made in a joint sitting of the Chamber of Deputies and Senate. Besides, the Senate rejected the law, but the Chamber of Deputies adopted it, thus violating the principle of bicameralism.

It was argued that the law in question was incomplete and created a regulatory void, because it limited itself (except for some provisions amending Framework Law No 153/2017 on the remuneration of staff paid from public funds and Law No 227/2015 on the Fiscal Code) to establishing provisions repealing the norms on "special pensions". The existence of this regulatory void is confirmed even by the provisions of Article 15 of the law, which stipulate that, within 6 months, specific laws will be prepared regarding the "occupational pension schemes" for each category of service pension beneficiaries.

Although the legislator's stated intention was to eliminate all categories of so-called "service" or "special" pensions, in reality, the regulation lefts out certain categories of pensions, such as, for example, the special pensions for military and police officers, in view of the "restrictions imposed by law during their activity", although similar restrictions and incompatibilities are imposed on all the professional categories covered by law.

It was also emphasized that the legislator's option to maintain military service pensions and eliminate the magistrates' service pensions was contrary to the clear case-law of the Constitutional Court (Decision No 20 of 2 February 2000, published in the Official Gazette of Romania, Part I, No 72 of 18 February 2000), in which it was held that such a hypothesis was contrary to the provisions of Article 16 (1) of the Constitution. Although the legislator chose to maintain the restrictions and incompatibilities specific to all the professional categories covered by law, it suppressed a statutory right only for some of the categories concerned,

without objectively and reasonably justifying, not even in appearance, the measure adopted by the law in question.

Parliament had already tried to eliminate the occupational pensions of certain professional categories before, on which occasion the Constitutional Court, by Decisions Nos 871 and 873 of 25 June 2010, established that special pensions were not a privilege.

According to the Court's case-law, the constitutional statute of magistrates requires the granting of the service pension as a component of the independence of the judiciary, a guarantee of the rule of law.

It was argued that the abolition of the service pension for magistrates, with the exception of military magistrates, introduced an element of discrimination within the body of magistrates, without there being a reasonable and objective justification for such a situation. The statute of magistrates cannot be differentiated depending on the capacity of the parts of the case-files assigned to them or on the nature of the cases solved.

**II. By examining the objections of unconstitutionality,** the Court noted that the impugned law also amended the provisions of Law No 96/2006 on the legal status of Deputies and Senators. The separate debate in the Senate and, respectively, in the Chamber of Deputies, violated the provisions of Article 65 (2) (j) of the Constitution, according to which the establishment of the legal status of Deputies and Senators, their emoluments and other rights should be made in a joint sitting of the Chambers of Parliament. Moreover, the order of referral of the Chambers regarding the amendment of Law No 303/2004 on the statute of judges and prosecutors was not observed, in violation of Article 73 (3) (l) of the Constitution.

It was argued that the law had been adopted by the Chamber of Deputies, as the decision-making Chamber, while the Senate had rejected it, and this way of adopting is contrary to the principle of bicameralism.

The Court ruled that the amendments and supplements made by the decision-making Chamber to the draft law adopted by the first Chamber referred to should have related to the field envisaged by the proponent and to the form in which it was regulated by the first Chamber. Otherwise, this would lead to the situation that only one Chamber, i.e. the decision-making Chamber, legislated, which is contrary to the principle of bicameralism.

The Court noted that this act of political will, materialized by the first Chamber's vote of rejection, did not offer the decision-making Chamber the possibility to disregard the original purpose of the law, the conception and philosophy of the legislative proposal. In other words, the fact that a legislative proposal rejected by the Chamber of sober second thought was adopted by the Decision-making Chamber is not such as to infringe, in itself, the principle of bicameralism. Thus, this possibility is regulated by Article 75 (3) of the Constitution, according to which "once a draft law or legislative proposal is passed or rejected by the first Chamber referred to, the draft law or legislative proposal shall be sent to the other Chamber, which will make a final decision".

The authors of the referrals also invoked the deficient nature of the explanatory statement to the legislative proposal. The Court noted that the proponents of the law had as starting point a premise imperatively expressed in the first paragraph of the explanatory statement, according to which "the lack of clear, objective and transparent provisions for

determining the professional categories that could benefit from service pensions, as well as the lack of a maximum ceiling for the service pensions turned this system of service pensions into one of the biggest problems in Romania". Next, "the feeling of disapproval, dissatisfaction and frustration with this system of service pensions" is invoked, as well as a sociological research conducted "from 27 November to 5 December 2018", on "a representative sample" (without specifying what this means), which apparently showed that "over 80% of Romania's population requests the abolition of service pensions, known as special pensions". The "feeling" invoked and the study mentioned determine the legislator to intervene in order to "stop this phenomenon that generates dissatisfaction". "Colossal differences" in the amount of the pensions, "outrageous" pensions, "irreversible social anomalies" are then invoked (without presenting any study or other documentary tool), hence the conclusion that "the repeal, as soon as possible, of the legal provisions on the existence of service pensions is necessary and even mandatory". The financial argument is also mentioned, respectively "major imbalances in the pension fund" and the annual expenditure generated by the payment of service pensions, also without presenting any documentation likely to support this conclusion.

In addition to the use of a non-motivating language, noted by the Legislative Council in its Negative Opinion, the Court also found the lack of official documents to objectively support the data presented and the conclusions stated, such as to justify the regulatory intervention. The socio-economic impact is not presented either, just like the impact on the legal system. Without a reasoning of the adopted law, it is not possible to know why some of the service pensions are abolished, while others are kept.

In its case-law, the Constitutional Court noted that the absence of a thorough reasoning of the regulatory acts and the summary nature of the presentation and motivation tool was contrary to the requirements of clarity of the law and legal certainty.

The Court also found that the previously reported deficiencies led to an incomplete regulation. Objectively, such a regulation, comprising a combination of repealing rules, cannot solve the "problem" stated by the proponents in the explanatory statement, leading instead to legal uncertainty as to the legal regime of pensions.

The adopted regulation repeals provisions included in several laws, referring to numerous professional statutes, essentially different, without proposing any solution or legislative rule to replace these provisions or to correlate them with the legislative system in force. The "perspective" of a future regulation ("within 6 months") established at the end of the law, in the sense of introducing "occupational" pensions, "for each category" is not likely to provide an immediate solution, but to confirm the regulatory void determined by the entry into force of the impugned law. The law in question is contrary to the principle of predictability and does not provide the person adequate protection against arbitrariness.

With regard to non-compliance with the general binding nature of the decisions of the Constitutional Court, the Court emphasized the constant nature of its case-law on both the general legal regime of regulations in the field of pensions and the service pension of magistrates. The Court found that the impugned law disregarded the decisions of the constitutional court.

The law also contradicts the decisions of the Constitutional Court by which it emphasized that, in order to observe the principle of equality, the granting or non-granting of service

pensions must be based on an analysis of the specific status of the various professions, in order to establish if such a status justifies a different treatment in terms of pension regulation.

The Court ruled that the law-making process conducted in violation of the decisions of the Constitutional Court was incompatible with the rule of law, enshrined in the provisions of Article 1 (3) of the Constitution.

In conclusion, the impugned law is unconstitutional as a whole. Parliament must ascertain the legal termination of the law-making process and, if a new legislative procedure is initiated, it must comply with the Court's decision.

**III. For all these reasons,** unanimously, the Court upheld the objections of unconstitutionality and found that the Law repealing provisions on service pensions and old-age pensions, as well as regulating a series of measures in the field of occupational pensions was unconstitutional as a whole.

*Decision No 153 of 6 May 2020 on the objections of unconstitutionality of the Law repealing provisions on service pensions and old-age pensions, as well as regulating a series of measures in the field of occupational pensions, published in the Official Gazette, Part I, No 489 of 10 June 2020*

**The amendments and supplements made by the decision-making Chamber to the draft law adopted by the first Chamber referred to must relate to the field envisaged by the proponent and to the form in which it was regulated by the first Chamber. Otherwise, this would lead to the situation that only one Chamber, i.e. the decision-making Chamber, legislated solely, which is contrary to the principle of bicameralism.**

**The legislative proposal that affects the provisions of the State budget must be accompanied by the request that Parliament be informed by the Government. Parliament cannot pre-determine the modification of the budgetary expenditure without asking the Government for information in this respect, and failure to comply with this obligation determines the unconstitutionality of the adopted law.**

**By an overlapping with respect to the regulatory object, as well as to the deadlines considered by the primary and, respectively, the delegated legislator, without the adopted law making any correlation in this respect with the emergency ordinance, a legislative parallelism is generated.**

**Keywords:** *principle of bicameralism, absence of the opinion of the Economic and Social Council, financial statement, information of Parliament, State budget, legislative parallelism*

**Summary**

**As grounds for the objection of unconstitutionality**, pleas of extrinsic, as well as of intrinsic unconstitutionality were formulated.

With regard to the grounds of *extrinsic* unconstitutionality, the authors of the referral argued that, in accordance with the case-law of the Constitutional Court, the law subject to the plea of unconstitutionality had been adopted unconstitutionally by the decision-making Chamber, as amendments referring to essential aspects related to the structure and philosophy of the law had evaded the debate and adoption of the first Chamber referred to. Thus, the impugned law violates the provisions of Article 61 (2) of the Constitution by non-observing the principle of bicameralism.

With regard to the extrinsic pleas, a violation of Article 141, by reference to Article 1 (5) of the Constitution, was also alleged, determined by the absence of the opinion of the Economic and Social Council (C.E.S.).

In the same context, the violation of the provisions of Article 111 (1) and of Article 138 (5) of the Constitution was argued, by indicating that, according to the explanatory statement, the proponents of the regulatory act envisaged essential changes, with a significant financial impact on the expenditure from the State budget, as of the date of entry into force of the law. Thus, by the provisions of Articles 1 and 2 of the law, the proponents proposed deferrals of social security obligations with a significant budgetary impact, including on the State budget for 2021, although this has not been prepared yet, exemptions from the payment of certain State social security obligations and their coverage from the State budget, without indicating the source of income to cover such expenditure, the issuance of State guarantees without indicating the source of their funding in case of their execution. It was also argued that the statement concerning the regulatory act indicated the lack of a request, from the proponents, for information on the impact of the provisions of the legislative initiative on the budgetary expenditure.

As grounds for the pleas of extrinsic unconstitutionality, a violation of the provisions of Article 1 (4) and (5) of the Constitution was also invoked. It was thus shown that the Government of Romania had adopted, as delegated legislator, on 18 March 2020, Government Emergency Ordinance No 29/2020 on a series of economic and fiscal and budgetary measures, which was submitted to Parliament on 20 March 2020 and was published in the Official Gazette of Romania, Part I, No 230 of 21 March 2020. Irrespective of the fact that the Senate had already been referred to with the Law approving Government Emergency Ordinance No 29/2020, a regulatory act in force since 21 March 2020, a number of 2 Senators and one Deputy registered, on 23 March 2020, 2 days after the entry into force of the respective Government emergency ordinance, a draft law having a regulatory object identical to a part of this Government emergency ordinance.

Next, the authors of the referral formulated grounds of *intrinsic* unconstitutionality. In the law that was the subject-matter of the objection of unconstitutionality, the legislator expressly provided for the production of legal effects as of 1 March 2020, although the law was adopted by the decision-making Chamber on 3 April 2020. Establishing the time-limit for the awarding of the tax facilities provided for by the impugned law at a date prior to the one of entry into force of the law is contrary to the principle of non-retroactivity of civil law, because even if the legislator justifiably wanted to remove or mitigate certain unfair situations, it cannot achieve this through a law that has a retroactive nature in the constitutional context in which a law becomes mandatory only after its publication in the Official Gazette of Romania, Part I.

The Court was also requested to ascertain the unconstitutionality of the provisions of Article 1, Article 2, Article 3 and Article 4 of the law, as they violate the provisions of Article 1 (3) and (5) of the Constitution, due to non-compliance with the principle of legal certainty in its essential component regarding the clarity of the legal norm, as well as with the principle of legality. At the same time, the violation, by Article 3 (1) of the law, of the provisions of Article 16 (1) of the Constitution, was also alleged, due to non-compliance with the principle of equal rights, in its non-discrimination component. It was also pointed out that, by the way the impugned law is drafted, discrimination was also established by imposing a condition impossible to fulfil by certain taxpayers, excluding them *a priori* from the category of beneficiaries of these measures.

**II. By examining the pleas of unconstitutionality** from the perspective of the alleged violation of the principle of bicameralism, from the analysis of the legislative proposal formulated in the context of the spread of the Covid-19 virus, which aimed at granting, upon request, facilities to taxpayers consisting of deferrals, under certain conditions, of State social security contributions and of the employment insurance contribution related to income from wages and assimilated wages, and which, in order to support taxpayers during this period, also proposed deferrals of the utility services for a period of 3 months, after analysing the explanatory statement, the form of law adopted by the Chamber of sober second thought and by the decision-making Chamber, the Court found, in accordance with the allegations of the authors of the referral, that the legislative solutions referred to by the authors of the referral did not appear in the regulatory intention nor in the form of the law adopted by the Senate.Thus, Article 4 (7) of the law aims to transpose provisions of a European act, namely Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU.It was found that the Directive aimed to achieve a common general framework at the level of the European Union for regulations in this field, as confirmed also by the reference to the category of vulnerable consumers, contained in Article 5 thereof. It was found that the scope of the concept of vulnerable consumer was different from that of the consumers targeted by the measures provided for by the impugned law. Even if, apparently, there is a connection with the regulatory context envisaged by the proponents in question, this regulatory context refers to a punctual, exceptional situation, requiring specific urgent measures. Thus, the introduction of an obligation, on the part of the Government, to transpose an Article of that Directive, which concerns a whole regulatory context and a wider category of consumers, defined by characteristics that do not relate exclusively to the emergency which gave rise to the legislative proposal, exceeds the intention of the proponents and of the debates/vote in the Senate, as the Chamber of sober second thought. Consequently, the Court found that the allegations of the authors of the referral were well-grounded, as the addition of the above-mentioned provisions in the decision-making Chamber is likely to lead to a change in the general idea of the regulation, contrary to the principle of bicameralism, in that it is no longer limited to the adoption of a series of exceptional, immediately applicable measures, as described in the explanatory statement, but it also establishes obligations aimed at transposing an act of the European

Union, comprising a set of legislative measures, and not just a specific change, intended for a category of consumers.

Regarding the allegations concerning the violation of Article 141 with reference to Article 1 (5) of the Constitution, at this point of the reasoning of the objection of unconstitutionality, the unconstitutionality of the law as a whole was invoked, with reference to the obligation to request the opinion of the C.E.S. It was also pointed out that, if the request is of a purely formal nature, not allowing the constitutional authority, i.e. the C.E.S., to fulfil its role, as established by Article 141 of the Constitution, i.e. to formulate and issue, within the legal time-limit, the requested opinion, this was tantamount to a circumvention of the constitutional provisions by formally addressing the request for issuing an opinion. With regard to these claims, the Court first found, as recorded both in the Senate's statement concerning the regulatory act and in the answer given by the General-Secretary of the Senate, that the opinion of the C.E.S. had been requested, the obligation imposed by Article 141 by reference to Article 1 (5) of the Constitution being fulfilled from this point of view. In this respect, in its case-law, the Court sanctioned the absence of the request, and not the lack of the opinion of the Economic and Social Council. Failure to issue a requested opinion cannot be imputed to the author of the request, in this case the Senate. As regards the alleged "formal" nature of the request, from the perspective of the time-limit set for reply, it is noted that the legislative proposal was forwarded to both the C.E.S. and to the Legislative Council for opinion, and to the Government for a viewpoint, one day after the date of registration of the legislative proposal with the Senate. Given the approved emergency procedure, the content of the law and the context in which it was promoted, the time-limits for response were naturally amended accordingly. These factors must all be taken into account by the opinion-issuing bodies, which must exercise diligence in fulfilling their constitutional and legal role. Therefore, the Court found that the claims related to the violation of Article 141 with reference to Article 1 (5) of the Constitution were not grounded.

With regard to the claims referring to the violation of the provisions of Article 111 (1) and Article 138 (5) of the Constitution, according to the consistent case-law of the Constitutional Court, the constitutional rules referred to establish, on the one hand, the obligation of the Government and of the other public administration bodies to present the information and documents necessary for conducting the law-making process and, on the other hand, the manner of obtaining such information, respectively upon the request of the Chamber of Deputies, of the Senate or of the parliamentary committees, through their chairmen. Under the constitutional relationships between Parliament and Government, it is mandatory to request information whenever the legislative initiative affects the provisions of the State budget. This obligation of Parliament is in line with the constitutional provisions of Article 138 (2), which stipulate that the Government has the exclusive competence to prepare the draft State budget and to submit it to Parliament for approval. Based on this competence, Parliament cannot pre-determine the modification of the budgetary expenditure without asking the Government for information in this respect. Given the imperative nature of this obligation to request the mentioned information, it follows that its non-compliance leads to the unconstitutionality of the adopted law. The Court noted that, according to the explanatory statement, the proponents of the regulatory act envisaged

changes with a financial impact on the expenditure from the State budget, reflected in the content of the regulatory act. Thus, the provisions of Articles 1 and 2 of the law regulate deferrals of the mandatory social security contributions and their "supplementing" from the State budget, deferrals of the employment insurance contribution related to income from wages, without indicating the source of their funding in case of their execution. These expenses would burden the State budget, which means that the adoption of the legal provisions in question would have been possible only after requesting the information provided for by Article 111 of the Constitution. Also, the decision-making Chamber introduced new paragraphs in Article 4 of the law, with implications on the State budget, and it established obligations for crediting utility providers by the Ministry of Public Finance, which would have also imposed the request of information under the same constitutional text mentioned above. However, the consultation of the statements concerning the regulatory act "Legislative proposal for granting tax facilities to taxpayers, natural and legal persons" revealed that the information provided for by Article 111 of the Constitution had not been requested at any stage of the legislative process in the Parliament. The explanatory statement made no reference either to the budgetary impact estimated by the proponents.

The viewpoint of the Chamber of Deputies invoked the fact that the legislative proposal had been sent to the Government by the President of the Senate, but the statement of the regulatory act only included the referral, on 24 March 2020, "to the Government, for a viewpoint". By examining the letter requesting this viewpoint, communicated to the Constitutional Court by the Government, it was found that the Senate's request, as formulated, concerned a general viewpoint on the law, without being able to replace the information requirement, referred to expressly by the provisions of the second sentence of Article 111 (1) of the Constitution, and without covering, under any circumstance, the lack of the request for a viewpoint on the changes made in the decision-making Chamber.

Consequently, compared to the information recorded in the legislative statements, and without any other document submitted by the authorities to which the Constitutional Court requested viewpoints in this case, i.e. the Government, the Chamber of Deputies, the Senate, it cannot be concluded that the above-mentioned constitutional requirement has been met. The absence of the financial statement (initial and updated) naturally leads to the conclusion that the adoption of the law took into account an uncertain, general source of funding, lacking objective and effective nature, without, thus, being real.

Concerning the allegations of a violation of the provisions of Article 1 (4) and (5) of the Constitution, from the perspective of the legislative parallelism established by the adoption of the impugned law, it was shown, in essence, that the Government of Romania had adopted, as delegated legislator, on 18 March 2020, Government Emergency Ordinance No 29/2020 on a series of economic and fiscal and budgetary measures, which was submitted to Parliament on 20 March 2020 and was published in the Official Gazette of Romania, Part I, No 230 of 21 March 2020. Although the Senate had already been referred to with the Law approving Government Emergency Ordinance No 29/2020, a regulatory act in force since 21 March 2020, 2 days after the entry into force of the respective Government emergency ordinance, a draft law having a regulatory object identical to a part of this Government emergency ordinance was promoted, which, according to the authors of the referral, is

contrary to the above-mentioned constitutional provisions. Following the comparative analysis of the impugned provisions, the Court found an overlapping with respect to the regulatory object, as well as to the deadlines considered by the primary and, respectively, the delegated legislator, without the adopted law making any correlation in this respect with the Government emergency ordinance in force. No express repeal was foreseen, nor could an implicit repeal of the provisions of Government Emergency Ordinance No 29/2020 be supported as a result of the entry into force of the law. This, because such an implicit repeal could only produce effects for the future, i.e. from the entry into force of the Law granting tax relief to taxpayers, economic operators in Romania. However, this latter law contains a term as of which the established facilities are granted (March), prior to its adoption and eventual entry into force, as well as rules regarding them, other than those provided for by the Government emergency ordinance, act which, being published in the Official Gazette of Romania and entered into force, has already produced legal effects during the period mentioned in the law.

Thus, it results that the impugned law establishes a legislative parallelism, in the sense of Article 16 of Law No 24/2000 on the norms of legislative technique for drawing up regulatory acts, as well as a contradictory regulation of the same legal issue, violating, from this perspective, the provisions of Article 1 (3) with reference to Article 1 (5) of the Constitution, enshrining the requirements of the law-making process within a State governed by the rule of law and the principle of legal certainty. By the eventual entry into force of the impugned law, different rules for the same regulatory field and for the same period of time (past) would subsist in the regulatory system, with negative consequences in terms of law implementation and, from this perspective, of the legal security of its addressees. Thus, even if it cannot be held that, by the simple option of promoting a legislative act distinct from the law approving an emergency ordinance with a partially common object, Parliament would have violated Article 1 (4) of the Constitution, the regulation thus adopted violates the principle of legal certainty and the requirements of the law-making process within a State governed by the rule of law, imposed by Article 1 (3) and (5) of the Constitution.

**III. For all these reasons,** unanimously, the Court upheld the objection of unconstitutionality and found that the Law granting tax relief to taxpayers, economic operators in Romania was unconstitutional as a whole.

*Decision No 154 of 6 May 2020 on the objection of unconstitutionality of the provisions of the Law granting tax relief to taxpayers, economic operators in Romania, published in the Official Gazette of Romania, Part I, No 398 of 15 May 2020*

**The principle of legality, provided for by Article 1 (5) of the Constitution, requires that both the procedural requirements and the substantive ones be observed during the law-making process. The law suspending the repayment of loans has the same scope as Government Emergency Ordinance No 37/2020. This legislative parallelism has negative**

**consequences on legal certainty and on the clarity and predictability of the law, consequences that affect both creditors and debtors of the payment obligations.**

**Keywords:** *legal certainty, clarity of law, predictability of law, principle of legality*

**Summary**

**I. As grounds for the objection of unconstitutionality**, the authors of the referral argued that the impugned law was unconstitutional with reference to the provisions of Article 1 (4) and (5), read in conjunction with Article 115 (5) and (7) of the Constitution, because it was adopted in violation of the principle of loyal cooperation between Parliament and the Government. Thus, by Decree No 195/2020, the state of emergency was established on the entire territory of Romania for a period of 30 days. On 30 March 2020, Government Emergency Ordinance No 37/2020 granting facilities in relation to the loans granted by credit institutions and non-banking financial institutions to certain categories of debtors entered into force, following its publication in the Official Gazette of Romania, Part I, and its submission, with the Senate, for approval that same day. However, a group of five Senators and Deputies submitted to the Standing Bureau of the Senate, for debate and adoption, a legislative proposal having as object the Law suspending the repayment of loans, with the same scope as Government Emergency Ordinance No 37/2020, remained not approved. Subsequently, in its sitting of 31 March 2020, the Plenum of the Senate adopted the legislative proposal with amendments and sent the form thus adopted to the Chamber of Deputies. Parliament thus intervened in the procedure initiated by the Government and finalized by the adoption of Government Emergency Ordinance No 37/2020, although it had the possibility to modify its provisions.

Also, according to Article 16 of Law No 24/2000 on the norms of legislative technique for drawing up regulatory acts, during the law-making process, it is forbidden to establish the same regulations in different articles or paragraphs of the same regulatory act or in two or more regulatory acts and, in the case of parallelisms, these must be removed either by repealing or by concentrating the respective provisions into a single regulation.

There are many similar or even identical provisions between Government Emergency Ordinance No 37/2020 and the law under discussion in the Chamber of Deputies, but also some irreconcilable contradictions, regarding the scope of the notions of creditor and debtor, regarding forced execution procedures, regarding the persons eligible to benefit from the provisions of this regulation (which may generate discrimination between debtors), regarding the term in which the request for the suspension of the obligation to pay the loans can be filed, regarding the conditions that need to be met by the debtors who are not natural persons, in order to benefit from the provisions of the regulation under review, as well as regarding the guarantees referring to the payment of the interest related to the suspension period for the mortgage loans contracted by natural persons.

Furthermore, the act is insufficiently substantiated and unnecessary, as it ignores the older rules governing such situations. At the same time, all debtors will be able to request the suspension of the obligation to pay instalments, regardless of whether they can pay

them or not, whether in good faith or not, which deprives the law of its legitimately stated purpose, i.e. the protection of the persons affected by the measures taken to limit the effects of the coronavirus pandemic.

The absence of the opinions of the National Bank of Romania and of the Economic and Social Council was also invoked, as well as the procedural flaws identified during the adoption of the law by the Senate.

**II. By examining the objection of unconstitutionality**, the Court noted that the impugned law had the same scope as Government Emergency Ordinance No 37/2020, i.e. the temporary suspension, up to 9 months, but without exceeding 31 December 2020, of the obligation to pay the instalments, interests and commissions related to the loans granted to the debtors by the creditors before the date of entry into force of the mentioned rules.

Government Emergency Ordinance No 37/2020 entered into force, being published in the Official Gazette of Romania, Part I, No 261 of 30 March 2020. There are many similarities between this and the impugned law.

As for the regulatory differences between the two regulatory acts, the Court found that they also contained different legislative solutions regarding the hypotheses and conditions, substantive and formal, for granting the suspension of the payment obligation, the interest regime, the establishment of a mechanism by which the State guarantees the payment of the interests and the suspension of any forced execution procedure.

Thus, regarding the content of the notion of creditor, the impugned law also includes therein, in addition to Government Emergency Ordinance No 37/2020, all registered conducting debt recovery activities.

Regarding the conditions for granting the measure of suspension of the payment obligation, the impugned law does not provide for the condition regulated by Government Emergency Ordinance No 37/2020, i.e. that the incomes of individuals should have been directly or indirectly affected by the serious situation generated by the COVID-19 pandemic.

Moreover, unlike the emergency ordinance, the impugned law does not guarantee the payment of the interests related to the due amounts whose payment is suspended at the end of the period of suspension of the loan payment.

Another substantial difference in regulation results from Article 2 (4) of the impugned law, which suspends all forced execution procedures, while the emergency ordinance does not provide for such a measure. There are also differences regarding the formal conditions for granting the measure of suspension of the payment obligation, such as the deadline for submitting the request and the one in which it must be answered, the possibility to formulate the request for suspension by telephone as well and the modality to modify the contracts.

In conclusion, the Court found that the impugned law had the same scope as Government Emergency Ordinance No 37/2020, which had already begun to produce effects on the date of adoption of the impugned law. Thus, both the hypotheses and the conditions for granting the suspension of the payment obligations and the effects of this suspension are regulated in a contradictory manner, without including any provision on the settlement of the conflict existing between these regulatory acts, thus generating situations of instability and legislative incoherence, with negative consequences on the application of the law to

concrete cases. At the same time, given that the ordinance has already produced effects since its entry into force, and that the law does not contain any provision on applications already solved or pending, submitted under it, a possible entry into force of the impugned law would generate even more many situations of legislative incoherence, with negative consequences on legal certainty and on the clarity and predictability of the law, consequences that affect both creditors and debtors of the payment obligations.

Besides, Parliament could make amendments and supplements to the mentioned emergency ordinance, through the law approving it.

The Court emphasized that the principle of legality, provided for by Article 1 (5) of the Constitution, required that both the procedural requirements and the substantive ones be observed during the law-making process. The law suspending the repayment of loans disregards, in terms of scope, the requirements mandatory for the adoption of any regulatory act, generating a legislative parallelism, prohibited by the provisions of Article 16 of Law No 24/2000.

Parliament must ascertain the legal termination of the law-making process, given that the law was found unconstitutional as a whole.

**III. For all these reasons,** unanimously, the Court upheld the objections of unconstitutionality and found that the Law suspending the repayment of loans was unconstitutional as a whole.

*Decision No 155 of 6 May 2020 on the objection of unconstitutionality of the provisions of the Law suspending the repayment of loans, published in the Official Gazette, Part I, No 473 of 4 June 2020*

**The amendments and supplements made by the decision-making Chamber to the draft law adopted by the first Chamber referred to must relate to the field envisaged by the proponent and to the form in which it was regulated by the first Chamber. Otherwise, this would lead to the situation that only one Chamber, i.e. the decision-making Chamber, legislated, which is contrary to the principle of bicameralism.**

**A law can only enter into force 3 days from its publication or at a later date set therein.**

**Keywords:** *principle of bicameralism, coming of laws into force*

**Summary**

**I. As grounds for the objection of unconstitutionality**, it was mainly argued that the Law supplementing National Education Law No 1/2011 was contrary to the provisions of Article 61 (2) and Article 75 and (1) of the Constitution, as the will of the proponents had been deviated, in violation of the principle of bicameralism developed by the constitutional case-law. It was also argued that the impugned law violated the provisions of Article 78 of the Constitution regarding the coming into force of laws.

**II. By examining the pleas of unconstitutionality** regarding the allegations of violation of the principle of bicameralism, enshrined by the provisions of Article 61 (2) and Article 75 (1) of the Constitution, regarding the legislative course of the impugned law, the Court found, according to legislative statements available on the websites of the Senate and, respectively, of the Chamber of Deputies, that, on 5 June 2019, the Legislative Proposal amending Article 71 of the National Education Law has been registered with the Chamber of Deputies for debate. This included a single article, amending paragraph (3) of Article 71 of the National Education Law No 1/2011. On 7 October 2019, the legislative proposal, in the form submitted by the proponents, was adopted by the Chamber of Deputies, as a result of the expiry of the 45-day time-limit, according to the third sentence of Article 75 (2) of the Constitution. On 9 October 2019, the legislative proposal adopted by the Chamber of Deputies was registered with the Senate. The Committee for Education, Science, Youth and Sports tabled a favourable Report with amendments, which: amended the title of the law, deleted the amendment proposed by the proponents and introduced additions regarding the organization and conduct of online teaching. According to the table of accepted amendments, annexed to the Report, the reporting Committee is the author of all the amendments. On 15 April 2020, the Senate adopted the Law supplementing National Education Law No 1/2011, with the amendments proposed and approved by the Committee for Education, Science, Youth and Sports. With regard to these changes operated in the decision-making Chamber, the author of the referral alleges the violation of the principle of bicameralism, as it was developed in the case-law of the Constitutional Court.

In its case-law, the Court established two essential criteria for determining the cases where the parliamentary procedure violates the principle of bicameralism: the existence of major differences in legal content between the forms adopted by the two Chambers of Parliament and the existence of a significantly different configuration between the forms adopted by the two Chambers of Parliament. The meeting of these criteria is likely to affect the principle governing the law-making activity of Parliament, placing the decision-making Chamber in a privileged position, while actually removing the first Chamber referred to from the legislative process. Moreover, in accordance with the case-law of the Constitutional Court, the assessment of the compliance with the mentioned criteria requires a comparative analysis between the form of the law adopted by the Chamber of sober second thought and the one adopted by the decision-making Chamber, even from the perspective of the content of the legislative draft/proposal, understood as the philosophy, the original concept of the regulatory act.

In conclusion, in order to verify compliance with the principle of bicameralism, the following must be taken into account: (a) the original purpose of the law, in the sense of political will of the authors of the legislative proposal or of philosophy, of original concept of the regulatory act; (b) if there are major, substantial differences of legal content between the forms adopted by the two Chambers of Parliament; (c) if there is a significantly different configuration between the forms adopted by the two Chambers of Parliament.

Regarding the original purpose of the law, as it results from the explanatory statement, it was found that it aimed to regulate how the results of the evaluation were expressed – at the level of the basic knowledge acquisition cycle (preparatory school year, 1st grade, 2nd grade); at the level of the 3rd and 4th grades, at gymnasium level and at the level of non-

university tertiary education. This purpose is reflected in the legal content of the legislative proposal, which refers exclusively to the amendment of Article 71 (3) of the National Education Law No 1/2011, contained in Chapter V – Evaluation of the learning outcomes, Section 1 – General provisions on evaluation.

The legislative proposal, in the form proposed by its initiators, was tacitly adopted by the first Chamber referred to, i.e. the Chamber of Deputies.

Examining the legal content of the form of law adopted by the decision-making Chamber, the Court found a major difference in content compared to the form of the legislative proposal adopted by the Chamber of sober second thought. Thus, it was noted that the legislative amendment proposed by the initiators was removed, completely different provisions being introduced and approved, which included different legislative solutions, unrelated to the intention of the law-making process and, implicitly, to the initial form of the law.

Its analysis reveals an obvious lack of any connection of the form of the law adopted by the decision-making Chamber with the legislative initiative and the form of the law adopted by the Chamber of sober second thought. The two forms are basically two different laws, this being a typical case in which only one Chamber of Parliament legislates. In conclusion, as the interventions made by the Senate completely changed the form of the law adopted by the first Chamber, and the texts adopted were not the object of the legislative initiative and were not subject to debate in the Chamber of sober second thought, the adopted law violates the principle of bicameralism.

Thus, the Court held that the pleas of the author of the referral were well grounded, thus leading to the unconstitutionality of the law as a whole, with reference to the provisions of Article 61 (2) and of Article 75 (1) of the Constitution.

As concerns the claim regarding the violation of the constitutional provisions of Article 78 – Coming of laws into force, according to the author of the referral, the element of unconstitutionality consists in the contradiction between the impugned text of law and the provisions of Article 78 of the Constitution, regulating the coming into force of laws. Contrary to these provisions, Article III of the law subject to review expressly states that its provisions shall enter into force on the date of publication in the Official Gazette of Romania, Part I. Therefore, it follows that the provisions of the law apply before its entry into force, which, however, according to Article 78 of the Constitution, can only take place 3 days after its publication or at a later date provided for in its text.

In accordance with the claims of the author of the referral, the Court found that the cited legal text violated the provisions of Article 78 of the Constitution. The clear meaning of the constitutional text is underlined in the case-law of the Constitutional Court, which held that a text of law amended or newly introduced could not enter into force before the expiry of the time-limit provided for by Article 78 of the Constitution, i.e. 3 days from the date of publication in the Official Gazette of Romania of the amending regulatory act.

**III. For all these reasons,** unanimously, the Court upheld the objections of unconstitutionality and found that the Law supplementing National Education Law No 1/2011 was unconstitutional as a whole.

*Decision No 190 of 27 May 2020 on the objection of unconstitutionality of the Law supplementing National Education Law No 1/2011, published in the Official Gazette of Romania, Part I, No 475 of 4 June 2020*

**The principle of bicameralism is reflected not only in the institutional dualism within Parliament but also in the functional one, as Article 75 of the Basic Law establishes law-making prerogatives according to which each of the two Chambers is, in expressly defined cases, either the first Chamber referred to or the decision-making Chamber. The order in which the two Chambers of Parliament will debate the draft law or the legislative proposal also depends on the characterization of the law, depending on which the Chamber competent to adopt the law as the first Chamber referred to, respectively as the decision-making Chamber, pursuant to Article 75 (1) of the Constitution, will be determined. The rule contained in Article 75 (5) of the Constitution establishes the manner of solving a possible conflict of competence regarding the order of referral of the Chambers.**

**Keywords:** *legislative adoption procedure, principle of bicameralism, principle of non-duplication of the regulation in a field, principle of legal certainty, conflict of competence regarding the order of referral of the Chambers, organic/ordinary law*

**Summary**

**I. As grounds for the referral of unconstitutionality,** the authors of the objection filed pleas of extrinsic unconstitutionality, claiming that the way in which the Law on measures for the protection of teaching, management, guidance and control staff in the pre-university education system violates the constitutional provisions of Article 75 (1). On the one hand, taking into account the regulatory object of the law, i.e. rules regarding the general organization of the education system and rules regarding criminal offences, punishments and the regime of their enforcement, according to Article 73 (3) (n) and (h) of the Constitution, the law has the status of an organic law. On the other hand, taking into account the constitutional provisions of Article 75, which expressly and restrictively lists the law-making fields that fall within the competence of the Chamber of Deputies, as the first Chamber referred to, it follows that in the case of laws concerning the general organization of the education system, the Chamber of Deputies must be the first Chamber referred to. In this context, the authors of the referral showed that, from a procedural point of view, the law had been adopted by the Chamber of Deputies, as the first Chamber referred to, and by the Senate, as the decision-making Chamber. Thus, the Chamber of Deputies adopted, as the first Chamber referred to, rules having as object criminal offences, punishments and the regime of their enforcement, although, according to the Constitution, the Chamber of Deputies is the decision-making Chamber in such cases. Therefore, considering that the Senate is the Chamber that made the final decision, the adopted law is unconstitutional in terms of the legislative adoption procedure, in violation of the provisions of Articles 73 and 75 of the Constitution.

Concerning the plea of intrinsic unconstitutionality, it refers to the provisions of Article 1 (3) and (5), Article 16 (1), Article 23 (11) and Article 53 of the Constitution. The authors of the referral claim that several provisions in the law subject to constitutional review contain unclear provisions, likely to affect the effectiveness of the regulatory act. Regarding the principle of non-duplication the of regulation in a field, the legislator created a *lex tertia* in which it included rules from different fields, which should have been included, on the one hand, in the National Education Law No 1/2011, and, on the other hand, in the Criminal Code and in the Code of Criminal Procedure.

**II. By examining the pleas of** extrinsic **unconstitutionality** formulated with reference to the constitutional provisions in Article 73 (3), the Court noted that the field of organic laws was very clearly defined by the text of the Constitution, this rule implying a strict interpretation, so that the legislator will adopt organic laws only in those fields.

The Court noted that, according to the title and regulatory content, the law regulated rules referring to the statute of teaching, management, guidance and control staff in the pre-university education system, granting to this professional category a legal protection similar to that of public authority functions. The regulatory object of these rules is limited to the notion of "general organization of the education system", provided for by Article 73 (3) (n) of the Constitution, so that the regulatory act has the nature of an organic law. The forms of legal protection established by the legislator aim at aggravating criminal liability for certain criminal offences committed against the teaching staff (Article 5), special rules regarding the notification of the criminal investigation bodies (Article 6) and an increased probative value of the referrals filed in writing by the teaching, management, guidance and control staff, while performing the duties specific to their functions (Article 4). All these regulations fall within the legal scope of "criminal offences, punishments and the regime of their enforcement" and, according to Article 73 (3) (h) of the Constitution, they also must be ordered by organic law.

Thus, the Court found that, being adopted by an absolute majority, respectively by the majority vote of each Chamber, pursuant to Article 76 (1), the Law on measures for the protection of teaching, management, guidance and control staff in the pre-university education system while performing the duties specific to their functions complied with the constitutional procedure for adopting organic laws. Since the formal criterion (the majority required by the Constitution for the valid adoption of a law) is subsequent to the fulfilment of the material criterion for classifying the law in the category of organic or ordinary laws, the Court found that, by adopting the law by the majority required by the constitutional rule, the legislator complied with the limits of the organic field provided for by Article 73 (3) of the Constitution.

On the other hand, the Court noted that, as a rule, the establishment of the organic or ordinary nature of a law was also relevant with regard to the observance of the procedure for the adoption of laws, as enshrined by the Basic Law. The initial classification of a law to be adopted, as organic or ordinary, has an influence on the legislative process, determining the course of the draft law or legislative proposal.

Examining the pleas of extrinsic unconstitutionality related to the constitutional provisions of Article 75, the Court noted that Parliament was the supreme representative

body of the Romanian people and the only legislative authority of the country, and that its structure was bicameral, consisting of the Chamber of Deputies and the Senate. Article 75 of the Basic Law establishes law-making prerogatives according to which each of the two Chambers is, in expressly defined cases, either the first Chamber referred to or the decision-making Chamber. Also, taking into account the indivisibility of Parliament as the supreme representative body of the Romanian people and its uniqueness as the country's legislative authority, the Constitution does not allow for the adoption of a law by a single Chamber, without the draft law being subject to debate in the other Chamber as well. Article 75 of the Basic Law introduced, after its revision and republishing in October 2003, the solution of the obligation to refer to the Senate, in certain matters, as the first Chamber, as the Chamber of sober second thought or, as the case may be, to the Chamber of Deputies and, consequently, the regulation of the role of decision-making Chamber, for certain matters, of the Senate and, for other matters, of the Chamber of Deputies, precisely so as not to exclude one Chamber or another from the law-making mechanism.

In setting the limits of the principle of bicameralism, the Court considered that the application of this principle could not result in diverting the role of Chamber of sober second thought of the first Chamber referred to, in the sense that it would be the Chamber which would definitively set the content of the draft law or legislative proposal (and, in fact, the regulatory content of the future law), thus leading to the fact that the second Chamber, the decision-making Chamber, will not have the possibility to amend or supplement the law adopted by the Chamber of sober second thought, but only the possibility to approve or dismiss it. From this perspective, it is undeniable that the principle of bicameralism requires both the cooperation of the two Chambers in the law-making process, and their obligation to express, by vote, their position on the adoption of laws.

The Court established that, by using the phrase "will make a final decision" with regard to the decision-making Chamber, Article 75 (3) of the Constitution did not exclude but, on the contrary, implied that the draft law or legislative proposal adopted by the first Chamber referred to be subject to debate in the decision-making Chamber, where it could be amended and supplemented. The Court emphasised that, in this case, the decision-making Chamber could not, however, substantially modify the regulatory object and configuration of the legislative initiative, with the consequence of diverting from the aim pursued by the initiator.

The provisions of Article 75 (4) and (5) of the Constitution regulate the procedure of returning the law to the Chamber with the final decision-making competence, established according to the regulatory object of a certain legal provision. When sharing the decision-making competence between the two Chambers of Parliament, according to Article 75 (1), the framers took into account the hypothesis in which a provision from the draft law/legislative proposal subject to adoption is adopted/amended during the law-making process by one Chamber, although it falls under the final decision-making competence of the other Chamber. The institution of returning the laws solves the conflict of competence and seeks to avoid a possible deadlock in the law-making process specific to the system of functional bicameralism, by ensuring the prevalence of the parliamentary Chamber competent to make the final decision.

If, during the law-making process, the first Chamber referred to adopts a provision that, according to its regulatory object, falls, pursuant to Article 75 (1) of the Constitution, under its decision-making competence, the provision is definitively adopted if the second Chamber also "agrees" to it. Otherwise, if the second Chamber intervenes on the respective provision (in the sense of removing or amending/supplementing it), the law, as adopted by the second Chamber, must be referred back to the first Chamber, which will make a final decision regarding exclusively that provision, by vote, in the emergency procedure. In fact, the first Chamber is thus once again put in the situation of acting as the decision-making Chamber, considering the regulatory object of the respective provision and in accordance with the provisions of Article 75 (1) of the Constitution, as an expression of the principle of functional bicameralism. The same rule of returning the laws is provided for by Article 75 (5) of the Constitution also for the situation in which the second Chamber, the decision-making one, adopts a provision that falls, through its object, under the decision-making competence of the first Chamber referred to. Obviously, in this situation, the decision-making Chamber adopts a new provision compared to the form of the law received following its adoption by the first Chamber referred to. In this case, the second Chamber does not have its own decision-making competence regarding the regulatory object of the new provision, but it represents the Chamber of sober second thought, so it is necessary that the law be sent back to the first Chamber, which will make a final decision only with regard to the legislative intervention (the novelty) of the second Chamber. In other words, it is not possible for a provision to be introduced, at the stage of its adoption in the decision-making Chamber, exclusively by such a Chamber, if, strictly in its respect, the latter does not have the competence to make a final law-making decision expressly assigned by Article 75 (1) of the Constitution, because it would mean that the respective legal rule be the result of the adoption by a single parliamentary Chamber, in violation of the principle of bicameralism. Therefore, it results that the institution of returning the laws acts as a regulator of competence, in the sense of protecting the Chamber with the final decision-making competence, established according to Article 75 (1) of the Constitution, in close connection with the principle of bicameralism as well, because both the issue of observance of the principle of bicameralism and the return of laws can only be raised with regard to a provision on which the second Chamber intervenes, depending on whether or not its final decision-making competence is maintained in relation to the regulatory object of the provision in question.

Given these reasons and by examining the pleas of unconstitutionality filed with regard to the Law on measures for the protection of teaching, management, guidance and control staff in the pre-university education system while performing the duties specific to their functions in relation to the provisions of Article 75 (1), (4) and (5), read in conjunction with those of Article 73 (3) of the Constitution, the Court found them to be well grounded.

In this case, the Law on measures for the protection of teaching, management, guidance and control staff in the pre-university education system while performing the duties specific to their functions regulates two fields for which the Basic Law expressly provides an organic nature, under Article 73 (3) (h) and (n): the statute of teaching staff (Articles 1 to 3 of the law), respectively criminal offences and punishments (Articles 4 to 6 of the law). Taking into account the constitutional provisions of the first sentence of Article 75 (1), which expressly

and restrictively lists the law-making fields that fall within the competence of the Chamber of Deputies, as the first Chamber referred to, it follows that in the case of laws concerning the general organization of the education system, the Chamber of Deputies must be the first Chamber referred to. Therefore, the regulation of the statute of the teaching staff entails the competence of the Chamber of Deputies, as the first Chamber referred to, and that of the Senate, as the decision-making Chamber. Moreover, the provisions of the second phrase of Article 75 (1) of the Constitution, based on a *per a contrario* reasoning, establish that "the other draft laws or legislative proposals are subject to the Senate's debate and adoption, as the first Chamber referred to". In other words, the legislative proposal that deals with criminal offences, punishments and the regime of their enforcement is subject to the vote of the Senate, as the first Chamber referred to, and of the Chamber of Deputies, which makes the final decision. Therefore, the law subject to review contains rules on which, by observing the principle of functional bicameralism, each of the two Chambers of Parliament is competent to make the final decision.

The Court noted that Parliament's unitary approach in the law-making process concerning the law subject to review met the imperative requirement of cohesion and coherence, so it is normal that, in view of the object and purpose of the regulation (adoption of measures to protect the teaching staff) with regard to which the Chamber of Deputies has the quality of first Chamber referred to, the legislative procedure started with the submission of the legislative proposal to this Chamber. However, the application of the provisions of Article 75 (1) of the Constitution, according to which the strict and distinct classification of each of the rules that make up the impugned law is achieved, imposes the observance of the provisions of Article 75 (4) and (5) of the Constitution.

In view of these reasons, the procedure for adopting the law would have complied with the constitutional provisions only in so far as the Senate had no longer amended or supplemented the rules which should have been adopted by the Chamber of Deputies, as the decision-making Chamber, respectively the rules concerning criminal liability for certain criminal offences committed against certain categories of teaching staff. Or, the Senate adopted a series of amendments modifying these rules. The amendments made concern aspects of substantive and procedural criminal law which the Chamber of Parliament with a decision-making role, according to Article 75 (1) of the Constitution, is bound to take up for debate and submit to vote. Thus, in accordance with Article 75 (4) and (5) of the Constitution, the law should have been returned to the Chamber of Deputies, which, as the decision-making Chamber, should have made the final decision.

In conclusion, given that the Senate is the Chamber that made the final decision concerning the Law on measures for the protection of teaching, management, guidance and control staff in the pre-university education system while performing the duties specific to their functions, in its entirety, the Court found that the regulatory act thus adopted was unconstitutional, violating the provisions of Article 75 (1), (4) and (5), read in conjunction with those of Article 73 (3) of the Constitution.

**III. For all these reasons,** unanimously, the Court upheld the objections of unconstitutionality and found that the Law on measures for the protection of teaching,

management, guidance and control staff in the pre-university education system while performing the duties specific to their functions was unconstitutional as a whole.

*Decision No 235 of 2 June 2020 on the objection of unconstitutionality of the provisions of the Law on measures for the protection of teaching, management, guidance and control staff in the pre-university education system while performing the duties specific to their functions, published in the Official Gazette of Romania, Part I, No 530 of 19 June 2020*

**The legislative solutions included in the emergency ordinance in the field of institutes for advanced studies in Romania are not based on the existence of an exceptional situation whose regulation cannot be postponed. The flaw of unconstitutionality of an emergency ordinance issued by the Government cannot be covered by the endorsement of the respective ordinance by Parliament. Consequently, the law approving an unconstitutional emergency ordinance is itself unconstitutional.**

**Keywords:** *emergency ordinance, extraordinary situation, urgency of regulation, public administrative authority, public institution of national interest, order of referral of the Chambers, organic law*

**Summary**

**I. As grounds for the referral of unconstitutionality**, the author of the objection filed pleas of extrinsic unconstitutionality, claiming that the Law approving Government Emergency Ordinance No 66/2019 amending and supplementing Law No 117/2017 on the establishment of the Institute for Advanced Studies in Levant Culture and the Civilization had been adopted by disregarding the provisions of Article 75 (1), Article 76 (1), Article 115 (4), Article 117 (3) and Article 147 (4) of the Constitution.

Regarding the violation of Article 115 (4) and Article 147 (4) of the Constitution, the author of the referral indicated that Emergency Ordinance No 66/2019 had as regulatory object the amendment and supplementing of Law No 117/2017 on the establishment of the Institute for Advanced Studies in Levant Culture and Civilization (I.S.A.C.C.L.). The author of the referral argued that the reasons stated by the initiators of the regulatory act were not such as to justify an extraordinary situation whose regulation could not be postponed or achieved through the ordinary legislative procedure. Clarifying the status of the I.S.A.C.C.L. and other aspects related to the organization and functioning of the institution does not fall, according to the author of the objection of unconstitutionality, within the provisions of Article 115 (4) of the Constitution, as developed by the case-law of the Constitutional Court, and the adoption of Government Emergency Ordinance No 66/2019 was made in violation of the constitutional requirements and of the case-law of the Court. Moreover, the flaw of extrinsic unconstitutionality cannot be covered by the law approving the emergency ordinance, which is why both the emergency ordinance and the law approving it are deemed unconstitutional, in their entirety.

In qualifying the status of I.S.A.C.C.L., by reference to the objectives of this authority, as established by Article 2 of Law No 117/2017, as amended by Government Emergency Ordinance No 66/2019, respectively by reference to its prerogatives provided for by Article 3 of the same regulatory act, it results that I.S.A.C.C.L. is an authority of the specialized central administration. Furthermore, the fact that throughout the regulatory act referring to the establishment, organization and functioning of this authority there are no provisions that reveal a subordination of this authority to another hierarchically superior body reveals its autonomous nature. From this perspective, the new statute of the I.S.A.C.C.L. cannot be defined outside the provisions strictly and limitatively provided for by the framers in Articles 116 and 117 of the Basic Law. Based on these considerations, the Law approving Government Emergency Ordinance No 66/2019 was adopted in violation of Article 117 (3) of the Constitution, being unconstitutional, as a whole.

The author of the referral then stated that, in accordance with Article 75 (1) of the Constitution, the draft organic laws referred to in Article 117 (3) of the Constitution were submitted to the Chamber of Deputies for discussion and adoption, as first referred Chamber. Therefore, when an autonomous administrative authority is established, the Chamber of Deputies is the Chamber of sober second thought and the Senate is the decision-making Chamber. In the present case, the Law approving Government Emergency Ordinance No 66/2019 was adopted by the Senate, as Chamber of sober second thought, and by the Chamber of Deputies, as decision-making Chamber, in breach of the constitutional powers provided for in Article 75 (1) of the Basic Law, a procedural defect entailing the unconstitutionality of the law subject to constitutional review as a whole.

The author of the objection also raised challenges of inherent unconstitutionality, arguing that a number of provisions of the Law approving Government Emergency Ordinance No 66/2019 infringe Article 1 (5) of the Constitution.

**II. Having examined the challenges of** extrinsic **unconstitutionality,** namely the challenges against Articles 115 (4) and 147 (4) of the Constitution, the Court held that, in accordance with its settled case-law on Article 115 (4) of the Constitution, the Government may adopt emergency ordinances under the following conditions, which must be cumulatively met: the existence of an extraordinary situation; which regulation cannot be deferred and where the reasons for the urgency are included in the ordinance. Extraordinary situations express a high degree of deviation from the ordinary and are objective in nature, in the sense that their existence does not depend on the will of the Government, which, in such circumstances, is obliged to react promptly to defend a public interest by means of the emergency ordinance. For an emergency ordinance to be issued, it is therefore necessary to have an objective, quantifiable factual situation, independent of the Government's control, which jeopardises a public interest. The Court held that reliance on the element of expediency, by definition of a subjective nature, which is given an emergency determining contributory effectiveness, which implicitly converts it into an extraordinary situation, requires the conclusion that it is not necessarily and unequivocally objective, but may also give expression to subjective factors.

Having examined the title and content of Government Emergency Ordinance No 66/2019, the Court held that, by adopting that legislative act, the Government amended and

supplemented a legislative act concerning I.S.A.C.C.L., namely Law No 117/2017. Thus, in the preamble to the Emergency Ordinance, the Government was required to identify the extraordinary situations the regulation of which could not be delayed and to state the reasons for the urgency of legislating on all the amended matter.

The Court found that, in justification of the extraordinary situation to be regulated by the adoption of an emergency ordinance in the field of advanced education institutes in Romania, namely I.S.A.C.C.L., in the preamble to the contested legislative act, the Government focused on the existence of "incomplete legislation", which requires "clarification of the statute, the operation and subordination arrangements and the classification of staff of advanced education institutes in Romania". In other words, the question arose as to the mandatory issue of an emergency ordinance which "ensures the conditions necessary for public institutions to operate in the best possible conditions, so that the objectives pursued by the legislator when setting up those structures can be attained". However, such a reason, irrespective of how it is expressed, cannot constitute an extraordinary situation requiring the adoption of an emergency ordinance. The operation of public institutions is carried out in accordance with the legislation in force, and the identification of efficiency-rendering solutions with regard to the status or classification of the staff of those institutions cannot be classified as a regulation the adoption of which is required as a matter of urgency, since it is not based on the existence of an extraordinary situation. The fact that negative effects may occur "as a result of the blocking of ongoing activities and projects for which budgetary funds have been allocated and incurred" is apparent from the assessment of the way in which the legal provisions in force are interpreted and applied, as well as from the way in which the own powers are exercised by the public institution and by the other entities with which it establishes collaborative relations. However, the identification of shortcomings in the system of operation of a public institution in Romania, which could be caused by "incomplete legislation" in this area, may constitute the basis for the Government's promotion of a draft law amending the current legislative framework in the field of advanced education institutes in Romania, but in no way constitutes an extraordinary situation requiring urgent correction within the meaning of Article 115 (4) of the Constitution.

The Court held that, although the field of scientific research into cultures and civilisations in the historic Levant area, the protection of geological, biological, geographical and archaeological areas or the promotion of dialogue between the peoples of the historic Levant area concerned social and cultural interests, which could be circumscribed by a particular public interest, the elements invoked as extraordinary situations, to be remedied as a matter of urgency, were not objective, quantifiable situations beyond the control of the Government, which would jeopardise a public interest, and therefore did not meet the requirements laid down in Article 115 (4). Since the case-law of the Constitutional Court has held, with regard to the concept of "extraordinary situation" and the concept of "urgency", that they do not overlap with the reasons for the usefulness of the legislation, the appropriateness of adopting the legislative act or the purpose/rationale of the legislation, it is clear that the extraordinary situation cannot be caused by the existence of an incomplete, unpredictable legislative framework and the urgency of the measure cannot be justified by the need to improve that framework or by finding the "strictly formal existence" of I.S.A.C.C.L..

In the light of the arguments set out above, the Court found that Government Emergency Ordinance No 66/2019 amending and supplementing Law No 117/2017 establishing the Institute for Advanced Studies in Levant Culture and Civilization infringes Article 115 (4) of the Constitution.

The Constitutional Court has consistently held in its case-law that the unconstitutionality of a simple ordinance or an emergency ordinance issued by the Government cannot be remedied by Parliament's approval of that ordinance. The law approving an unconstitutional emergency ordinance is itself unconstitutional.

As regards the criticism of extrinsic unconstitutionality in the light of the provisions of Article 117 (3) in conjunction with Articles 76 (1) and 75 (1) of the Constitution, respectively, the Court considered it necessary to establish the legal nature of I.S.A.C.C.L. In accordance with Article 1 of Law No 117/2017 establishing the Institute for Advanced Studies in Levant Culture and Civilization, as amended by Article 1 of Government Emergency Ordinance No 66/2019, I.S.A.C.C.L. is "a specialised, autonomous public institution of national interest with legal personality" and "a World Academy of Art and Science Centre of Excellence". The Institute therefore operates as a public institution, financed from the State budget, whose main purpose is to conduct scientific research into cultures and civilisations in the historic Levant area and to protect geological, biological, geographical and archaeological areas representative of the universal cultural heritage by university communities in cooperation with local communities and to promote dialogue between the peoples of the historic Levant area [Article 2 (1) of the Law, as amended by Article 2 of the Emergency Ordinance].

In view of the articles of association of I.S.A.C.L., its object, the purposes for which it was created and the entities with which the Institute collaborates in order to achieve its purpose, the Court found that it is a public institution of national interest, with an academic profile, specialising in scientific research in the field of culture and civilisation. It also confers on it the status of centre of excellence of the World Academy of Art and Science. None of the elements listed demonstrates that the institute is an administrative public authority, since it is neither a State body acting under a public authority nor a legal person governed by private law which, according to the law, has public utility or is authorised to provide a public service, as a public authority. Although the field of scientific research into cultures and civilisations in the historic Levant area, the protection of geological, biological, geographical and archaeological areas, or the promotion of dialogue between the peoples of the historic Levant area, concerns social and cultural interests, which may be circumscribed by a particular public interest, the legislator has neither granted it public utility status nor authorised the Institute to provide a public service.

Accordingly, the Court found that Law No 117/2017 establishing the Institute for Advanced Studies in Levant Culture and Civilization did not establish an autonomous administrative authority and Government Emergency Ordinance No 66/2019 did not regulate the powers of such an authority, so that the criticism under Article 117 (3) of the Constitution, which provides that "*Autonomous administrative authorities may be established by an organic law*", cannot be upheld. By implication, neither are the constitutional provisions contained in Article 75 (1) relating to the order of referral to the Chambers of the Parliament in the event of the adoption of a law intended to create an autonomous administrative authority, namely amending the

status of such an authority, nor those contained in Article 76, (1) relating to the quorum for the adoption of organic laws, have been infringed.

**III. For all these reasons**, the Court unanimously upheld the objection of unconstitutionality and found that the Law approving Government Emergency Ordinance No 66/2019 amending and supplementing Law No 117/2017 establishing the Institute for Advanced Studies in Levant Culture and Civilization and Government Emergency Ordinance No 66/2019 were unconstitutional as a whole.

*Decision No 237 of 3 June 2020 on the objection of unconstitutionality of the Law approving Government Emergency Ordinance No 66/2019 amending and supplementing Law No 117/2017 establishing the Institute for Advanced Studies in Levant Culture and Civilization and Government Emergency Ordinance No 66/2019, published in the Official Gazette of Romania, Part I, No 512 of 16 June 2020*

**The right to vote and the right to stand as a candidate are naturally exercised in timely elections. In principle, the mandate conferred may not exceed the time-limit laid down by law, otherwise the exercise of those electoral rights will be restricted. The electoral system must be regulated, in accordance with Article 73 (3) (a) of the Constitution, by means of an organic law adopted during parliamentary debates, in compliance with the prohibition laid down in Article 115 (6) of the Basic Law.**

**Keywords:** *government emergency ordinances, local elections, electoral system, right to vote, right to stand as a candidate, legal certainty, law rejecting the emergency ordinance, democratic state, national sovereignty, cooperation of powers, effects of decisions of the Constitutional Court*

**Summary**

**I. As grounds for the objection of unconstitutionality**, the authors of the referral argued that the Parliament had breached the principle of sincere cooperation between the State authorities, as by setting the date of local elections, even though it was the statutory power of the government. Parliament's intervention in an area reserved exclusively to the government is in breach of the principle of the separation of powers.

The concept of legislative delegation establishes a form of cooperation between Parliament and the Government in terms of law-making. Since its legal regime is laid down in the Constitution, it must be respected by both parties involved. The Government must therefore fully comply with the conditions for issuing an emergency ordinance, but the Parliament is also obliged not to intervene in a discretionary manner in the sphere of the legislative process carried out by the Government.

It was also alleged that the principle of bicameralism had been infringed, on the ground that the two Chambers had acted in a manner diametrically opposed to the aim pursued by

the delegated legislator. Repeals, amendments and additions made by the two Chambers were submitted, with the specification that the date of initiation of the electoral procedures had changed substantially and it was established the date of the elections would be set by the Parliament and not by the Government. Those situations were not taken into account by the author of the legislative act. Thus, what was intended to be a rule not to change the design of the existing legal framework, but merely to adapt it to the effects of the COVID-19 pandemic, was transformed into a measure of reconfiguration of the whole mechanism for setting the election date for local public authorities.

**II. Having examined the objection of unconstitutionality**, the Court addressed, as a matter of priority, questions relating to the relationship between the Parliament and the Government, since they concern the institutional architecture of the State itself. Where the Court is called upon to examine the issue of sincere cooperation between public authorities, that analysis is not limited to specific or particular issues, viewed solely from the point of view of one of the authorities concerned. A coherent and exhaustive examination of the constitutional legal relationships existing between the public authorities is necessary. The Court therefore examined whether the Government had constitutional competence to issue an emergency ordinance regulating the prolongation of the mandates of local public administration authorities.

In the present case, the Court relied on the principle of the periodicity of elections, namely that the mandate of a representative assembly must not exceed a certain period laid down by the Constitution or by law. Democratic governance requires the people to decide at regular intervals so that the representatives reflect their will. Given the importance of this principle, the exceptions (resulting in the extension of the mandates of elected representatives beyond the statutory deadlines) are strictly and exhaustively provided for by the Constitution and the law and concern extreme situations of a very particular nature, such as the state of mobilisation, war, siege or emergency, natural calamity, disaster or particularly serious damage, situations which do not exist in the present case. The democratic nature of a State (such as the Romanian State is defined in the first article of the Constitution) cannot be conceived without electoral legislation allowing, effectively, that citizens express their real will to choose their representative bodies, through free, regular and fair elections. The right to free elections is widely regarded as the most profound expression of the organisation of a truly democratic society and requires respect for certain requirements, including the stability of legal rules in the electoral field. The stability of these rules is an expression of the principle of legal certainty, implicitly established by Article 1 (5) of the Constitution. According to this principle, citizens must be protected against a danger coming from the right itself, against the insecurity that the law has created or risks creating, requiring the law to be accessible and foreseeable.

The electoral system must be regulated, in accordance with Article 73 (3) (a) of the Constitution, by means of an organic law adopted during parliamentary debates, in compliance with the prohibition laid down in Article 115 (6) of the Basic Law.

With regard to elected public authorities, the Constitution set the term of office of the Parliament at 4 years and of the President of Romania at 5 years, but left it to the organic

legislator to determine the mandates of local public administration authorities. However, it is clear that the constituent legislator could not envisage the election of local public administration authorities for an indefinite or variable period, but for a mandate of fixed duration.

Elective mandates can only be extended by an authority that is also elected and enjoys representativeness at national level. It alone has the necessary popular legitimacy. As far as the Parliament is concerned, the Constitution establishes a legal extension of its mandate in certain situations, so there is no question of an authority extending that mandate. In the case of the mandate of the local public administration authorities, the legislator chose the extension to be carried out by organic law, precisely because only an elected public authority can do so, namely the supreme representative body of the Romanian people — the Parliament. The Government is an executive authority, not a representative body formed after elections, so the people cannot exercise national sovereignty through it.

The provisions of Article 115 (6) of the Constitution generically establish that the emergency ordinance may not affect fundamental rights and freedoms. In that generic category, the constituent legislator expressly listed the electoral rights (Article 36 of the Constitution on the right to vote, Article 37 of the Constitution on the right to stand as a candidate), as fundamental rights which cannot be affected by the issuing of an emergency ordinance, which shows the particular importance attached to them. The Government, as was the case with the adoption of Emergency Ordinance No 57/2019, fixed the duration of the mandates of the local public administration authorities, but derogations from the legislative framework do not fall within its competence as delegated legislator. Moreover, the Court found that the extension of the mandate of local public administration authorities affects their very regime. The extension of that mandate directly concerns their election, with the result that postponing the election of those authorities may have negative consequences in relation to their popular legitimacy. The extension of the mandate of local public authorities therefore affects the legal regime of some fundamental authorities, expressly provided for in Articles 121 and 122 of the Constitution, in the component relating to their election.

The rule of law, even during the state of emergency, enshrines a number of safeguards designed to ensure that citizens' rights and freedoms are respected. An emergency ordinance cannot therefore be adopted in that field. Any breach of this division of powers between the Parliament and the Government, in the sense that the Government takes over an exclusive power of Parliament, must be penalised by the Parliament by adopting a law of rejection, an expression of parliamentary control over the Government's activities. The Court pointed out that the Parliament has a discretionary power to reject an emergency ordinance or to repeal, amend or supplement it, as the case may be, in accordance with the principles and provisions of the Constitution, so that there is no question of the Parliament itself encroaching on the Government's delegated power to legislate.

In conclusion, by issuing Emergency Ordinance No 44/2020, the Government undertook an exclusive competence of the Parliament and infringed the constitutional loyalty rules derived from Article 1 (4) and guaranteed by Article 1 (5) of the Constitution.

A declaration that the law approving the emergency ordinance is unconstitutional also includes the ordinance to which it refers, which ceases to produce legal effects, under the

conditions laid down by Article 147 (1) of the Constitution. Parliament will have to reject by law the unconstitutional emergency ordinance and possibly regulate, in accordance with Article 115 (8) of the Constitution, the necessary measures regarding the legal effects produced during the period of application of Government Emergency Ordinance No 44/2020.

**III. For all these reasons,** by a majority vote, the Court upheld the objection of unconstitutionality and found that the Law approving Government Emergency Ordinance No 44/2020 on the extension of the mandates of local public administration authorities from 2016 to 2020, certain measures for the organisation of local elections in 2020, as well as the amendment of Government Emergency Ordinance No 57/2019 on the Administrative Code, and Government Emergency Ordinance No 44/2020, taken as a whole, were unconstitutional.

*Decision No 240 of 3 June 2020 on the objection of unconstitutionality of the Law approving Government Emergency Ordinance No 44/2020 on the extension of the mandates of the local public administration authorities from 2016 to 2020, certain measures for the organisation of local elections in 2020, and amending Government Emergency Ordinance No 57/2019 on the Administrative Code and Government Emergency Ordinance No 44/2020, published in the Official Gazette of Romania, Part I, No 504 of 12 June 2020*

**Whenever there is an overlap between various regulatory solutions or hypotheses contained in two or more articles or laws, there is a legislative parallelism contrary to Article 1 (5) of the Constitution. Therefore, two public authorities cannot concurrently regulate one and the same situation in a particular sphere of social relations.**

**Keywords:** *quality of the law, effects of decisions ascertaining the unconstitutionality*

**Summary**

**I. As grounds for the objections of unconstitutionality**, the authors of the referrals argued that the contested law has the same regulatory purpose as Government Emergency Ordinance No 44/2020, which extends the term of office of elected local representatives due to the COVID-19 pandemic. There is a genuine legislative parallelism which affects the principle of legal certainty in its component relating to the quality of the law. Such situations create legal uncertainty as to how citizens would adapt their behaviour in relation to the same rule contained in different acts.

Moreover, the legislation complained of appears as a rule applicable to a single individual case, namely the 2020 local elections, although the primary rule must relate to situations of a general nature.

**II. Having examined the objections of unconstitutionality**, the Court held that whenever there is an overlap between various regulatory solutions or hypotheses contained in two or more articles or laws, there is a legislative parallelism, contrary to Article 1 (5) of the Constitution. If a law having the same regulatory purpose as a legislative act in force

does not contain any provision relating to the settlement of the conflict between those legislative acts, there is a situation of legislative instability and inconsistency, with negative consequences for the application of the law to specific cases.

By comparing the legislative content of Articles 1 to 3 of Government Emergency Ordinance No 44/2020 with that of the contested law, the Court held that the two legislative acts had the same regulatory purpose, namely the extension of the terms of office of the authorities of the local public administration. The differences between them consist of two aspects, namely the date from which they are extended and the date until which those mandates are extended, as well as the authority determining the date of the elections. Thus, the Emergency Ordinance regulates the fact that the date from which the terms of office of the local authorities are to be extended is the date on which they cease as a result of their expiry, and the date until which they are extended shall be the date on which the new local authorities take over the mandates resulting from the elections, but no later than 31 December 2020. By contrast, the contested law provides that those terms of office are to be extended as from the date of termination of the state of emergency for a period not exceeding 6 months. At the same time, the Emergency Ordinance provides that the date of the elections is to be determined by decision of the Government, whereas, according to the contested law, the date of the 2020 local elections is determined by organic law.

The Court has held that there is legislative parallelism both where identical rules are applied in a particular sphere of social relations and where the same issue is regulated differently, as it has been done in the present case. Therefore, two public authorities cannot concurrently regulate one and the same situation in a particular sphere of social relations.

Since the contested law did not expressly repeal the contrary texts of Government Emergency Ordinance No 44/2020 and does not contain any correlation to the Ordinance, it disregards the mandatory requirements for the adoption of a legislative act, compliance with which is necessary to ensure the systematisation, unification and coordination of legislation. The law creates a legislative parallelism, prohibited by Article 16 of Law No 24/2000, which leads to situations of legislative inconsistency and instability. The situation of legislative inconsistency is all the more evident since, at the time of adoption of the law in question, the draft law approving Government Emergency Ordinance No 44/2020 was under parliamentary procedure and Parliament was able to decide on it on the basis of Articles 61 (1) and 115 (7) of the Constitution.

Under Article 147 (4) of the Basic Law, it is for the Parliament to declare that the legislative process has been automatically terminated, following a declaration that the law is unconstitutional, in its entirety.

**III. For all these reasons**, the Court unanimously upheld the objection of unconstitutionality and found unconstitutional the Law on the extension of the terms of office of local public administration authorities.

*Decision No 242 of 3 June 2020 on the objection of unconstitutionality of the Law on the extension of the terms of office of local public administration authorities, published in Official Gazette of Romania, Part I, No 503 of 12 June 2020*

## II. Decisions rendered within the *a posteriori* constitutional review

### 1. Constitutional review of Parliament's regulations [Article 146 (c) of the Constitution]

**A drafting deficiency relating to the accuracy of the wording does not necessarily render the legislative act unpredictable if the persons to whom it is addressed, having regard to their (parliamentary) status, can easily determine the meaning of that provision. In addition, in exceptional circumstances, it is desirable that the parliamentary procedure for the adoption of laws should be regulated as flexibly as possible.**

**Keywords:** *Regulation of the Senate, review of constitutionality of Parliament's resolutions, Standing Bureau of the Senate, Committee of Parliamentary Group Leaders, state of emergency, quality of regulation*

**Summary**

**I. As grounds for the referral of unconstitutionality,** the authors argued that, at the meeting of 26 March 2020, the Senate's Regulation were amended by the Standing Bureau of the Chamber, the amendments made being contrary to Article 64 of the Constitution. It was noted that Article $133^1$ of the Senate's Regulation, introduced by Resolution No 16/2020, gave the Standing Bureau the power to determine by its own decision the procedure for the holding by electronic means of meetings of the Standing Bureau of the Senate, meetings of the Parliamentary Group Leaders' Committee, meetings of the standing committees and meetings of the plenary of the Senate. Thus, a constitutional task of the Senate was transferred to an internal governing body of the Senate, namely the Standing Bureau. In accordance with Article 64 (1) of the Constitution, the Chambers of Parliament decide on their own organisation and procedures for the conduct of parliamentary works by means of their own regulations. None of the Chambers of Parliament can reserve to the Standing Bureau an own and exclusive power of the Chambers, as that would be in breach of the principle of parliamentary autonomy.

In addition, the new regulatory text enshrines a procedure unknown to Senators, which is not foreseeable and which is to be subject to the discretionary resolution of the Standing Bureau, which will adopt it by its own decisions whenever the political majority so wishes. Such a procedure for the conduct of Senate sessions is unclear and arbitrary, being contrary to Article 1 of the Constitution relating to the rule of law.

The new procedure described in the Senate Resolution No 16/2020 does not offer any of the democratic safeguards provided for by the Constitution concerning the functioning of the Chambers of Parliament. In addition to regulatory loopholes, the wording of the contested text is unclear, as it refers both to "exceptional situations, established by the competent authorities" and to the power of the Standing Bureau to declare, by resolution, the exceptional situation. However, the Standing Bureau cannot find, establish or declare exceptional situations.

Furthermore, by prohibiting the right to table amendments or to discuss the normative content of the law, the Parliament's deliberative function provided for in Article 61 (1) of the Constitution is infringed. As the procedure for the final vote can be modified by the Committee of the leaders of the parliamentary groups, a transfer of constitutional competences is carried out from the Parliament to a political body of a Chamber. The delegation of a decision-making power which the Constitution has reserved to the Chamber as a whole to a political body with no managerial role and without any power to work in that Chamber infringes Article 64 (1) of the Constitution and the principle of legality.

**II. Having examined the referral of unconstitutionality**, the Court held that it did not have jurisdiction to rule on the application of the regulations, since it would infringe the principle of the regulatory autonomy of the two Chambers established by the first sentence of Article 64 (1) of the Constitution. Members of Parliament's complaints concerning specific acts implementing the provisions of the Regulation fall within the exclusive competence of the Chamber of Deputies or the Senate, as the case may be.

The provisions contained in parliamentary regulations are not reference rules in the exercise of constitutional review, unless they have constitutional relevance and are expressly or implicitly laid down in a constitutional rule. In principle, the Chamber of Deputies/the Senate, through its vote on the draft resolution, covers its procedural flaws. The Court cannot be called upon to examine the specific conduct of the plenary sitting of the Senate and to conclude whether it was conducted in accordance with the Regulation or other rules, and therefore to infer therefrom the constitutionality or unconstitutionality of the legislative acts adopted. The Court reviews the constitutionality of the rule contained in the regulation and not the conduct of the sitting at which it was adopted or the constitutionality of a resolution or procedure adopted by the Standing Bureau.

The Court pointed out that public authorities must carry out their activities in accordance with the provisions of the Constitution, even under the decreed state of emergency, since the principle of legality is not limited or suspended during that period. As regards the criticisms of unconstitutionality concerning the delegation to the Standing Bureau of the power of the plenary of the Senate to determine the procedure for the conduct of sittings by electronic means, the Court noted that the contested text contained flexible rules to allow the Standing Bureau to draw up the procedures necessary to carry out the work of the Senate in situations which make it impossible for Senators to be present at the Senate's headquarters. The procedure referred to is therefore a technical one, representing secondary and detailed issues of how sittings are held by electronic means.

The text of the Constitution lays down neither the procedure for holding the sittings of the Chambers of Parliament nor the level of detail of the statutory rules, so that these aspects fall within the choice of the respective parliamentary Chamber. It is not for the Constitutional Court to determine the optimal level of detail of the Regulation itself. However, it is easy to understand that for exceptional circumstances it is desirable that the procedure is as flexible as possible so that it can respond to the various exceptional situations that have arisen. A procedure laid down by regulation may be amended only by a resolution of the plenary sitting of the Chamber, which implies that a quorum is met and a

majority vote is reached in that Chamber. Such a procedure for amending the Regulation gives it a certain degree of stability and formal rigidity. Instead, the acts of the Standing Bureau are more adaptable to the various situations, since they are adopted by a quorum and a majority vote at the level of the Standing Bureau.

As regards the complaint that neither the exceptional circumstances in which the procedure for discussion by electronic means applies nor the public authorities which may ascertain them are expressly specified in the contested text, the Court observed that, even though the wording of the text is rather atypical by making reference to too vague and generic notions, the contested text is not unpredictable, since, from its entirety, it can be concluded that it can only cover situations with a high degree of deviation from usual in relation to which the State authorities have put in place appropriate measures. These situations may only be those established by Articles 92 and 93 of the Constitution, i.e. partial and general mobilisation, state of war, state of siege and state of emergency. The fact that the regulatory provision could be drafted more precisely does not automatically amount to a breach of the quality requirements of legislative acts, but must be examined whether the wording chosen is sufficiently foreseeable to understand the hypothesis of the rule. A drafting deficiency relating to the accuracy of the wording does not necessarily render the legislative act unpredictable if the persons to whom it is addressed, having regard to their (parliamentary) status, can easily determine the meaning of that provision.

With regard to the complaint relating to the breach of Parliament's deliberative function provided for in Article 61 (1) of the Constitution, the Court found that the procedure for holding the sitting by electronic means consists of a set of measures of an organisational nature, which do not concern the Senators' right to table amendments. There is nothing to prevent amendments from being tabled to the committee dealing with the substance.

As regards the fact that the procedure for the final vote can be changed by the Committee of the leaders of the parliamentary groups, which is a political body without a leading role, the Court has held that this committee may legitimately choose between a procedure involving a single vote on the report and the legislative proposal, which is the rule in the case of Article $133^1$, and the general one involving two separate votes. Therefore, this text does not refer to the fact that the regulation itself can be amended by decision of the Committee of the leaders of the parliamentary groups, but to its right of choice between the two existing procedures. The Court also held that all the bodies of the Chambers of the Parliament are of a political nature, so that the conferral of such competence on the Committee of the leaders of the parliamentary groups does not raise any question of constitutionality. On the contrary, only if that power had been granted to a non-political body, for example the Secretariat-General of that Chamber, there would indeed have been a question of constitutionality, namely an interference in the conduct of the Chamber's activity. The principle of the rule of law was therefore observed in the present case.

**III. For all these reasons**, by a majority vote, the Court dismissed as unfounded the referral of unconstitutionality and found that the provisions of Article I of Senate's Resolution No 16/2020 supplementing the Senate's Regulation, as well as the resolution as a whole, are constitutional in the light of the criticisms made.

*Decision No 156 of 6 May 2020 on the referral of unconstitutionality of the provisions of Article I of Senate's Resolution No 16/2020 supplementing the Senate's Regulation and of the resolution as a whole, published in Official Gazette of Romania, Part I, No 478 of 5 June 2020*

**2. Settlement of exceptions of unconstitutionality of laws and ordinances [Article 146 (d) of the Constitution]**

**The right to the postponement of the execution of a sentence of imprisonment or life detention must be granted both to convicted women who are pregnant or have a child of less than one year of age and to men who have a child of less than one year of age. The exclusion of men from that possibility is contrary to the best interests of the child and infringes the principle of equality before the law and the right to family life.**

**Keywords:** *equal rights, family life, protection of children and young people, custodial sentence, non-discrimination based on gender*

**Summary**

**I. As grounds for the exception of unconstitutionality,** its author argued that Article 589 (1) (b) of the Code of Criminal Procedure infringes the constitutional provisions of Article 16 (1) on equality of citizens before the law and of public authorities, and those of Article 26 (1), on the respect and protection by public authorities of personal, family and private life, by granting the right to postponement of the execution of sentences of imprisonment or life detention only to convicted women who are pregnant or have a child of less than one year of age, and not also to men who do not have a child of less than one year of age. The author of the exception considered that also men should be able to request the postponement of the execution of the prison sentence for at least three months, in order to be able to organise the living conditions of the child and his mother during the period when the father would be imprisoned. In support of this hypothesis, reference was made to Article 453 (1) (c) of the Code of Criminal Procedure of 1968, which provided that the execution of the custodial sentence or life imprisonment could be postponed where, due to special circumstances, the immediate execution of the sentence would have had serious consequences for the sentenced person, his family or the unit at which he/she was working.

**II. Having examined the exception of unconstitutionality,** the Court referred to the judgment of 3 October 2017, delivered in the case of Alexandru Enache v. Romania, concerning Article 453 of the Code of Criminal Procedure of 1968. In that judgement, the European Court of Human Rights held that there was no infringement of the provisions of Article 14 relating to the prohibition of discrimination in conjunction with those of Article 8 concerning the right to respect for private and family life of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Strasbourg Court accepted that maternity has specific features to be taken into account, sometimes through protective measures, and held that, in view of the wide discretion granted to the defendant State in that field, there was a reasonable

relationship of proportionality between the means employed and the legitimate aim pursued. The Strasbourg Court also took into account the fact that the Romanian criminal law in force at the material time provided for all convicted persons, regardless of gender, also other possibilities to request postponement of the sentence.

The Constitutional Court held that, in the light of the right to take into care of the child, a convicted man who has a child of less than one year of age is in a situation comparable to that of a convicted woman with a child of the same age and that the difference in treatment between the two categories of convicted person has no objective and reasonable justification. Thus, with regard to parental leave and parental leave allowance, the Strasbourg Court pointed out that, beyond the differences that may exist between the father and the mother in their relationship with the child, as regards childcare during parental leave, men and women are in similar situations (Judgement of 22 March 2012 in the case of Konstantin Markin v. Russia). It is true that the concept of postponement of the execution of a custodial sentence, being of a criminal nature, is essentially different from parental leave, which is a measure pertaining to employment law. However, the question arises as to whether, during the child's first year of life, a convicted father finds himself in a situation similar to that of a convicted mother. From that perspective, the considerations held in the case of Konstantin Markin v. Russia are fully applicable to the present case. The postponement of the execution of a custodial sentence is directed primarily at the best interests of the child in order to ensure that the child receives appropriate attention and care in his or her first year of life. Although there may be differences in their relationship with the child, both the mother and the father may also pay that attention and ensure that care. Moreover, the Strasbourg Court observed that the possibility of obtaining postponement of the sentence exists until the child reaches the age of one year, thus going beyond the consequences of the mother's pregnancy and the birth.

In relation to the context of the imprisonment of a parent, the best interests of the child presuppose that the framework necessary for its normal development during intrauterine life is provided and that adequate parental attention and care is provided during the first year of life. Therefore, the case of postponement of execution of the sentence provided for in the contested provision does not concern only the interest of the convicted woman in postponing the enforcement of the final criminal judgement, in the light of the particular situation in which she finds herself but is primarily aimed at safeguarding the best interests of the child. That is also why convicted women who are pregnant or who have a child of less than one year of age are not automatically granted postponement of the sentence. It has thus been established in the practice of the courts that it is not possible to order the interruption of the execution of the prison sentence — for the pregnant woman — where she has been convicted of the murder of a newly-born child and has been deprived of her parental rights.

The Court found that there are situations in which the newborn child is deprived of maternal care, namely the death of the mother, the loss of her parental rights, the abandonment of the child, a prolonged illness or any other situation where the mother does not take care of the child. In such situations, the best interests of the child may dictate that the convicted father remains at liberty in order to provide the child with adequate care in his or her first year of life.

The Court also noted that, in the field of social security, the Romanian law provides for the right to maternity leave, as well as to parental leave, which can be granted to both women and men. Moreover, a comparative legal analysis reflects the fact that in contemporary European societies the role of fathers in caring for young children is better recognised.

In conclusion, in view of the important role played by the father from the earliest age of the child, the Court held that the difference in legal treatment in the present case does not serve the best interests of the child. Thus, the Court found that the principle of equal rights, read in conjunction with the right to family life, requires that the contested legislation also allows the convicted father to request the postponement of the sentence. Courts will have to assess, by assessing the circumstances of each individual case, whether such a postponement is justified.

**III. For all these reasons,** by a majority vote, the Court upheld the exception of unconstitutionality and found that the legislative solution contained in the provisions of Article 589 (1) (b) second sentence of the Code of Criminal Procedure, which excludes a man convicted who has a child of less than one year of age from the possibility to request the postponement of the execution of the custodial sentence or life imprisonment, was unconstitutional.

*Decision No 535 of 24 September 2019 on the exception of unconstitutionality of the provisions of Article 589 (1) (b) second sentence of the Code of Criminal Procedure, published in Official Gazette of Romania, Part I, No 1026 of 20 December 2019*

**During criminal proceedings, procedural measures, included the precautionary measures, are ordered by judicial bodies. The legislator does not have the power to regulate the maintenance of the administrative precautionary measure for an indefinite and random period during criminal proceedings. Similarly, the fact that there is no possibility of challenging those measures constitutes an infringement of the right to a fair trial.**

**Keywords:** *fair trial, quality of law, right to private property, legal certainty*

**Summary**

**I. As grounds for the exception of unconstitutionality**, its author argued that the statutory provisions of Article 213 (8) of Law No 207/2015 on the Code of Fiscal Procedure are ambiguous and unpredictable and leave room for arbitrary decisions by tax bodies. They also infringe the right to property by establishing a restriction which affects its very substance and does not strike a fair balance between the general social and economic interests and the legitimate particular interests of the taxpayer. They allow the tax authority to no longer order the lifting of the precautionary measure if it has referred the matter to the criminal authorities, but fail to state whether it is still required to issue the debt

instrument. However, in the absence of a debt instrument — an administrative act which the taxpayer may challenge and then bring an action before the courts — the taxpayer does not have the legal opportunity to bring an action before the courts. Thus, by simply referring the matter to the criminal authorities, the tax authorities create the premiss that precautionary measures will be extended sine die, even if the danger for which precautionary measures have been taken does not materialise. Maintaining fiscal precautionary measures for an indefinite and long period of time is not proportionate and constitutional in so far as precautionary measures are not taken in accordance with the Code of Criminal Procedure.

**II. Having examined the exception of unconstitutionality,** the Court observed that the issue under review is the temporal extension of a measure taken in the course of the administrative and tax proceedings and its maintenance during the criminal proceedings until an indefinite time, that is to say, until the date on which the case is settled by the prosecution or the court. There is thus no possibility of confusion between the two sets of proceedings. However, in criminal proceedings, procedural measures, included the precautionary measures, are ordered by judicial bodies, so that it cannot be recognised that the declaratory body has the power to order procedural measures relating to the conduct of the criminal proceedings.

In view of the negative effects which the termination of the precautionary measures could have, the Court did not deny that the precautionary measures ordered in the administrative procedure could automatically maintain their validity for a short and transitional period in order to allow the public prosecutor sufficient time to assess whether or not to order precautionary measures in the light of the specific circumstances of the case. However, the legislator does not have the power to regulate the maintenance of the administrative precautionary measure for an indefinite and random period during criminal proceedings.

The Court has held that the rules of law relating to criminal proceedings must be clear, precise and foreseeable, which implies, inter alia, that the legislator must lay down a coherent regulatory framework in which the rules complement each other in a harmonious manner, without creating contradictions between the general rules and the special rules. However, the Court found that legislation such as that at issue in the present case is contrary to Article 21 (3) of the Constitution on the fairness of criminal proceedings, since it eliminates the procedural safeguards required for ordering and challenging the precautionary measure, resulting in an excessive temporal scope of the precautionary measure of a fiscal administrative nature. The purpose of a procedural rule is, first, to protect the concerned person against the risks of misuse of powers, so that a measure of a fiscal administrative nature cannot diminish the procedural safeguards specific to criminal proceedings.

With regard to the reliance on Article 44 of the Constitution, the Court has held that the legislator has the right to determine the content and limits of the right to property, provided that this does not completely negate that right. In principle, the owner of the assets subject to precautionary measures loses the right to dispose of, alienate or encumber them, the measure affecting the attribute of the legal and material disposition over them for the entire duration of the criminal proceedings, pending the final resolution of the case. In its case-law

(Decision No 629 of 8 October 2015, published in the Official Gazette of Romania, Part I, No 868 of 20 November 2015), the Court has held that such a measure, even though it affects the right to property, is proportionate to the aim pursued. However, in order to reach such a conclusion, the Constitutional Court started from the premiss that the precautionary measure is ordered by a judicial body. Again, in its case-law, i.e. Decision No 24 of 20 January 2016, published in the Official Gazette of Romania, Part I, No 276 of 12 April 2016, the Court held that the State did not fulfil its constitutional obligation to guarantee private property if it did not ensure effective judicial review of the freezing of assets, even if ordered by a court, in the course of criminal proceedings. Since the Court has held that a legislative solution which does not make it possible to challenge the adoption of the precautionary measure by the pre-trial chamber judge or by the court infringes the right to private property, the same solution is all the more necessary in the event that such a measure is taken by a tax body during criminal proceedings.

The Court therefore found that the contested law infringed the constitutional requirements relating to the quality of the law and the legal certainty of the person, as well as the taxpayer's right to a fair trial and private property.

**III. For all these reasons,** the Court unanimously upheld the exception of unconstitutionality and found unconstitutional Article 213 (8) of Law No 207/2015 on the Code of Fiscal Procedure, in the version prior to its amendment by Government Ordinance No 30/2017 amending and supplementing Law No 207/2015 on the Code of Fiscal Procedure. By a majority vote, the Court upheld the objection of unconstitutionality and found unconstitutional the provisions of Article 213 (8) of Law No 207/2015, as amended by Government Ordinance No 30/2017.

*Decision No 581 of 1 October 2019 on the objection of unconstitutionality of the provisions of Article 213 (8) of Law No 207/2015 on the Code of Fiscal Procedure, in the version prior to its amendment by Government Ordinance No 30/2017 amending and supplementing Law No 207/2015 on the Code of Fiscal Procedure, and against the provisions of Article 213 (8) of Law No 207/2015 on the Code of Fiscal Procedure, as amended by Government Ordinance No 30/2017, published in Official Gazette of Romania, Part I, No 40 of 21 January 2020*

**The fundamental right to pension may be regulated at the infraconstitutional level only by the adoption of laws, simple ordinances or emergency ordinances of the Government (primary regulatory act) that meet the standards of quality of the law, i.e. clarity, foreseeability and accessibility. By regulating the right to pension through administrative acts of a normative nature, the State has failed to fulfil its constitutional obligation relating to social protection measures.**

**Keywords:** *right to pension, quality of the law, social protection, primary regulation, secondary regulation*

**Summary**

**I. As grounds for the exception of unconstitutionality,** its author stated that the right to pension, its limits, contribution rates, contribution periods, obligations and other matters relating to it can be determined only by law. In the present case, that fundamental right is governed by the National Union of Notaries Public by a decision of the Council of the Union (as well as by the Regulation governing the Notaries Public Pension Fund and by its Articles), thus circumventing the review of constitutionality which may be initiated by any person demonstrating an interest.

Moreover, the provisions criticised are unconstitutional because they make a private pension scheme mandatory, complementary to the public pension scheme, i.e. a double contributory obligation. The author of the exception claimed that the legal provisions complained of infringed her right to property over the sums of money which she was obliged to pay, failing which she would be suspended from the profession, to the Notaries Public Pension Fund.

**II. Having examined the exception of unconstitutionality,** the Court noted that Article 62 (1) and (3) of Law No 36/1995, a primary legislative act, merely regulates the establishment of the Notaries Public Pension Fund, setting out the purpose of that institution and general aspects relating to its operation. On the other hand, the Articles of the Public Notaries Pension Fund lay down the rights and obligations of insured persons, namely social security benefits (Article 6), contribution period (Article 7), categories of pensions (Articles 8 to 14), calculation of pensions (Article 15), updating of pensions (Article 16), categories of financial aid (Articles 17 to 19), issuing of pension decisions (Article 20), appeals against decisions of the Pension Fund (Articles 21 to 23), persons paying contributions to own insurance scheme (Articles 24), persons insured under the scheme (Articles 25), and insured persons' contributions (Article 28). Similarly, the Regulation on the organisation and functioning of the Notaries Public Pension Fund, approved by Decision No 449 of 11 December 2012 of the Council of the Union of Notaries Public, provide that "social security benefits shall be granted in the form of pensions and financial assistance, under the conditions laid down in the Articles and in this Regulation" (Article 3). The Regulation lays down: the pension contribution period (Articles 4 to 6), the categories of pensions (Articles 7 to 26), the calculation of the pension (Articles 27 to 29), the establishment and payment of the pension (Articles 30 to 43), the updating of pensions (Article 44), the categories of financial aid (Articles 45 to 52), and the establishment and payment of aid (Articles 53 to 57). The Regulation also establishes the avenues of appeal against decisions issued by the Pension Fund (Articles 58 to 68), and includes provisions concerning contribution-payers (Articles 69 to 73) and social security contributions (Articles 74 to 97).

The Court pointed out that the right to pension is constitutionally enshrined in the provisions of Article 47 (2) of the Basic Law. The State has a positive obligation to ensure the means of subsistence of those who have acquired that right under the law and to refrain from any conduct of such a kind as to limit the right to social security.

As the constitutional rule expressly states that social security entitlements must be "provided for by law," which includes both laws adopted by Parliament and Government

ordinances, the Court found that the fundamental right to pension may be regulated at the infraconstitutional level only by the adoption of laws, simple ordinances or emergency ordinances of the Government (primary regulatory act) that meet the standards of quality of the law, i.e. clarity, foreseeability and accessibility.

The Court held that, in the present case, the essential aspects of the right to pension of notaries public had not been determined by a primary regulatory act, but by acts of an administrative nature, with less legal force than the law, issued by the Council of the National Union of Notaries Public, the governing body of the professional organisation. Those essential aspects are not to be found in the Law No 36/1995 on public notaries and notarial activity. The deliberate failure to regulate at the level of primary law resulted in an implicit delegation of the task of regulating the essential elements of the right to pension to the management body of a professional organisation.

It is not possible to regulate the right to pension by means of administrative acts of a normative nature, which do not comply with the requirements of stability, foreseeability and accessibility. Given that secondary regulatory acts usually have a high degree of instability, being subject to successive changes over time, the failure to regulate the right to pension by law leads to a state of legal uncertainty, with detrimental consequences for the rights of individuals. However, it is well known that administrative acts of a normative nature may be issued only on the basis of, and in the application of, the law, must be strictly limited to the framework established by the acts on the basis and enforcement of which they were issued and may not contain normative solutions replacing the law.

The Court therefore found that there had been an infringement of the constitutional provisions of Article 47 (2) relating to the right to pension and of Article 1 (5), in its component relating to the foreseeability and accessibility of the law, since the persons to whom the law is addressed may relate only to the incomplete provisions thereof, with the result that they are not in a position to adapt their conduct adequately or to have a precise representation of their rights which, while enshrined in the Constitution, are not found in the legislative framework adopted by the Romanian State. The Court held that the State had failed to fulfil its constitutional obligation relating to social protection measures guaranteeing the right to pension of its citizens exercising the profession of notary public.

As regards the dual obligation to pay contributions, it is the legislator's choice as regards social policies in the field of pensions, which falls within its discretion. It is not such as to affect the fundamental right to pension of contributors since, on their retirement, they are entitled to the rights under both schemes in which they have contributed.

**III. For all these reasons**, the Court unanimously upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 62 (1) and (3) of the Law No 36/1995 on notaries and notarial activity, in the version prior to its amendment by Law No 206/2016, and the provisions of Article 63 (1) and (4) of Law No 36/1995, as republished following the amendment by Law No 206/2016. Likewise, the Court unanimously dismissed as unfounded the exception of unconstitutionality relating to the provisions of Article 62 (2) of Law No 36/1995, in the version prior to its amendment by Law No 206/2016, and found that they were constitutional in the light of the criticisms made.

*Decision No 591 of 8 October 2019 on the exception of unconstitutionality of the provisions of Article 62 (1), (2) and (3) of Law No 36/1995 on notaries and notarial activity, in the version prior to its amendment by Law No 206/2016, and of Article 63 (1) and (4) of Law No 36/1995 on notaries and notarial activity, as republished following the amendment by Law No 206/2016, published in the Official Gazette of Romania, Part I, No 53 of 28 January 2020*

**One of the requirements of the principle of respect for laws relates to the quality of legislative acts, which means that they must be sufficiently clear and precise to be applied. Of course, it may be difficult to draft laws with complete precision, and some flexibility may even be necessary, but without affecting the foreseeability of the law.The lack of foreseeability of a criminalisation rule also affects the principle of legality of the punishment.**

**Keywords:** *quality of the law, legality of criminalisation, compliance with laws*

**Summary**

**I. As grounds for the exception of unconstitutionality**, it was argued that the expression "dogs exhibiting potentially aggressive behaviours" in the first sentence of Article 6 (4) of Government Emergency Ordinance No 55/2002 infringes the principles of respect for the law and the principle of legality of criminalisation and punishment, as well as the right to a fair trial, as it does not satisfy the requirements of foreseeability of the law.

Government Emergency Ordinance No 55/2002 criminalises the failure of the dog's owner or temporary keeper to take measures to prevent a canine attack on a person if the attack has taken place. The Ordinance in question defines only the terms "dangerous dogs" (Article 1) and "aggressive dogs" (Article 2), but does not explain the terms "dogs exhibiting potentially aggressive behaviours" and does not indicate the breeds of dogs concerned.

In order to comply with the principle of legality, the legislator is required to draft legislation in a clear and predictable manner, so that any person may take into account the conduct penalised and the conditions under which it is punishable, as well as the measures which may be taken by judicial bodies.

At the same time, the potentially aggressive behaviour of a dog can only be established if it has already had aggressive behaviour, with the result that the criminal punishment of the owner or temporary keeper of the dog who acted aggressively for the first time appears to be unfair.

**II. Having examined the exception of unconstitutionality,** the Court found that the frequency of attacks by dogs on individuals, sometimes even resulting in the death of the victims, required the regulation of the dog keeping regime.

The Court noted that, as regards the provisions contained in Article 6 (1) to (3) and the first sentence of paragraph (4) of Government Emergency Ordinance No 55/2002, the legislator is consistent with the definitions laid down in this legislative act, given that it establishes several measures to prevent canine attacks (on persons and domestic animals) with regard to the categories of dogs defined by Article 1 (a) and (b) of that Emergency

Ordinance. On the other hand, in the second sentence of Article 6 (4), the legislator renounces the drafting rigour and uses an unclear wording, referring to "dogs exhibiting potentially aggressive behaviours". The Court noted that the contested expression was used only once in the ordinance, without being defined in legal terms, although the meaning of that expression in common language was very broad, with "potentially aggressive" or potential aggression meaning generally aggressive.

According to the Court, the aggressiveness of dogs depends not exclusively on the breed to which they belong, but on a multitude of factors, including, in particular, environmental factors. Aggressiveness is a behaviour which may be exhibited by any dog, regardless of breed or age. It is not clear whether, by using the words "dogs exhibiting potentially aggressive behaviours", the legislator sought to impose on all dogs, regardless of race or age, the wearing of a muzzle and a leash in public places, or only in respect of those dogs which, by virtue of the power or size of the jaw, have the capacity to injure or kill humans or domestic animals.

The Court considered that an objective behavioural assessment carried out by a specialist, in order to determine the level of risk of aggression of a dog, cannot disregard the fact that there are risks inherent to the canine species, even if the dog in question does not pose a particular risk. However, it is difficult for the owner or temporary keeper to objectively assess the potentially aggressive behaviour of the dog in the sense of being aware that it poses a critical or high risk to certain persons and in certain situations. In the absence of clear indications or criteria established by the legislator, the owner or keeper will assess his dog subjectively by reference to his own way of dealing with his dog in particular and with other dogs in general.

The Court observed that the meaning of the expression "dogs exhibiting potentially aggressive behaviours" cannot be clarified with certainty either by carrying out an analysis of the body of legislation of which it forms part. It follows from a logical and systematic interpretation of Article 6 of Government Emergency Ordinance No 55/2002 that the expression "dogs exhibiting potentially aggressive behaviours" necessarily includes the category of "aggressive dogs", as defined in Article 2 (1) of that legislative act, but it is not possible to know with certainty whether they are confined to it or not.

In view of these difficulties of interpretation owing to the absence of a legal definition of the criticised expression, the Court found that the expression "dogs exhibiting potentially aggressive behaviours" in the first sentence of Article 6 (4) of Government Emergency Ordinance No 55/2002 does not meet the requirements of clarity and foreseeability of criminal law.

Although, in principle, Parliament has exclusive competence to regulate measures relating to the criminal policy of the State, that power is not absolute. Parliament can only exercise its power to criminalise and decriminalise antisocial acts in accordance with the rules and principles enshrined in the Constitution. The measures adopted by the legislator to safeguard social values must be appropriate, necessary and respect a fair balance between the public interest and the individual interest. The legislator must take into account the principle that the criminalisation of an act as a criminal offence must intervene as the last resort in the protection of a social value. Thus, it is not sufficient to find that the acts complained of undermine the social value protected, but that impairment must be of a certain degree of severity, seriousness, justifying the criminal penalty. At the same time, one

of the requirements of the principle of respect for laws relates to the quality of legislative acts, which means that they must be sufficiently clear and precise to be applied. Of course, it may be difficult to draft laws with complete precision, and some flexibility may even be necessary, but without affecting the foreseeability of the law.

When drafting legislative acts, the legislator must use legal language. Common language terms may also be used, but in a way appropriate to the area concerned. The Court has held that a legal concept may have an autonomous meaning differing from one law to another, provided that the law which uses that term defines it. Otherwise, the addressee of the rule will determine the meaning of that concept on a case-by-case basis by an assessment which can only be a subjective one. The interpretation of the judicial body called upon to apply the law also risks to be discretionary.

The lack of foreseeability of the contested rule is contrary to the constitutional provisions of Article 1 (5) on the principle of respect for the laws and of Article 23 (12) on the legality of the punishment and the provisions of Article 7 on the principle of legality of criminalisation and punishment of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court held that the first sentence of Article 6 (4) of Government Emergency Ordinance No 55/2002 covers (necessarily, but not necessarily enough) the category of "dogs exhibiting potentially aggressive behaviours", as defined in Article 2 (1) of the above-mentioned legislative act. Thus, until any action may be taken by the legislator, which is able to explain the words "dogs exhibiting potentially aggressive behaviours", the disputed expression can refer only to the category of "aggressive dogs".

**III. For all these reasons**, the Court, by a majority vote, upheld the exception of unconstitutionality and found that the expression "dogs exhibiting potentially aggressive behaviours" in the first sentence of Article 6 (4) of Government Emergency Ordinance No 55/2002 on the rules governing the keeping of dangerous or aggressive dogs was constitutional in so far as it concerned the dogs referred to in Article 2 (1) of the same legislative act.

*Decision No 678 of 29 October 2019 on the exception of the unconstitutionality of the expression "dogs exhibiting potentially aggressive behaviours" in the first sentence of Article 6 (4) of Government Emergency Ordinance No 55/2002 on the rules governing the keeping of dangerous or aggressive dogs, published in the Official Gazette of Romania, Part I, No 126 of 18 February 2020*

**The granting of the invalidity pension is justified by the occurrence of random events which are not subject to the insured person's will or choice. Persons who have obtained an invalidity pension under the earlier legislation do not benefit from any advantage acquired under that legislation, with the result that their exclusion from the application of the correction index provided for by the new law is not objectively and reasonably justified.**

**Keywords:** *equal rights, right to pension*

**Summary**

**I. As grounds for the exception of unconstitutionality**, the authors thereof stated that the provisions of Article 170 of Law No 263/2010, which provide that the correction index for the average annual score on the basis of which the pension is calculated is to be granted upon "initial pension registration", are unconstitutional in so far as they are interpreted as also applying to persons who received an invalidity pension before the entry into force of Law No 263/2010, with the effect of excluding them from the grant of that index when calculating the old-age pension. The invalidity pension cannot be considered an initial pension registration because it is random in nature. Otherwise, the principle of equal rights for citizens is infringed, since the loss of capacity to work does not justify different treatment between persons for whom Law No 263/2010 lays down the same conditions for retirement.

At the same time, the authors of the exception argued that the old-age pension is a stand-alone pension and does not derive from the invalidity pension, citing in this regard the provisions of Article 49 (1) of Law No 263/2010, which equates to the contribution period the period during which the insured person has received the invalidity pension.

**II. Having examined the exception of unconstitutionality,** the Court held that the authors of the exception were persons who have benefited from an invalidity pension under Law No 19/2000 on the public pension system and other social security rights, published in the Official Gazette of Romania, Part I, No 140 of 1 April 2000, but satisfied the conditions for obtaining an old-age pension after the entry into force of Law No 263/2010. Under Article 82 (1) of Law No 263/2010, "on the date on which the conditions for granting an old-age pension are met, the invalidity pension shall become an old-age pension".

The challenge of unconstitutionality raised by the authors of the exception refers to the interpretation of the expression "initial pension registration" in Article 170 (3) of Law No 263/2010, an interpretation according to which the date of the initial pension registration is regarded not only as the date when the application for old-age pension is made, but also the date when a person applies for early retirement, partially early retirement or invalidity pension. The effect of this interpretation for the authors of the exception is that, by obtaining an invalidity pension under the legislation preceding Law No 263/2010, they can no longer benefit from the correction rate provided for in Article 170 (1) of Law No 263/2010 upon the determination of the old-age pension. That interpretation was enshrined in Decision No 71 of 16 October 2017 of the High Court of Cassation and Justice — The Panel with jurisdiction to adjudicate on points of law, published in the Official Gazette of Romania, Part I, No 953 of 4 December 2017.

The Court found that there is a difference in legal treatment between persons who initially obtained an invalidity pension under Law No 19/2000 and persons who have obtained the same type of pension under Law No 263/2010, in the light of the method of calculating the old-age pension, which is granted, in both cases, under Law No 263/2010.

In its case-law, the Constitutional Court has consistently held that the situations in which certain categories of persons find themselves must essentially differ in order to justify the difference in legal treatment, and that difference in treatment must be based on an objective and rational criterion.

The Constitutional Court examined whether, in the present case, there was a legitimate aim for introducing a different legal treatment and whether a reasonable relationship of proportionality could be established between the means employed and the aim pursued.

The Court recalled that the legislation on the application of a correction index was enacted as a compensatory measure for persons who retire under Law No 263/2010, compared with those who retired under Law No 19/2000, who had benefited from more favourable conditions. There is therefore an objective justification for the fact that that correction index does not apply to persons in the latter situation. Moreover, in its case-law, the Constitutional Court has also held that the different situation in which citizens find themselves according to the legislation applicable in accordance with the principle *tempus regit actum* cannot be regarded as an infringement of constitutional provisions establishing equality before the law and the public authorities.

However, the Court observed that those arguments are not applicable to the particular situation of the authors of the exception.

The Court has thus held that the grant of the invalidity pension is justified by the occurrence of random events which are not subject to the will or choice of the insured person. The application for an invalidity pension before meeting the contribution and age requirements required for the grant of the old-age pension was not a expression of the insured person's will in order to obtain the right to pension under more favourable conditions, but was the result of unforeseeable events with adverse effects on the capacity to work of the person concerned.

Moreover, at the time of the determination of the old-age pension, both for persons who have obtained an invalidity pension under Law No 19/2000 and for those who have obtained the same type of pension under Law No 263/2010, the full period of contribution provided for by Law is taken into account. Consequently, persons who have obtained an invalidity pension under the previous legislation do not benefit from any advantage acquired under Law No 19/2000, so that their exclusion from the application of the correction index provided for in Article 170 of Law No 263/2010 is not objectively and rationally justified.

The Court therefore held that the expression "initial pension registration" is constitutional only in so far as it is understood that, for persons who have obtained an invalidity pension under Law No 19/2000, the initial pension registration refers to the time when the pension was determined for the first time under Law No 263/2010, that is to say, when the retirement pension was granted.

**III. For all these reasons,** the Court unanimously upheld the exception of unconstitutionality and found that the expression "initial pension registration" in Article 170 (3) of Law No 263/2010 on the harmonised public pension system was constitutional with regard to the recipients of invalidity pensions, in so far as interpreted as referring to the determination of the retirement pension by applying, for the first time, the statutory retirement age and full contribution period requirements laid down in Law No 263/2010.

*Decision No 702 of 31 October 2019 on the exception of unconstitutionality of the expression "upon initial pension registration" in Article 170 (3) of Law No 263/2010 on the harmonised public pension system, published in Official Gazette of Romania, Part I, No 96 of 10 February 2020*

**The legislator's decision to include persons who have paid contributions to health insurance, among those who are subject to civil liability in tort for damage to their own health in respect of acts committed by the slightest misconduct, denies one of the safeguards of the right to protection of health, undermining Article 1 (5) of the Constitution which enshrined the legal certainty of the person, a concept which is defined as a complex of safeguards of a nature or with constitutional aspects inherent to the rule of law, in consideration of which the legislator has the constitutional obligation to insure both a natural stability of the law, and the exercise under optimum conditions of the basic rights and freedoms.**

**Keywords:** *right to health protection, health insurance, health care, principle of legal certainty*

**Summary**

**I. As grounds for the exception of unconstitutionality,** it was pointed out, in essence, that, Article 320 (1) of Law No 95/2006 on health reform laid down that the person who has suffered an accident must pay the costs of hospitalisation, making the protection of health in practice conditional on making payments to the health establishment, even though the injured person is insured and contributes to emergency health care, which has major consequences for his life and bodily integrity, values protected by Article 22 of the Constitution. It was also emphasised that the injured party has contributed to the health insurance system, thus being able to receive services to protect his life and physical integrity in the event of a medical emergency. However, the fact that he was injured and that, by way of an order, the prosecutor found him guilty for the accident must not influence the cost of the emergency medical services. The legislation at issue, which leaves to the hospital the provision of health care and the recovery of sums of money, infringes Article 34 of the Constitution. Thus, in accordance with Article 34 of the Basic Law, Article 219 (1) of Law No 95/2006 governs the fact that health insurance is the main scheme for financing the protection of the health of the population providing access to a package of basic services for insured persons, the law stipulating that the very objective of the health insurance scheme is to be achieved, inter alia, by protecting insured persons from the costs of medical services in the event of illness or accident. Similarly, Article 230 (1) of Law No 95/2006 governs the fact that insured persons benefit from the package of basic services in the event of illness or accident from the first day of illness or from the date of the accident until their recovery, under the conditions laid down by law and the framework contract and its implementing rules. Therefore, these laws make it clear that the social security system, in the event of accidents, protects insured persons against the costs of medical services, so that the right to health care is guaranteed. Consequently, the expression "as well as damage to one's own health" contained in Article 320 (1) of Law No 95/2006 infringe the constitutional provisions relied upon, bearing in mind that any activity resulting in the injury of the person concerned involves a certain degree of fault, whereas citizens pay insurance precisely in order to receive medical services in the event of an emergency.

**II. Having examined the exception of unconstitutionality,** the Court held that, in accordance with Article 34 of the Constitution, the right to health protection is guaranteed, which means that the State has a general positive obligation to take measures to that end by guaranteeing an appropriate legislative framework and allocating the necessary resources to ensure hygiene and public health, to organise health care and social security for illness, accidents, maternity and recovery, and to monitor the exercise of medical professions and paramedical activities. The State may also take any other measures to protect the physical and mental health of the person.

The Court held that in order to guarantee the right to health care by organising the social security system for illness and accidents, as provided for in Article 34 of the Constitution, and to comply with the commitments made by the State in the International Covenant on Economic, Social and Cultural Rights and the revised European Social Charter, the legislator adopted Law No 95/2006 on health reform. Article 219, contained in Title VIII "Social health insurance" of Law No 95/2006, defines social health insurance as the main system for financing the protection of the health of the general public which provides access to a package of basic services for insured persons, the objectives of which are to protect insured persons from the costs of medical services in the event of illness and accident and to ensure the protection of insured persons in a universal, equitable and non-discriminatory manner under the effective use of the Single National Health Insurance Fund. At the same time, Article 221 defines the package of basic services to be provided to insured persons, comprising medical services, health care services, medicines, sanitary supplies, medical devices and other package services, to be approved by Government Decision. Persons who do not provide proof that they are insured shall benefit from the minimum package of services, comprising health care services, medicines and sanitary supplies only in the case of medico-surgical emergencies and endemic diseases — epidemic, monitoring of pregnancy and nursing period, family planning services, prevention services and community health care package, which will also be approved by Government Decision. Article 224 of Law No 95/2006 also regulates certain categories of persons who are vulnerable or have been subjected to persecution measures for political or ethnic reasons and who benefit from insurance without payment of the contribution.

The Court held that, in accordance with Articles 229 and 230 of Law No 95/2006, insured persons are entitled to a package of basic services, established in accordance with a multiannual framework contract drawn up by the National Health Insurance Fund, from the first day of illness or from the date of the accident until recovery, in accordance with the conditions laid down in Law No 95/2006. The Court also noted that, under Article 266 of Law No 95/2006, insured persons are required to pay a monthly financial contribution for health insurance, with the exception of the persons referred to in Article 224 (1) of Law No 95/2006.

The Court held that the legislative solution introduced brought an element of novelty, namely the obligation to bear the costs of healthcare provided for damage to one's own health. The expression "as well as damage to one's own health", criticised in the present case, was introduced by an amendment adopted by the Committee for Health and Family of the Chamber of Deputies, which was annexed to the report on the draft Law approving Government Emergency Ordinance No 2/2014 amending and supplementing Law

No 95/2006 on health reform and amending and supplementing certain legislative acts (PLx no.161/2014). The statement of reasons for the amendment states that it was adopted "in order to clarify the situation with regard to road traffic accidents. The civil liability insurance for motor vehicles covers third-party medical expenses. In the proposed wording, settlement is made from the civil liability insurance". The Court found that, on the date on which the expression at issue was introduced into the Law, Law No 136/1995 on insurance and reinsurance in Romania, which, in Articles 49 and 50, provided that the insurer was to pay compensation to third parties injured as a result of motor vehicle accidents and expressly excluded the driver of the motor vehicle from entitlement to compensation. The same legislative framework was maintained by the provisions of Articles 11 (1) and 13 (b) of Government Emergency Ordinance No 54/2016 on compulsory civil liability insurance in respect of the use of motor vehicles for damage to third persons caused by vehicle and tram accidents, and by Article 10 (2) and Article 12 (b) of Law No 132/2017 on compulsory civil liability insurance in respect of the use of motor vehicles for damage caused to third parties by vehicle and tram accidents. In conclusion, the Court held that the contested expression, as drafted, is not in any way circumscribed to the damage to be awarded in the event of a motor vehicle accident, but refers to all types of motor vehicle accidents, whatever their nature. In order for the exclusion from the right to compensation to cover only traffic accidents, the legislator should have amended Law No 136/1995 — the special law governing compulsory civil liability insurance in respect of the use of motor vehicles, and not Law No 95/2006, the framework law in the field of health insurance. Thus, the Court held that, as regards the right to compensation of persons who, as a result of their actions, adversely affect their own health, the legislator drastically changes the perspective relied on, which was based on an incorrect reference to the legislative reality, rendering vulnerable the legal situation of insured persons by the total elimination of the right to compensation for the damage aforementioned.

The Court held that Article 320 (1) of Law No 95/2006, following the aforementioned amendments, provided that the insured person was liable to the medical service provider for damage to his own health "through negligence", that is to say, regardless of the form of guilt, liability must be incurred both for having committed acts intentionally and as a result of gross fault — *culpa lata*, and ordinary negligence — *culpa levis* and the slightest fault— *culpa levissima*. With regard to civil liability in tort, the Court held that, both under the Civil Code of 1864 and under the legislation now contained in Article 1349 of the Civil Code, the perpetrator of the tort had an obligation to ensure full reparation of the damage caused by his act, irrespective of whether he acted intentionally or negligently. In this respect, the provisions of Article 1357 of the Civil Code, according to which a person who causes damage to another as a result of a wrongful act, committed with fault, is required to provide reparation, since the author of the damage is liable for the slightest fault. With regard to guilt, Article 16 of the Civil Code sets out the types of guilt: intent and fault. It also governs the commission of an intentional act: a situation in which the perpetrator foresees the result of his act and either aims to produce it by means of the act or, although he does not seek to do so, accepts the possibility that that result may occur. It also regulates the commission of the act by negligence, as well as the definition of gross fault: the act is committed negligently

where the perpetrator either foresees for the result of his act but does not accept it, considering, without any due reason, that it will not occur, or does not foresee the result of the act, even though he should have foreseen it; fault is gross when the perpetrator acted with negligence or recklessness which even the most unskilled person would not have shown for his own interests. At the same time, Article 16 (4) of the Civil Code provides that where the law makes the legal effects of an act subject to fault, the condition is also fulfilled if the act was committed intentionally.

Having examined that legislative framework governing the guarantees of the right to protection of health, laid down with principle value by Article 34 of the Constitution, the Court held that insured persons under Law No 95/2006, who are required to pay the amounts constituting the social security contribution, must receive, in return, protection against the costs of medical services in the event of illness or accident, as provided for in Article 219 (2) (a) of Law No 95/2006. The enactment by law of social security entails rights and obligations for both the insured person and the State, since it is essential to cover a risk in the event of occurrence of certain events relating to the health of insured persons. The right to health protection requires that the risks insured be determined in a way that protects life and bodily integrity.

The Court found that the guarantee of the right to health protection provided for in Article 219 (2) (a) of Law No 95/2006, namely that insured persons are protected against the costs of medical services, is completely removed in the event of self-accident. This is because the generic reference to "fault" in Article 320 (1) of Law No 95/2006 means that the insured person will be liable for damage to his own health, including accidents caused by the slightest fault. The acts resulting in self-accident always presuppose the existence of a fault, most often committed by the slightest fault. The inclusion of persons who have paid the social health insurance contribution in the sphere of those who incur tortious civil liability for damage to their own health for acts committed due to the slightest fault infringes Article 1 (5) of the Constitution, which enshrines the legal certainty of the person.

The Court has held that the right to protection of health requires compliance with certain requirements, including that of the stability of the legal rules guaranteeing it. More broadly, the stability of these rules is an expression of the principle of legal certainty, implicitly established by Article 1 (5) of the Constitution, a principle which reflects, in essence, that citizens must be protected against a danger which arises even from the law, against the uncertainty created by the law or which it risks creating, by requiring that the law be accessible and foreseeable. In a rich case-law, the European Court of Human Rights emphasised the importance of ensuring the accessibility and foreseeability of the law, including from the point of view of its stability, by also introducing a number of benchmarks which the legislator must take into account in order to ensure those requirements.

The Court observed that it was for the legislator to choose whether the provision of healthcare was free of charge. However, the fact that, irrespective of the type of fault, the person who has caused damage to his own health will be obliged to repair the damage caused to the healthcare provider, representing the actual costs of the healthcare provided, denies the right to health care in the case of insured persons who, in return for payment of the social security contribution, should receive compensation from the State when the

insured risk — injury to his own health — occurs. Thus, the risk borne by the "insurer" — in this case the State — is diluted to almost extinction, since the commission of any act affecting one's own health implies a minimal fault in its commission.

**III. For all these reasons,** by a majority vote, the Court upheld the exception of unconstitutionality and found unconstitutional that the expression "as well as damage to the one's own health" in Article 320 (1) of Law No 95/2006 on health reform.

*Decision No 818 of 5 December 2019 on the exception of unconstitutionality of the expression "as well as damage to the one's own health" in Article 320 (1) of Law No 95/2006 on health reform, published in the Official Gazette of Romania, Part I, No 561 of 29 June 2020*

**The Law on Administrative Proceedings, when it relates to concepts specific to civil law, must do so by using terms and concepts specific to the law in force and not by using independent terms and concepts without a proper statement of reasons. Otherwise, the requirements for clarity and foreseeability of the rule laid down in Article 1 (5) of the Constitution are breached.**

**Keywords:** *administrative litigation, preliminary procedures, clarity of the law, forseeability of the law*

**Summary**

**I. As grounds for the exception of unconstitutionality,** its author argued that the contested provisions were unconstitutional due to the application of the procedure for reviewing the legality of the unilateral administrative act with regard to the civil effects of the corresponding rights and obligations arising under administrative contracts. The provisions in question are as follows:

Article 7 (6) of Law No 554/2004 on administrative proceedings: "Prior complaint in actions relating to administrative contracts shall be aimed at reconciling commercial disputes, the provisions of the Code of Civil Procedure being duly applicable. In this case, the complaint must be made within the 6-month period laid down in paragraph (7), which shall begin to run: [...]"

Article 11 (1) (e) and (2) of that law:

"(1) Requests for the annulment of an individual administrative act, an individual administrative contract, the recognition of the alleged right and compensation for the damage caused may be brought within 6 months as of:

[...]

(e) the date of signing of the report drawn up upon conclusion of the conciliation procedure in the case of administrative contracts.

(2) For duly justified reasons, in the case of an individual administrative act, the request may also be submitted beyond the time limit laid down in paragraph (1), but not later than one

year from the date of notification of the act, the date of knowledge, the date of submission of the request or the date of signing of the conciliation report, as the case may be."

Those provisions make it impossible to carry out the preliminary complaint procedure after the expiry of the 6-month period, calculated from the date of the breach of the obligation, even though the substantive right of action relating to the obligation infringed is not time-barred and in some cases has not even started to run. It is also impossible to bring the administrative action after the expiry of the period of 6 months from the signing of the conciliation report/the completion of the preliminary procedure (a maximum of 6 months after the breach of the obligation), although the substantive right of action relating to the obligation infringed is not time-barred and in some cases has not even started to run. The excessive limitation becomes even more obvious by regulating the one-year limitation period for bringing proceedings before the court, which is calculated from the date of the conciliation report.

In addition, these articles are ambiguous, unclear, characteristics which are contrary to the requirements relating to the quality of the law laid down in Article 1 (5) of the Constitution.

**II. Having examined the exception of unconstitutionality**, the Court observed that the provisions of Article 7 (6) were amended by Law No 212/2018 amending Law No 554/2004 on administrative proceedings and other legislative acts, published in the Official Gazette of Romania, Part I, No 658 of 30 July 2018, and the provisions of Article 11 (1) (e) were repealed by the same legislative act. The introductory part of Article 7 (6) now reads as follows: "The prior complaint in the case of actions relating to administrative contracts must be made within 6 months, which shall begin to run: [...]".

In the previous version, this rule was to be read in conjunction with the provisions of Article $720^1$ of the Code of Civil Procedure of 1865, which governed the procedure for prior conciliation in the case of commercial disputes. This article was repealed with the entry into force of the new Code of Civil Procedure.

On 23 May 2016, Law No 101/2016 on remedies and appeals concerning the award of public procurement contracts, sectoral contracts, works concession contracts and service concession contracts, and on the establishment and functioning of the National Council for Solving Complaints, published in the Official Gazette of Romania, Part I, No 393 of 23 May 2016, entered into force. According to Article 53 (1) thereof, "the procedures and claims for compensation for damage caused in the context of the award procedure, as well as those relating to the performance, annulment, nullity, termination, resolution or unilateral termination of the contracts, shall be resolved at first instance, as a matter of urgency and, in particular, by the administrative and tax disputes chamber of the court within whose jurisdiction the seat of the contracting authority is located, by specialised public procurement panels". Government Emergency Ordinance No 107/2017, published in the Official Gazette of Romania, Part I, No 1022 of 22 December 2017, established that no prior procedure was required.

The Court found that, between 15 February 2013 (when the new Code of Civil Procedure entered into force) and 2 August 2018 (when Law No 212/2018 entered into force), there was a legal vacuum with regard to the preliminary procedure in administrative

proceedings relating to administrative contracts. At present, the general law on the matter governs the preliminary procedure. In the field of public procurement, from the entry into force of the new Code of Civil Procedure until the entry into force of Law No 101/2016, there has been a legal vacuum with regard to the preliminary procedure in administrative proceedings relating to public procurement contracts. At present, the special law establishes that there is no need to go through a prior procedure.

The procedure for challenging an administrative act is governed by specific rules, which require, prior to the action before the competent court, the lodging of a complaint before the administrative authority. The preliminary complaint referred to in Article 7 of Law No 554/2004 is known as an administrative appeal. The administrative appeal may be lodged with the public authority issuing the document (administrative appeal), with the public authority superior to the issuing authority (hierarchical appeal) and before the court (appeal as part of administrative proceedings before the court). Article 7 (1) of Law No 554/2004 lays down the obligation for the aggrieved party to exercise either an administrative appeal or an appeal before the administrative court.

The Court observed that the administrative appeal is a means of remedying the possible unlawfulness of the contested administrative act by its re-examination by the issuing body or the superior body. Since the procedure for settling an administrative appeal lacks the guarantee of independence and impartiality, it cannot prevent or restrict access to justice for the allegedly aggrieved party.

Since an administrative contract is a legal means by which the public administration is carried out, it is natural for the legislator to prioritise the public interest over the principle of freedom to enter into contracts when adjudicating on such a contract.

In the period following the repeal of the provisions of Article $720^1$ of the Code of Civil Procedure of 1865, as a result of the confusion arising from the fact that the repealed provisions were no longer included in the new Code of Civil Procedure, the provisions of Article 7 (6) of Law No 554/2004 were deemed to have become obsolete. Therefore, the provisions of Article 7 (1) of the same law have also been applied to disputes concerning administrative contracts, so that failure to comply with the prior administrative procedure has been penalised in judicial practice with the dismissal of the action either as inadmissible or as prematurely filled.

In the situation governed by Article 7 (1), the prior administrative procedure concerns disputes arising from unilateral administrative acts which are, in principle, revocable. The Court observed that it was difficult, if not impossible, to apply this procedure to disputes arising from administrative contracts which, being bilateral legal acts, were, in principle, irrevocable. In addition, the Court found that, by definition, the prior complaint is made by the aggrieved party with a view to revoking the administrative act issued by a public authority, so that that procedure may be carried out only by private persons whose rights or legitimate interests were affected by those acts, and not by the contracting public authorities.

Extending the application of this procedure to any harm suffered by the public authority through acts of a private person has no legal basis and runs counter to the purpose of this legal concept. Moreover, the preliminary procedure is inapplicable in the case of disputes

concerning the performance of administrative contracts triggered by the failure of one of the contracting parties to fulfil its contractual obligations. This can only be a remedy in the case of disputes concerning the annulment of administrative acts, including administrative contracts.

Until the entry into force of the new Code of Civil Procedure, the concept of a prior complaint in the case of actions relating to administrative contracts had the meaning of conciliation in the case of commercial disputes. At present, this notion can no longer be applicable in view of the changes in the new Code. The Law on Administrative Proceedings, when it relates to concepts specific to civil law, must do so by using terms and concepts specific to the law in force and not by using independent terms and concepts without a proper statement of reasons.

The Court therefore found that the expression "shall be aimed at reconciling commercial disputes, the provisions of the Code of Civil Procedure being duly applicable" in the provisions of Article 7 (6) of Law No 554/2004, which refers to the repealed rules of civil procedure, has become devoid of purpose. Its retention in positive law has led to uncertainty and unforeseeablity of the rule, which is contrary to Article 1 (5) of the Constitution. Moreover, the amendment made by Article I point 6 of Law No 212/2018, which deletes that expression, does not ensure clarity and foreseeablity either, since it does not expressly identify the conduct which the parties to an administrative contract must adopt, so that it allows that the same judicial practice which imposes an obligation on the contracting public authority to conduct the prior complaint procedure is perpetuated.

**III. For all those reasons,** by a majority vote, the Court upheld the exception of unconstitutionality and found that the provisions of Article 7 (6) of Law No 554/2004 on administrative proceedings, in the version prior to amendment by Law No 212/2018, were constitutional only in so far as they did not require the contracting public authority to carry out the preliminary procedure. The Court also found that the expression "shall be aimed at reconciling commercial disputes, the provisions of the Code of Civil Procedure being duly applicable" in the provisions of Article 7 (6) and Article 11 (1) (e) of that law, in the version prior to the amendment by Law No 212/2018, and the words "date of signing of the conciliation report" in Article 11 (2) were unconstitutional.

*Decision No 12 of 14 January 2020 on the exception of unconstitutionality of the provisions of Articles 7 (6) and 11 (1) (e) of Law No 554/2004 on administrative proceedings, in the version prior to amendment by Law No 212/2018, and against the provisions of Article 11 (2) of Law No 554/2004 on administrative proceedings, published in Official Gazette of Romania, Part I, No 198 of 11 March 2020*

**The legal provisions examined, by regulating the possibility of derogation/amendment of the legal regime imposed by the urban planning documents previously approved for a given area, do not contain sufficient and effective safeguards and also afford the possibility of discrimination — negative or positive — to a person by the fact that the request for derogation/modification of documents is rejected or approved based on the**

**mere and exclusive assessment by the public authority competent to decide on the same and, secondly, adversely affects the principles of foreseeability of legal acts and legal certainty, which is contrary to Article 1 (5) and Article 16 (1) of the Constitution.**

**Keywords:** *urban planning documentation, principle of legal certainty, legality, discrimination*

**Summary**

**I. As grounds for the exception of unconstitutionality,** its author argued, in essence, that Article 32 of Law No 350/2001 on Territorial and Urban Planning, "as in force at 25 September 2007" allowed the local public authority to act in a discretionary and even abusive manner with regard to the approval of requests for modification/derogation from the provisions of the planning documents approved for a given area. Urban planning documentation is the means of implementing, in a detailed manner, land use documentation, which, as provided for in Article 39 (4) of Law No 350/2001, is binding on all public authorities and thus on all natural and legal persons. In the absence of regulation of any objective conditions/criteria, limitations or requirements capable of justifying the need to amend/derogate from the provisions of urban planning documents, based on a simple request from a person, the competent public authorities receive virtually a 'blank cheque' for discrimination and abuse which cannot be reviewed both by administrative bodies and by the courts, the latter having the power to examine only the lawfulness of administrative acts of public authorities, not their appropriateness.

The public authority may act in a discriminatory manner by approving some requests and/or rejecting others, thereby creating situations of inequality between citizens, contrary to Article 16 (1) of the Constitution. The discretionary derogation from the planning documents without any conditionality also opens up the possibility of easily infringing the right to property, protected by Article 44 (1), (2) and (7) of the Basic Law, since the planning rules serve to protect the property of others. The violation of the fundamental rights set out above takes place without complying with the strict and restrictive requirements laid down in Article 53 of the Constitution.

The legislator did not lay down in the first sentence of Article 32 (1) of Law No 350/2001, in a specific, explicit and sufficiently predictable manner, the specific cases and conditions in which such a modification of the planning documentation is possible, which is liable to affect the principles of legal certainty, legality and the protection of legitimate expectations, as enshrined in the case-law of the European Court of Human Rights.

The possibility of urban planning documents being amended on a discretionary basis also affects the right to privacy and the right to a healthy home and environment, which must be exercised under the conditions guaranteed by Articles 26, 27 and 34 of the Constitution and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

**II. Having examined the exception of unconstitutionality,** the Court found, in the light of the provisions of Law No 350/2001 on Territorial and Urban Planning, that the application

of approved land use and planning documentation is ensured by the issue of planning permission (Article 28). Planning permission is granted at the request of any applicant (a natural or legal person) who may be interested in knowing the data and regulations to which the immovable property is subject and does not confer the right to carry out construction, development or planting works (Article 29). The planning permission is issued by the same local public administration authorities which, in accordance with the powers laid down by the legislation in force, issue building permits (Article 33).

As regards the procedure for approving and approving planning documents, Article 56 of the Law states that it is to be carried out by the relevant central and territorial authorities and bodies, in accordance with the provisions of Annex 1 to Law No 350/2001, and that the content of the documents subject to approval and of the issuers of opinions for each category of documentation shall be specified by order of the Minister for Public Works, Transport and Housing.

Next, Law No 350/2001 regulates, in Articles 57 to 59, the possibility of participation by the population in land use and planning activities, among the detailed rules expressly laid down being that concerning information, at least by posting at the town hall and public announcement in the press and by consulting prior to approval of urban planning and land planning documents. Thus, the intentions of the central and local public administration authorities concerning the preparation of land use and planning documents, the purpose for which they are drawn up, the content of the planning documents to be approved and the documents approved under the law are known.

In this legislative context, the Court noted that, Article 32 (1) first sentence of Law No 350/2001 — the subject matter of this exception of unconstitutionality — provides that any person — natural or legal — may apply to the competent authority for a derogation from the provisions of the planning documents previously approved for a given area.

Taken as a whole, all the above regulations set out the framework within which planning documents are issued and which may be derogated from under the first sentence of Article 32 (1) of Law No 350/2001. The complaints of unconstitutionality in the present case relate, in essence, to the absence, in the latter text, of effective safeguards against arbitrariness of the public authorities competent to approve the request for derogation/ amendment thus made.

Analysing both the contested legal text and Law No 350/2001, taken as a whole, the Court found that the guarantees laid down for the protection of the individual rights and interests, in particular, or of the local community, in general, against arbitrary decisions by the public authorities responsible for drawing up and amending town-planning documents, are regulated in a vague manner, are of a high degree of generality and of a formal, principled and not effective and real nature. The legal provisions examined, by regulating the possibility of a derogation from/modification of the legal regime imposed by the urban planning documents previously approved for a given area, do not, at the same time, contain sufficient and effective safeguards, in the form of minimum requirements or objective criteria which the requests for derogation should meet and which also protect the addressee of the legal rule against arbitrary interference or abuse by the public authorities competent to interpret and apply it.

The Court observed that the inadequacy of the effective guarantees was essentially the result of the incomplete nature of the text at issue. In addition, it was considered worthy pointing out that the entire normative content of the first sentence of Article 32 (1) of Law No 350/2001 was drafted in a flawed, elliptical and confusing manner that lacked rigour and clarity. According to Article 8 (4) of Law No 24/2000 on legislative technical rules for the drawing up of regulatory acts, "the legislative text must be drafted in plain, fluent and comprehensible terms, without syntactical difficulties and obscure or ambiguous passages" and, in accordance with Article 36 (1) of that law, "regulatory acts shall be drafted in a specific normative, concise, formal clear and precise language and style, excluding any ambiguity, in strict compliance with the grammatical and spelling rules".

Thus, even on a systematic interpretation of the provisions of Law No 350/2001 as a whole, the Court held that it is not clear what is meant by the words "through the documentation submitted" in the first sentence of paragraph (1) of Article 32, that is to say, the holder of the right who draws up and submits the documentation and the nature and purpose of that documentation. At the same time, having examined the sentence "the planning permission may include the requirement of drawing up other planning documentation to justify and demonstrate the possibility of the requested urban development", the Court found that it is difficult or impossible to understand how a planning permission may require another planning document to be drawn up, since, under the rules of Law No 350/2001, planning permission is issued by the competent authorities and is intended to inform the applicant of the data and regulations to which a particular immovable property is subject. Moreover, it is apparent from the contested text that the planning documents requested by way of planning permission may require justification and proof of the possibility of the requested urban development. That legislative solution is, once again, difficult to understand and even illogical, since the law expressly regulates the content of the provisions of urban planning documents, with the result that they cannot contain a justification and demonstration of a certain possibility of derogation or alteration of previously approved planning documents. Finally, the text does not clearly state who must provide the justification and demonstration referred to. Logically, those obligations should belong to the applicant for the derogation, but the latter may not issue planning documentation, but only local public authorities. The Court therefore found that the legal rules complained of are contradictory and, irrespective of the method of legal interpretation used, simply cannot be understood or read in conjunction with the law as a whole.

In that context, the Court has pointed out that the possibility to regulate at infralegal level certain working procedures, followed as such by the competent public authorities, such as to give precedence to the legal rules under consideration, in the sense of establishing all those elements which are expressly missing from the text in question in order to give it a logical meaning, cannot cover the legislative defects specific to the reference text itself. In the hierarchy of legislative acts, the law, through its provisions, must clearly regulate legal relationships by indicating and detailing all the relevant elements, while subsequent legislative acts, adopted in the application of the law, can only develop them and detail them, but may not go beyond the legal framework of reference. Law No 350/2001 is the general regulation governing land use and urban planning, namely the legislative act enforceable *erga omnes* by publication in the Official Gazette of Romania, Part I, in

accordance with the constitutional principles requiring compliance with the law and its universality, as laid down in Articles 1 (5) and respectively Article 15 (1) of the Constitution. Similarly, even if, when drawing up the new urban planning documentation derogating/ modifying the documentation previously approved, the competent public authorities are required, on the basis of the request submitted on the basis of the first sentence of Article 32 (1) of Law No 350/2001, also to comply with other relevant pieces of legislation, that cannot replace the drafting gaps in the legal text under consideration.

The Court therefore found that the provisions of the first sentence of Article 32 (1) of Law No 350/2001, in the version in force on 25 September 2007, constitute a loophole regulation in terms of sufficient and effective safeguards against arbitrariness of the public authorities and does not meet the minimum requirements of quality of the law, which is based on the principle of legality enshrined in Article 1 (5) of the Constitution, in terms of the requirements of clarity and foreseeability of the rule.

The Court noted that there was a legislative loophole in the present case, namely the lack of regulation in the first sentence of Article 32 (1) of Law No 350/2001 of sufficient and adequate safeguards against arbitrariness by the authorities.

The Court noted the unconstitutional potential of the text under consideration also with regard to the protection of the right to personal, family and private life, as enshrined in Article 26 of the Constitution of Romania and in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In that regard, the Court has held that, according to the case-law of the European Court of Human Rights in this area, the State has, in relation to those fundamental rights, both the positive obligation to regulate measures capable of giving effect to them specifically and effectively and the negative obligation to refrain from any unjustified intrusion, and, in the event of a particular interference, it must be justified and maintain a reasonable balance between the interests of the community and the interests of the individual. The same European court pointed out that Article 8 of the Convention may include the right to protection against severe environmental pollution if this problem affects the well-being of individuals and prevails over their right to enjoy their homes in a way that seriously affects their private and family life, even if it does not seriously threaten their health.

The Court found that the contested text, as a result of its incomplete legislative content, in terms of setting minimum mandatory requirements or objective criteria for granting the derogation/modification requested, is capable of affecting the normal exercise of the right to personal, private and family life, which amounts to interference which does not comply with any public policy requirements, expressly and exhaustively mentioned at the legal level. Thus, natural persons living in an area with a certain construction regime previously established by planning documents and planning permission cannot have the certainty that it will be maintained, at least for a reasonable period of time; on the contrary, the legal rule leaves it open to the competent public authorities to amend that regime continuously, without any restriction or condition imposed by the legislation complained of.

The Court has not been able to find the alleged infringement of the constitutional rules of Article 27 (1), since this text protects the inviolability of the home, of Article 34 on the right to health protection and of Article 44 (1), (2) and (7) concerning the right to property.

**III. For all these reasons,** by a majority vote, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of the first sentence of Article 32 (1) of Law No 350/2001 on Territorial and Urban Planning, as amended by Article I (6) of Law No 289/2006 amending and supplementing Law No 350/2001 on Territorial and Urban Planning.

*Decision No 49 of 4 February 2020 on the exception of unconstitutionality of the provisions of the first sentence of Article 32 (1) of Law No 350/2001 on Territorial and Urban Planning, as amended by Article I (6) of Law No 289/2006 amending and supplementing Law No 350/2001 on Territorial and Urban Planning, published in the Official Gazette of Romania, Part I, No 385 of 13 May 2020*

**The High Court of Cassation and Justice was required, in its interpretation of the legislation, since the legal framework was not amended, to comply with the interpretation previously given by the Constitutional Court to the same legislative texts by its decisions, which, according to Article 147 (4) of the Constitution, are generally binding. The possibility for the courts to annul legal provisions and replace them with other rules of general application not envisaged by the legislator is contrary to the principle of separation of powers. By its interpretation, the supreme court, on the one hand, amended the legislator's choice and, on the other hand, substituted itself to the Constitutional Court, in breach of Article 142 (1) of the Constitution, which enshrines the role of the Constitutional Court as the supreme guarantor of the Constitution.**

**Keywords:** *rule of law, separation of powers, respect for the Constitution, effects of Constitutional Court's decisions, compensatory amounts, appeal in the interest of the law*

**Summary**

**I. As grounds for the exception of unconstitutionality,** it was pointed out that the interpretation by the High Court of Cassation and Justice – The Panel competent to adjudicate on appeals in the interest of the law, by Decision No 21 of 21 November 2016, to the provisions of Article 30 (6) and Article 48 (1) point 7 of Framework-Law No 330/2009 on the uniform remuneration of staff paid from public funds, the provisions of Article 4 (1) and Article 6 (1) of Government Emergency Ordinance No 1/2010 on certain measures to reinstate staff in the budgetary sector and setting their salaries and other measures in the budgetary field, the provisions of Article 1 (5) of Law No 285/2010 on the remuneration in 2011 of staff paid from public funds and Article 8 of Annex No 5 to Law No 63/2011 on the employment and remuneration in 2011 of teaching and auxiliary teaching staff in the education system, is in contradiction with the conclusions of the Constitutional Court in paragraph 26 of Decision No 794 of 15 December 2016, point 3 of the reasoning part of Decision No 587 of 5 June 2012, point II of Decision No 594 of 5 June 2012 and in the reasoning part of Decision No 885 of 25 October 2012. Failure to comply with the decisions

of the Constitutional Court constitutes an infringement of Article 1 (3), (4) and (5), Article 126 (3), Article 142 (1) and Article 147 (4) of the Constitution.

**II. Having examined the exception of unconstitutionality,** the Court found, in the light of the reasoning part of Decision No 21 of 21 November 2016 of the High Court of Cassation and Justice – The Panel competent to adjudicate on appeals in the interest of the law, and the decisions of the Constitutional Court relied on by the author of the exception, that the two courts had given a different interpretation to the contested legal texts. Thus, while the supreme court took the view that "the legislator did not actually and effectively repeal that legal text, but established a new legal nature for the amount rewarding an employee who enhances his training by obtaining the scientific title of a doctor", so that the right survived, by becoming known as a "compensatory amount", the Constitutional Court held that "the increment in question was abolished as from 1 January 2010". Moreover, the High Court of Cassation and Justice, relying on considerations of fairness and application of the principle of equal treatment, ruled that the compensatory amounts were also granted to those who obtained their doctoral degree after 12 December 2009 and until the entry into force of Law No 71/2015, whereas the Constitutional Court held that the sums of money relating to the increment were maintained in the form of a transitional compensatory amount only for those who were receiving it on 31 December 2009.

As regards differences in the interpretation of legal texts which may arise from case-law, the Constitutional Court, by Decision No 370 of 30 May 2017, paragraph 39, held that, as long as both interpretations were constitutional, the High Court of Cassation and Justice had constitutional jurisdiction to choose, when deciding on an appeal in the interest of the law, for the most appropriate/correct solution. In the same decision, paragraph 40, the Constitutional Court held that it could not be argued that whenever there is a divergence of case-law questions of constitutionality arise — different case-law solutions do not mean *ab initio* that one interpretation is constitutional and another unconstitutional, on the contrary, there may be two or more interpretations which do not go beyond the constitutional framework and fall within the requirements of the constitutional framework.

In the present case, however, the Constitutional Court found that there was a divergence between the interpretation given by the High Court of Cassation and Justice – The Panel competent to adjudicate on appeals in the interest of the law to the legal provisions subject to constitutional review, and the interpretation which the Constitutional Court had previously given to the same legal texts in its case-law. As long as the legal framework remained unchanged after the decisions of the Constitutional Court, the High Court of Cassation and Justice was required, in its interpretation of the legal texts, to comply with the decisions of the constitutional court, which, according to Article 147 (4) of the Constitution, are generally binding from the date of publication in the Official Gazette of Romania.

Furthermore, the Constitutional Court held that, by its Decision No 21 of 21 November 2016, the High Court of Cassation and Justice – The Panel competent to adjudicate on appeals in the interest of the law infringed the constitutional principle of separation of powers by subrogating itself both to the constitutional powers of the legislator and to those of the Constitutional Court. In that regard, the Constitutional Court held that the solution

adopted by the supreme court that "persons who acquired a doctor's degree after the entry into force of Law No 330/2009 are entitled to compensatory amounts" is based on two main considerations. The first consideration is that, after the entry into force of Framework Laws No 330/2009 and No 284/2010, the doctoral increment was transformed from a secondary salary right into a component of salary, as a fundamental right recognised and protected by law. That interpretation ignores the fact that, after the entry into force of the abovementioned laws, the doctoral increment was no longer provided for in the legislation and the compensatory amount granted was a transitional measure designed to avoid a reduction in the income of persons who previously obtained higher earnings than those which would have resulted from the application of the new framework laws on pay. The assessment that these compensatory amounts constituted a new way of rewarding professional qualification by obtaining the doctorate degree is also not supported by the argument that the award of the compensatory amounts was not limited solely to the rights previously granted as doctoral increments, but also related to other salary rights, as set out in Article 30 (6) of Law No 330/2009, Article 6 (1) of Government Emergency Ordinance No 1/2010 and Article 1 (5) of Law No 285/2010. The Court therefore found that the interpretation of the supreme court amounts, in fact, to a change in the legislator's choice, in a sense contrary to what had been decided by the legislator, by affirming the existence of a right that no longer had a legal basis, contrary to the constitutional principle of separation of powers, enshrined in Article 1 (4) of the Constitution, and the constitutional provisions of Article 61 (1) and Article 115, which enshrine the Parliament's role as the sole legislative authority of the country, and, respectively, legislative delegation, by virtue of which the Government has the power to establish, amend and repeal legal rules of general application.

At the same time, the Court held that the second consideration taken into account by the High Court of Cassation and Justice – The Panel competent to adjudicate on appeals in the interest of the law in delivering Decision No 21 of 21 November 2016 was based on considerations relating to fairness and the principle of equal rights for citizens, set out at both legal and constitutional and international levels, the supreme court taking the view that "for all categories of staff in identical situations, remuneration must be ensured at the level of pay for similar posts in the public institution/authority where they are employed". (paragraph 47) The Constitutional Court held that, by its interpretation, the supreme court had not only changed the legislator's choice again, but also replaced the Constitutional Court, in breach of Article 142 (1) of the Constitution, which enshrines the role of the Constitutional Court as the supreme guarantor of the Constitution, carrying out a genuine constitutional review resulting in a refusal to apply legal provisions which, in its view, would have been contrary to the principle of equal rights.

In this context, the Court considered relevant also the conclusions reached in Decision No 1325 of 4 December 2008, in which it found, in essence, that the possibility for the courts to annul the legal provisions which they consider to be discriminatory and to replace them with other rules of general application not envisaged by the legislator or established by legislative acts inapplicable in the cases brought before the court contravenes the principle of the separation of powers enshrined in Article 1 (4) of the Constitution and the provisions of Article 61 (1), according to which Parliament is the sole legislative authority. The Court

stated that, by virtue of the aforementioned constitutional texts, the Parliament and, by legislative delegation, under conditions Article 115 of the Constitution, the Government has the power to establish, amend and repeal legal rules of general application. The courts do not have such jurisdiction, since their constitutional task is to carry out justice in accordance with Article 126 (1) of the Basic Law, that is to say, to settle, by applying the law, disputes between legal persons as to the existence, scope and exercise of their subjective rights.

**III. For all these reasons,** the Court unanimously upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 30 (6) and Article 48 (1) point 7 of Framework-Law No 330/2009 on the uniform remuneration of staff paid from public funds, the provisions of Article 4 (1) and Article 6 (1) of Government Emergency Ordinance No 1/2010 on certain measures to reinstate staff in the budgetary sector and setting their salaries and other measures in the budgetary field, the provisions of Article 1 (5) of Law No 285/2010 on the remuneration in 2011 of staff paid from public funds and Article 8 of Annex No 5 to Law No 63/2011 on the employment and remuneration in 2011 of teaching and auxiliary teaching staff in the education system in the interpretation given to them by the High Court of Cassation and Justice – The Panel competent to adjudicate on appeals in the interest of the law, in Decision No 21 of 21 November 2016.

*Decision No 51 of 4 February 2020 on the exception of unconstitutionality of the provisions of Article 30 (6) and Article 48 (1) point 7 of Framework-Law No 330/2009 on the uniform remuneration of staff paid from public funds, the provisions of Article 4 (1) and Article 6 (1) of Government Emergency Ordinance No 1/2010 on certain measures to reinstate staff in the budgetary sector and setting their salaries and other measures in the budgetary field, the provisions of Article 1 (5) of Law No 285/2010 on the remuneration in 2011 of staff paid from public funds and Article 8 of Annex No 5 to Law No 63/2011 on the employment and remuneration in 2011 of teaching and auxiliary teaching staff in the education system in the interpretation given to them by the High Court of Cassation and Justice – The Panel competent to adjudicate on appeals in the interest of the law, in Decision No 21 of 21 November 2016, published in the Official Gazette of Romania, Part I, No 204 of 13 March 2020*

**The contested legal provisions establish the entitlement to classification in the category of employment under special working conditions for a particular category of persons, namely for staff working in the mortuary and anatomic pathology units of hospitals, as well as for university staff in the anatomy, histology, anatomic pathology and cell biology departments, and the disadvantage, without objective or reasonable reason, in the meaning that they exclude from the right to benefit from special working conditions medical staff working in the mortuary units of forensic institutions, thereby undermining the principle of equality of citizens before the law, since they differentiate between hospital medical staff and medical staff in forensic institutions carrying out the same activities, with the same risk characteristics.**

**Keywords:** *principle of equality, special working conditions, discrimination*

**Summary**

**I. As grounds for the exception of unconstitutionality,** it was stated, in essence, that the provisions of Article 22 of Law No 104/2003 governing the handling of dead human bodies and the removal of organs and tissues from bodies for transplantation, according to which personnel working in the mortuary and anatomic pathology units of hospitals, as well as university staff in the anatomy, histology, anatomic pathology and cell biology departments was included in the category of employment under special working conditions, were unconstitutional whereas they exclude the personnel carrying out the same activities at the "Mina Minovici" National Forensic Institute. This exclusion was thus considered discriminatory, affecting Articles 1 (3), 16 (1) and (2) and 53 (1) and (2) of the Constitution, as well as Articles 6 (1) and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It was also been argued that the provisions of Article 41 (2) of the Basic Law had been infringed, since it was apparent from the contested legislation that the legislator had analysed the conditions of employment in anatomic pathology, mortuary, histology and cell biology units and concluded that they represented a real danger to the health of the staff in those units.

**II. Having examined the exception of unconstitutionality,** the Court found that the contested provisions of law establish for personnel working in the mortuary and anatomic pathology units of hospitals, as well as for university staff in the anatomy, histology, anatomic pathology and cell biology departments the advantage of classification in the category of employment under special working conditions.

The Court found that the provisions of Law No 104/2003 establish a special rule derogating from the general laws on public pensions — namely Law No 19/2000 and Law No 263/2010 — as regards the classification of jobs under special working conditions. Unlike the provisions of those laws, according to which the classification of jobs in particular conditions is to be carried out in accordance with a methodology and procedure which was intended to establish the specific existence in the case of workplaces of those factors and conditions which genuinely justified their classification as particular, the provisions of Law No 104/2003 provide for staff to be classified under particular conditions *ope legis*, without any assessment procedures being carried out, since the premise was that concerning the degree of obvious occupational risk to which personnel working in the mortuary and anatomic pathology units of hospitals, as well as university staff in the anatomy, histology, anatomic pathology and cell biology departments are exposed.

The Court also considered that, in laying down the legislative solution contained in Article 22 of Law No 104/2003, the legislator took into account that whatever steps are taken to reduce or limit the risk factors arising from the activity of handling human bodies, it is impossible to remove them altogether, so that the jobs in which that activity is carried out will always preserve the characteristics of the jobs carried out under particular conditions.

As regards the relevance of the classification in the category of employment under special working conditions, the Court found that it relates mainly to the conditions for entitlement to a pension. Thus, the current legislation provides for the granting of additional

periods of service, which constitute a qualifying period, for the retirement age to be reduced according to the period of employment under particular conditions, and for an increase in the monthly scores achieved during those periods [Articles 17 (1), 18 (a), 55 (1) (a) and 100 (a) of Law No 263/2010].

The authors of the exception of unconstitutionality argued that the contested provisions of law are discriminatory, since they exclude staff of the "Mina Minovici" National Forensic Institute, who carry out the same activities as those referred to in Article 22 of Law No 104/2003, namely anatomic pathology and morgue activities, from the benefit of the classification of their employment under special working conditions.

The Court found that Law No 104/2003 referred to a special regulation of anatomic pathology and morgue activities where they involve forensic consequences, namely Government Ordinance No 1/2000 on the organisation of the activity and functioning of forensic institutions. Regulating those activities by means of a specific legislative act is justified by their specific nature, namely by contributing to the achievement of justice by establishing the truth for the purpose of resolving criminal, civil or other cases.

In examining the regulations, the Court found that the anatomic pathology and morgue activities carried out in forensic institutions are identical or comparable to those carried out at hospitals, the risk factors arising from the handling of human bodies and the examination of biological samples being equally present. However, Government Ordinance No 1/2000 does not provide forensic medicine practitioners with the same rights that Article 22 of Law No 104/2003 enshrines for personnel working in the mortuary and anatomic pathology units of hospitals, as well as for university staff in the anatomy, histology, anatomic pathology and cell biology departments.

In summary, the Court held that medical and teaching activities involving the handling of human bodies and the removal of organs and tissues from bodies for transplantation enjoy special rules, which establish specific rights for staff carrying out those activities, such as the classification in the category of professions carried out under special working conditions. These activities also form part of the competences of forensic institutions. However, in view of the specific nature of these institutions, namely contributing to the achievement of justice by establishing the truth for the purpose of resolving criminal, civil or other cases, the activity of forensic medicine is subject to a separate regulation by Government Ordinance No 1/2000. However, the Court considered that the morgue and anatomic pathology services provided within those establishments have the same risk characteristics as activities carried out in hospitals. Therefore, the introduction of different legal treatment for the staff of the forensic establishments carrying out those activities, in the sense of excluding from the right to benefit from special working conditions, appears to lack any objective and reasonable justification. The difference in the fact that the activity of those institutions contributes to the performance of justice cannot be regarded as an objective criterion, let alone reasonable, for the purpose of creating different rules with discriminatory consequences, since the risk factors constituting the conditions specific to the classification under special working conditions are equally found in the activities of pathological anatomy and prosecting in institutions of equal medicine, deriving from the very nature of those activities, as stated above.

The Court therefore held that the contested provisions of law were discriminatory, creating an unjustified legal difference in treatment in the light of legal measures relating to the safety and health of employees between persons carrying out their work in similar circumstances, and were therefore unconstitutional in nature.

**III. For all these reasons,** by a majority vote, the Court upheld the exception of unconstitutionality and found unconstitutional the legislative solution contained in Article 22 of Law No 104/2003 governing the handling of dead human bodies and the removal of organs and tissues from bodies for transplantation, which excluded the personnel carrying out anatomic pathology and morgues activities in forensic institutions from the classification of jobs under special working conditions.

*Decision No 53 of 4 February 2020 on the exception of unconstitutionality of Article 22 of Law No 104/2003 governing the handling of dead human bodies and the removal of organs and tissues from bodies for transplantation, published in the Official Gazette of Romania, Part I, No 199 of 12 March 2020*

**The absence of a clear and coherent legislative framework governing evidence leads to a violation of the right to a fair trial provided for in Article 21 (3) of the Constitution. In the case of recordings obtained in accordance with Law No 51/1991, the legislator did not laid down any specific procedure applicable in the event of a challenge as to their lawfulness. The lack of clarity and foreseeability of the procedure for challenging the lawfulness of the taking of evidence renders it ineffective.**

**Keywords:** *national security, evidence, restriction on the exercise of certain fundamental rights or freedoms, principle of legality, clarity of law, foreseeability of the law, fair trial, free access to justice, right of defence*

**Summary**

**I. As grounds for the exception of unconstitutionality,** the author argued that it is apparent from a combined reading of the contested legal texts that entities other than the prosecution, such as workers of the Romanian Intelligence Service, are allowed to carry out the interception of telephone conversations which would subsequently constitute evidence in the context of a criminal case, contrary to the legal and constitutional provisions expressly prohibiting it. If that interpretation were accepted, it would be contrary to the constitutional rules on the obligation to respect the laws, the right to personal, family and private life, the secrecy of correspondence and the restriction on the exercise of certain rights or freedoms.

**II. Having examined the exception of unconstitutionality,** the Court found that the provisions of the Law on national security do not confer the quality of evidence on data and information derived from activities specific to the collection of information involving

restrictions on the exercise of fundamental human rights or freedoms. The question of constitutionality raised by the author of the exception does not concern Law No 51/1991, but the way in which criminal procedural provisions are regulated. The Court therefore dismissed as inadmissible the exception of unconstitutionality of the provisions of Article 11 (1) (d) of Law No 51/1991.

The Court noted that the author of the exception criticises the provisions of Article 139 (3) of the Code of Criminal Procedure, since it is apparent from the documents in the case that recordings resulting from the execution of national security warrants were used in the criminal case, in accordance with Law No 51/1991.

By Decision No 633 of 12 October 2018, published in Official Gazette of Romania, Part I, No 1020 of 29 November 2018, the Court held that evidence is not listed strictly and exhaustively in the current criminal procedural law, and judicial bodies may administer any evidence which, although not expressly listed in Article 97 (2) (a) to (e) of the Code of Criminal Procedure, is not prohibited by law, in accordance with Article 97 (2) (f). The new Code of Criminal Procedure takes account of continuous technical developments which require a flexible approach to probation, capable of effectively leading to finding the truth in criminal cases.

In principle, the legislator is free to regulate the category of evidence, the inclusion or exclusion of certain items of evidence from that category. The legislature enjoys a rather wide margin of discretion, since it is in a position which enables it to assess the need for a particular criminal policy. However, any regulation in this area must be carried out in compliance with the relevant fundamental rights and freedoms. Regardless of how the category of evidence is regulated, it remains governed by the principle of legality. According to the Court, conferring on certain items of evidence the status of evidence in criminal proceedings is intrinsically linked to the creation of the appropriate framework enabling the lawfulness of that evidence to be challenged.

The Court held that, in the absence of a clear and coherent legislative framework in the field of evidence, the right to a fair trial, provided for in Article 21 (3) of the Constitution, was infringed. At the same time, in order to determine whether the procedure as a whole was fair, the European Court of Human Rights held that it was necessary to determine whether the right of defence had been respected. In particular, it must be ascertained whether the applicant had the opportunity to challenge the authenticity of the evidence and to oppose to its use. Account must also be taken of the quality of the evidence, including whether the circumstances in which it was obtained cast doubt on its credibility or accuracy (Judgement of 10 March 2009, Bykov v. Russia, paragraphs 88 to 90).

With regard to the technical surveillance measure, the Court noted that it is ordered by a judge of rights and freedoms, who verifies to whether the conditions laid down in Article 139 of the Code of Criminal Procedure are met. However, according to the European Court, the status of judge of the person who orders and supervises the recordings does not mean that they are lawful and consistent with Article 8 of the Convention. An interpretation to the contrary would render superfluous any appeal brought by the interested parties. There must therefore be a post-technical surveillance verification. The verification carried out by the pre-trial chamber judge must be characterised by effectiveness, ensuring, in the first place, the establishment of an appropriate, clear and predictable legislative framework.

Where recordings are obtained in accordance with the system governed by the Code of Criminal Procedure, requests and objections may be made in writing in the pre-trial chamber procedure concerning the lawfulness of the referral to the court, the lawfulness of the taking of evidence and of the performance of the acts by the prosecution.

As regards the recordings made on the basis of Law No 51/1991 on national security in Romania, they may be authorised in the event of the existence of a situation referred to in Article 3 of the Law, which constitutes a threat to the national security of Romania. The existence of such a situation does not necessarily require the preparation or commission of a criminal offence against national security. The measure is always ordered by a judge of the High Court of Cassation and Justice. However, that rule does not amount to the existence of an absolute presumption of lawfulness which precludes the exercise of a priori judicial review. The lawfulness of these recordings must be verified in compliance with the same procedural safeguards applicable to the use in criminal proceedings of recordings resulting from the application of the system governed by the Code of Criminal Procedure.

The Court found that, in the case of recordings obtained under Law No 51/1991, the legislator did not lay down a specific procedure applicable in the event of a challenge to their lawfulness. The pre-trial chamber judge will have to examine their legality by reference to either the relevant provisions of Law No 51/1991 or those of the Code of Criminal Procedure, which are clearly different. The purpose of the activities undertaken in the field of national security is different from that of criminal proceedings. The former focus on knowledge, prevention and removal of internal or external threats to safeguard national security, while the others are aimed at holding to account persons who have committed criminal offences.

If the pre-trial chamber judge adopts as a benchmark the provisions of the Code of Criminal Procedure, this will lead to a situation in which, although the collection of information has been authorised under Law No 51/1991, the lawfulness of the evidence obtained will be verified by reference to a legislative act which was not taken into account when the measure was authorised. If the pre-trial chamber judge adopts as a benchmark the provisions of Law No 51/1991, courts which are hierarchically lower than that which issued the mandate will have the jurisdiction to verify the lawfulness of the evidence. However, the establishment of the High Court of Cassation and Justice as a specialised court in the field of authorisation of the activity specific to the collection of information governed by Law No 51/1991 also presupposes a certain specialised competence of that court, which is strictly determined by law.

The Court found that the regulation of the possibility of conferring the status of evidence on recordings resulting from activities specific to the collection of information involving restrictions on the exercise of fundamental human rights or freedoms is not accompanied by a set of rules which make it possible to challenge their lawfulness in conditions of effectiveness. The lack of clarity and foreseeability of the relevant legislative framework for challenging the lawfulness of recordings leads, in fact, to a formal and ineffective review, with the result that the fundamental rights and freedoms laid down by the Constitution are infringed.

The legislator is required to lay down a coherent regulatory framework in which the rules adopted complement each other in a harmonious manner, without creating contradictions

between the legislative act constituting the general regulations governing this matter and those governing particular or special aspects thereof.

The lack of clarity and foreseeability in the procedure for challenging the lawfulness of the taking of evidence renders it ineffective, which results in a breach of free access to justice and of the right to a fair trial.

**III. For all these reasons,** the Court unanimously dismissed as inadmissible the exception of unconstitutionality of the provisions of Article 11 (1) (d) of Law No 51/1991 on national security in Romania. By a majority vote, the Court upheld the exception of unconstitutionality and found that the provisions of the last sentence of Article 139 (3) of the Code of Criminal Procedure were constitutional in so far as they did not concern recordings resulting from the performance of activities specific to the collection of information involving restrictions on the exercise of fundamental human rights or freedoms carried out in compliance with the legal provisions authorised under Law No 51/1991.

*Decision No 55 of 4 February 2020 on the exception of unconstitutionality of the provisions of Article 139 (3) the last sentence of the Code of Criminal Procedure and of Article 11 (1) (d) of Law No 51/1991 on national security in Romania, published in the Official Gazette of Romania, Part I, No 517 of 17 June 2020*

**The legislative mechanism specific to the Parliament, even in an emergency procedure, is not capable to respond quickly to the need to intervene immediately, so that regulation by the Government, through the emergency ordinance procedure, is the only way to avoid serious consequences. The adoption of an emergency ordinance containing measures of the same nature as those previously confirmed by Parliament cannot be regarded as an act of appropriateness, but rather of necessity, given the requirement to implement certain measures and to unblock situations with serious consequences.**

**Keywords:** *emergency ordinance, extraordinary situation, urgency of regulation, effects of decisions of the Constitutional Court, standard of integrity specific to the civil service, legislative process*

**Summary**

**I. As grounds for the exception of unconstitutionality,** it was argued, in essence, that Government Emergency Ordinance No 57/2019 on the Administrative Code was issued in breach of the constitutional provisions of Article 115 (4) and (6) concerning the conditions under which the Government may adopt emergency ordinances, Article 69 on the representative mandate, Article 109 with regard to the liability of members of the Government and Article 147 (4) regulating the legal effects of decisions of the Constitutional Court.

With regard to the infringement of Article 115 (4) of the Constitution, the author of the referral stated that the grounds set out in the preamble to the Emergency Ordinance, both

individually and as a whole, are aspects related to the appropriateness for issuing the ordinance, a subjective element which, according to the case-law of the Constitutional Court, cannot justify the adoption of such a legislative act. At the same time, it was considered that the elements relied on by the Government in the preamble to the criticised legislative act to justify the existence of an "extraordinary situation" did not in fact satisfy that requirement, since the shortcomings and problems referred to had been consistently pointed out by the local public administration authorities and were the consequence of the failure to adapt the current legal framework which regulates the organisation and functioning of those authorities to the commitments made. At the same time, it was pointed out that the contested legislative act contains provisions which are not confined to the measures set out in its preamble, since the requirement to state reasons is not satisfied. Thus, Government Emergency Ordinance No 57/2019 regulates a number of issues unrelated to the reasons put forward by the Government in support of the urgency and extraordinary situation justifying the adoption of such an ordinance.

As regards the infringement of the provisions of Articles 69, 109 and 111 (1) of the Constitution, the author considered that the Government's decision and action to legislate by means of the Emergency Ordinance in fact constituted a penalty on the failure of the legislative process carried out by Parliament. Having analysed the explanatory memoranda attached to Government Emergency Ordinance No 57/2019, the conclusion drawn by the author of the exception on unconstitutionality was that "the constitutional relations between Parliament and the Government are being reversed", resulting in the infringement of Article 69 on the representative mandate, of Article 109 on the liability of members of the Government and Article 111 (1) of the Constitution on parliamentary control over Government activity.

In the opinion of the author, Government Emergency Ordinance No 57/2019 also contravenes Article 115 (6) of the Constitution, as it affects the system of the fundamental institutions of the State and weakens the status of the members of the Government and of this institution as a whole.

**II. Having examined the exception of unconstitutionality,** in the light of the provisions of Article 115 (4) of the Constitution, in relation to the criticisms of unconstitutionality made in relation to Government Emergency Ordinance No 57/2019, contrary to the statements made by the author of the referral, arguing, in essence, that the elements relied on as extraordinary situations were not new, representing, in fact, previously known realities, latent situations which had not been regulated in due time, in line with Romania's commitments as regards the field of administration and the public service, the Court found that of the essence of the extraordinary situation is not its novelty. Moreover, the Court observed that the delegated legislator, in the preamble to the contested legislative act, did not even claim that new situations which were unknown up to the time of the adoption of the emergency ordinance had occurred.

In the light of what the Constitutional Court has held in its case-law on the subject, in the present case, the evidence adduced by the Government for the purposes of invoking the extraordinary situation corresponds to the constitutional framework thus established. The

failure to regulate over time situations reported to be dysfunctional and, as is the case here, the failure to complete the parliamentary procedures for legislating on a legislative initiative with a similar object do not in themselves constitute obstacles to the adoption of the Emergency Ordinance, since the very combination of factors (delays, omissions, etc.) has led to a negative accumulation which has exacerbated/aggravated the shortcomings already in existence and has therefore converted into an extraordinary situation which justifies the urgency of rapid and effective regulation by means of the Government Emergency Ordinance.

With regard to the urgency of regulation, the Court has pointed out that the urgency of the measure cannot, in principle, be justified by the need to harmonise Romanian legislation with Community law, stating in that regard that the amendment or harmonisation of legislation in one or other area does not in itself justify the issuing of an emergency ordinance. However, the Court has accepted the use of the Government Emergency Ordinance as a legislative instrument for specific situations, establishing, in view of the obligations imposed on the Romanian State by Article 148 (4) of the Constitution, that the Government is constitutionally empowered to guarantee, by the means at its disposal, the fulfilment of Romania's obligations towards the European Union. Thus, the use of emergency orders to bring national legislation into line with Community law, in the event that the initiation of infringement proceedings before the Court of Justice was imminent, is entirely constitutional. In those circumstances, the emergency ordinance criticised was found to comply with the requirements of Article 115 (4) of the Constitution.

The Court observed that Government Emergency Ordinance No 57/2019 on the Administrative Code was adopted by the Government, while the parliamentary legislative process of the draft Law on the Romanian Administrative Code (PL-x no.369/2018) had finally come to an end following the declaration that that law was unconstitutional, taken as a whole, by Constitutional Court Decision No 681 of 6 November 2018, and the rejection of the law by the Senate and by the Chamber of Deputies.The Court also noted, in a context where the parliamentary legislative initiative for the adoption of the Romanian Administrative Code had come to an end by its final rejection in Parliament, that the Government had immediately started the legislative procedure on the same regulatory object and adopted Government Emergency Ordinance No 57/2019 on the Administrative Code.

The Court found that urgency was not motivated at the theoretical level and solely by the need to transpose and implement external commitments into the national legislation of Romania, as the author of the referral had claimed, but related to specific data and imminent risks linked to the need for organisational and functional changes at central and local public administration level and to the need for a significant reform in the public service, capable of rationalising its role in the public interest. The risks of losing opportunities for using the European funds programmed in Romania's Partnership Agreement with the European Commission for the period 2014-2020 were also highlighted, with negative consequences for the development and modernisation of public administration.

The Court found that the urgency of the regulation by emergency ordinance was real, in the absence of the criticised legislative act being directly applicable the penalty of suspension of interim payments by the Commission for failure to comply with ex ante conditionality No 11 of the Partnership Agreement concluded by Romania with the European

Commission for the period 2014-2020, which would have led to major negative consequences for the performance of the public service of an administrative nature throughout the country.

The Court went on to point out that the criticism made by the author of the referral that the legislative act contained rules laying down unreasoned measures in the preamble was also unfounded and it could not be accepted that Article 115 (4) of the Constitution had been infringed. Government Emergency Ordinance No 57/2019 is a particularly complex legislative act, comprising a multitude of measures, so it would have been impossible to refer to each of them in the preamble, being useful, in this regard, also the instrument for submission of the emergency ordinance for debate to Parliament, namely the explanatory memorandum to the draft law approving this emergency ordinance, which contains broader explanations on the measures regulated.

For all the arguments set out above, the Court found that Government Emergency Ordinance No 57/2019 had been adopted in compliance with the conditions laid down in Article 115 (4) of the Constitution.

Another complaint of unconstitutionality was made with reference to Article 115 (6) of the Constitution, the author of the referral arguing that Government Emergency Ordinance No 57/2019 affected the system of the fundamental institutions of the State by weakening the status of the members of the Government and of this institution as a whole, since it removed a condition of integrity specific to the office of member of the Government, previously governed by Article 2 of Law No 90/2001 on the organisation and functioning of the Government of Romania and the Ministries, as amended.

The Court found that the new choice of the delegated legislator did not conflict with the constitutional rule relied on, since it did not in fact alter the conditions for the performance of the duties of member of the Government or remove any standard of integrity specific to the civil service. Thus, cases of incompatibility and conflict of interest, an expression of the legal standard of integrity of the civil service, remain governed by the same legislative acts — Law No 161/2003 and Law No 176/2010 — as expressly stated in Articles 39 and 40 of Government Emergency Ordinance No 57/2019 on the Administrative Code. In addition, Article 41 provides, as a guarantee of compliance with this standard, for the penalty consisting of the automatic termination of the mandate in the event of incompatibility, this situation also being repeated in Article 42 (d), which lists the cases of termination of the office of member of the Government.

The legislative solution contained in Article 41 of Government Emergency Ordinance No 57/2019 is not new as regards the system of incompatibilities in the civil service, since it is expressly laid down in Law No 96/2006 and Law No 161/2003 for the category of local parliamentarians and local elected representatives. In that context, the legislator's choice is, in fact, consistent with the legislative solutions already laid down with regard to the incompatibility regime and the finding of incompatibility during the exercise of public offices, and therefore establishes harmonised rules, including for members of the Government. Moreover, this regulatory solution follows the natural succession of the procedure whereby a person is in a position to be appointed as a member of the Government — his proposal, the entry by the Prime Minister onto the list of government, the presentation of the list to Parliament and the obtaining of a vote of trust and, finally, the taking of the oath before the President of the country (in accordance with Articles 103 and 104 of the Constitution). It is

only after that latter point that a specific case of incompatibility may arise through the simultaneous exercise of two incompatible positions. Before the oath is taken, there is only a probability, or only the possibility, that the person concerned will, at an indefinite time in the future, find himself in one of the situations of incompatibility provided for by law. The Court has held that such a purely hypothetical circumstance cannot take on drastic legal consequences, such as the abandonment of one position on the ground that it would be incompatible at some point in the future with another position.

The Court found that, unlike the legislative provisions on resolving situations of incompatibility arising during the exercise of a public office, Article 41 of the Administrative Code is worded in mandatory terms, in that it does not provide for a right of option but an obligation to resign, within 15 days of the end of the state of incompatibility, thus immediately after entry into the public office, from one of the two incompatible positions, failing which the civil service will be automatically terminated. On the other hand, the finding and sanctioning of the state of incompatibility and conflict of interest for persons holding the position of member of the Government are to be made, in accordance with Article 40 of the Administrative Code, in accordance with Law No 176/2010. The establishment in Article 41 of the Administrative Code of the resignation obligation also ensures that the standard of integrity specific to the civil service is ensured.

The Court therefore found that, by the provisions relating to the filling of the office of member of the Government and cases of incompatibility and conflict of interest, Government Emergency Ordinance No 57/2019 did not in fact affect the integrity standard specific to the office of member of the Government and did not contravene Article 115 (6) of the Constitution.

As regards the criticisms of unconstitutionality relating to the infringement of Articles 69, 109 and 111 (1) of the Constitution, the Court, in line with the submissions as to the alleged unconstitutionality in relation to the requirements laid down in Article 115 (4) of the Constitution for the adoption of emergency ordinances by the Government, held that the special situation characterising the entire legislative process initiated in Parliament for the adoption of the Law on the Romanian Administrative Code (PL-x no.369/2018) had determined the Government to act promptly so that the measures envisaged in that legislative initiative be implemented until the end of strategic programmes running from 2014 to 2020. The adoption, in this context, of an emergency ordinance containing measures of the same nature as those previously confirmed by Parliament cannot be regarded as an act of appropriateness, but rather of necessity, in view of the imperative of implementing certain measures and of unblocking situations with serious consequences in the conduct of administrative projects and resulting in a breach of certain commitments made by Romania to the European institutions to develop and strengthen public administration and the civil service.

Furthermore, the Court held that Government Emergency Ordinance No 57/2019 was adopted three months after the final rejection by Parliament of the Law on the Romanian Administrative Code, following the delivery of Decision No 681 of 6 November 2018, by which the Court found only defects of extrinsic unconstitutionality, namely infringement of the principle of bicameralism and of the parliamentary procedure on the return of the law in the case of the regulation of certain legal texts, and of the principle of legality and of the provisions of Article 141 of the Constitution, relating to the Economic and Social Council, as the opinion of

that authority was not sought during the parliamentary procedure, as the Court did not review the constitutionality of the legal solutions provided for. Against this background, it cannot be argued that the Government defied the Parliament's sovereign law-making authority in that it adopted the criticised emergency ordinance by reproducing, in practice, in that form of legislative act most of the texts initially adopted by the Parliament when approving the Law on the Romanian Administrative Code (PL-x no.369/2018). Nor can it be argued that the Government thus circumvented or disregarded the decision of the Constitutional Court No 681 of 6 November 2018, since the defects of unconstitutionality found by the Court did not concern substantive issues, but exclusively the parliamentary legislative procedure.

Similarly, the Court could not accept the complaints of unconstitutionality concerning the effect on the representativeness of the parliamentary mandate or the breach of constitutional relations between Parliament and the Government, since the prerogative and method of adoption of the Emergency Ordinance by the Government are governed by the Constitution in accordance with the conditions laid down in Article 115 (4) to (8) and involve parliamentary scrutiny exercised by submission by the Government, for discussion by the two chambers of Parliament, of the draft law for approval of the emergency ordinance, a procedure followed in the adoption of Government Emergency Ordinance No 57/2019.

The author of referral also raised criticisms of constitutionality, according to which the provisions of Article 17 (c) of the legislative act under consideration, by establishing exhaustively that the office of member of the Government may be occupied by persons who have not been convicted of criminal offences, except where rehabilitation has taken place, are not in line with criminal law or with Decision No 304 of 4 May 2017, in which the Constitutional Court held that there were other situations which remove the consequences of the conviction, such as the application of the criminal law on decriminalisation and the post-conviction amnesty.

In response to those allegation, the Court could not find that there had been an infringement of Article 147 of the Constitution from the point of view of failure to comply with Decision No 304 of 4 May 2017, as long as the Constitutional Court had not issued an admission decision to the effect that the words "have not been convicted of criminal offences" were unconstitutional. At the same time, in the reasoning part of that decision, the Court stated that the criminal legislation governs the cases in which criminal liability is removed, the consequences of the conviction and the extrinsic consequences deriving from the conviction. Therefore, the fact that Article 17 of Government Emergency Ordinance No 57/2019 does not, separately, list all those causes cannot be interpreted as contrary to fundamental rules or affecting a right protected by the Constitution, since the ancillary legal framework provides solutions in the sense indicated by the author of the referral.

**III. For all these reasons,** by a majority vote, the Court dismissed as unfounded the exception of unconstitutionality and found that the provisions of Government Emergency Ordinance No 57/2019 on the Administrative Code were constitutional in the light of the criticisms of unconstitutionality raised.

*Decision No 60 of 12 February 2020 on the exception of unconstitutionality of the provisions of Government Emergency Ordinance No 57/2019 on the Administrative Code, published in the Official Gazette of Romania, Part I, No 369 of 8 May 2020*

**The concept of extraordinary circumstances and the concept of urgency do not overlap with statement of reasons as to the usefulness of regulation, the appropriateness of adopting legislation or the purpose/rationale of legislation, so that the extraordinary situation resulting from the implementation of additional means of emergency caller location and the urgency of the measure justified by the impossibility of identifying end-users of telephony services who benefit from those services by means of pre-paid cards and the impossibility of integrating modern advanced technologies to locate callers to the single dedicated emergency number 112 cannot therefore be qualified as an extraordinary one, nor, therefore, can it be argued that there was an urgency in the adoption of the contested legislation. The absence or failure to explain the urgency of regulating extraordinary situations clearly constitutes a constitutional barrier to the adoption by the Government of an emergency ordinance.**

**Keywords:** *emergency ordinance, extraordinary situation, urgency of regulation*

**Summary**

**I. As grounds for the exception of unconstitutionality,** on the one hand, criticisms of extrinsic unconstitutionality were formulated in respect of the Emergency Government Ordinance No 62/2019 amending and supplementing the Emergency Ordinance No 34/2008 on the organisation and functioning of the Single National System for Emergency Calls and supplementing the Emergency Ordinance No 111/2011 on electronic communications, relying on the provisions of Article 115 (4) and (6) and Article 147 of the Constitution, based on the fact that the delegated legislator did not explain in the text of the legislative act which was the extraordinary situation, the urgency and why it was impossible to delay legislation, while the deadline for the entry into force of certain provisions was delayed even in the original form of the act and, subsequently, by a new legislative act, the contested Emergency Ordinance, fundamental rights and freedoms, constitutionally protected by Articles 11, 20 and 26 of the Basic Law, were infringed upon, and the delegated legislator ignored the case-law of the Constitutional Court, namely Decision No 1258 din 25 November 2008, Decision No 440 of 8 July 2014, Decision No 461 of 28 June 2016 and Decision No 498 of 17 July 2018, and, on the other hand, criticisms of intrinsic unconstitutionality were formulated, relying on the provisions of Articles 11, 20, 26, 53 and 148 (2) and (4) of the Constitution, as well as of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The retention, storage and processing of personal data were regarded as interferences with the fundamental right to personal, family and private life, the proportionality of which to the objective pursued by the legislator was not ensured in such a way as to ensure the confidentiality of the personal data of users of publicly available telephone services at mobile points for which payment is made in advance.

**II. Having examined the exception of unconstitutionality,**the Court held that, by adopting Government Emergency Ordinance No .62/2019, the Government amended and supplemented two legislative acts concerning, on the one hand, the organisation and

functioning of the Single National System for Emergency Calls (Government Emergency Ordinance No 34/2008, approved with amendments by Law No 160/2008) and, on the other hand, the electronic communications regime (Government Ordinance No 111/2011, approved by Law No 140/2012). Thus, in the preamble to the Emergency Ordinance, the Government was required to identify the extraordinary situations whose regulation could not be delayed and to state the reasons for the urgency of legislating on the amended matters.

Having examined the criticisms raised, the Court found that, in justification of the extraordinary situation which regulation is required by the adoption of an emergency ordinance in the field of the operation of the Single National System for Emergency Calls, the question was raised of the need to issue an emergency ordinance enabling emergency dispatchers to benefit from positioning as close as possible to the reality of those applying for assistance by means of emergency calls to 112. However, such a reason, regardless how it is expressed, cannot constitute an extraordinary situation requiring the adoption of an emergency ordinance. The use of information technology in the national emergency call system, resulting in the evaluation of the efficiency which it confers in determining the data necessary to identify the caller or his location, and the identification of solutions to improve such efficiency, cannot be classified as a regulation whose adoption is urgent, since they are not based on the existence of an extraordinary situation.

Furthermore, the fact that the 112 emergency service must be provided in the best possible conditions at European level, with high quality standards, can be a general objective of legislation resulting from the evaluation of the implementation and use of communication and information technology equipment by the actors involved in the management of the national emergency call system. Such information/assessments may constitute the basis for the Government's promotion of a draft law amending the current legislative framework in this field aimed at implementing additional means of location of the caller to the single emergency number 112, but in no way constitutes an extraordinary situation within the meaning of Article 115 (4) of the Constitution.

Furthermore, the Court noted that, in the preamble, the Government listed a number of arguments demonstrating only the need for regulation, namely that the display of subscriber pre-recorded data contributes significantly both to reducing the processing time of the emergency call and to the possibility for the operator of single emergency call centres to match/supplement/compare caller location and identification information, as specialised intervention agencies must be provided with on the most accurate location and identification data of the person in an emergency situation, or to increasing the efficiency of the handling of emergency calls by reducing the incidence of abusive calls by non-identifiable callers because they use prepaid cards.

The Court held that, although the area of the single national emergency call system and the electronic communications regime relate to the public interest, the elements invoked as extraordinary situations, to be remedied as a matter of urgency, do not constitute objective, quantifiable facts beyond the control of the Government which would jeopardise a public interest and therefore do not meet the requirements laid down in Article 115 (4) of the Constitution. The reasons for the adoption of the Emergency Ordinance are related to the appropriateness of the measure, reasons which clearly cannot be invoked for the adoption of an emergency ordinance.

The urgency of the regulation with regard to the purchase of publicly available telephone services at mobile points for which payment is made in advance only after the provider of those services has collected the identification data of the end user of the SIM is contradicted by the very content of the legislative act which does not contain immediate implementing measures on that point. Thus, although Government Emergency Ordinance No 62/2019 was published in the Official Gazette of Romania on 3 September 2019, in accordance with Article II (3) of that legislative act, the actual application of the legislative solution on the collection of the identification data of end-users of the pre-paid SIM card was postponed to 1 January 2020. Moreover, by Article I of Government Emergency Ordinance No 89/2019 amending Article 511 (1) and (4) of Government Emergency Ordinance No 111/2011 on electronic communications and amending certain legislative acts, the application of those provisions was further postponed to 31 March 2020.

Also with regard to the urgency of regulation, the Court held that, with regard to the processing of personal data and the protection of privacy in the electronic communications sector, that is to say, telephony services to the public at mobile locations, for which payment is made in advance, the Court ruled in Decision No 461 of 16 September 2014, in which it held that the Law amending and supplementing Government Emergency Ordinance No 111/2011 introducing a series of regulations in that area was unconstitutional. In providing that the law must contain "clear and precise rules as to the content and application of the retention and use measure, so that persons whose data have been retained enjoy sufficient guarantees to ensure effective protection against abuse and unlawful access or use", the Court found that the mechanism for retaining data generated or processed by providers of public electronic communications networks and providers of publicly available electronic communications services consists of two stages: the first consists of the retention and storage of the data, the second consists of access to that data and its use. The retention and storage of data shall be the responsibility of providers of public networks and publicly available electronic communications services. At this stage, as it concerns only the retention and storage of a mass of information, the identification or location of those who are the subjects of an electronic communication does not actually take place, as those operations will take place only in the second stage, after access to and use of the data are allowed. Thus, given that the purchase of electronic communications services for which payment is made in advance was conditional on the user filling in a standard form, on paper or secure electronic form, provided by the provider, with personal identification data, the Court has held that the rule does not precisely determine the scope of persons who make available the standard form and who thus collects that stored data, that is to say, whether it relates only to providers of electronic communications services to the public and to persons empowered by them as intermediaries (dealers) or includes other distributors selling electronic communications services for which payment is made in advance (as currently happens on the market for prepaid telephone and internet services), which creates the preconditions for abuse in the retention, processing and use of stored data. Next, the Court observed that it is uncertain whether or not the user's obligation to fill in the standard form (which is, at least apparently, a unilateral legal act) corresponds to a corresponding obligation on the part of the person who collects the personal data to ensure the confidentiality, security and use of

that data in accordance with the purpose laid down by law, as long as the depositaries of the standard forms merely receive those documents, without being legally liable to that effect. However, since the measures adopted by the law subject to constitutional review were not precise and foreseeable, the State's interference with the exercise of constitutionally protected fundamental rights relating to personal, family and private life, secrecy of correspondence and freedom of expression, although provided for by law, was not clearly, rigorously and exhaustively worded in order to give confidence to citizens, the strict necessity in a democratic society was not fully justified and the proportionality of the measure was not ensured by the regulation of appropriate safeguards, the Court found that the provisions of the Law amending and supplementing Government Emergency Ordinance No 111/2011 on electronic communications infringed Articles 1 (5), 26, 28, 30 and 53 of the Constitution.

Since Decision No 461 of 16 September 2014 was published in the Official Gazette of Romania, Part I, No 775 of 24 October 2014, the Court found that, by the legislative act subject to this review, that is to say, only 5 years after the decision of the Constitutional Court, the delegated legislator, relying on a state of emergency, repeated the amendments adopted as early as 2014. Those factual and legal circumstances bear witness to the non-existence of the extraordinary situation the regulation of which cannot be delayed and demonstrate precisely the lack of urgency in the adoption of the contested legislative act.

**III.For all these reasons,** the Court unanimously upheld the exception of unconstitutionality and found that Government Emergency Ordinance No 62/2019 amending Government Emergency Ordinance No 34/2008 on the organisation and functioning of the Single National System for Emergency Calls and supplementing Government Emergency Ordinance No 111/2011 on electronic communications was unconstitutional as a whole.

*Decision No 83 of 18 February 2020 on the exception of unconstitutionality of the provisions of Government Emergency Ordinance No 62/2019 amending Government Emergency Ordinance No 34/2008 on the organisation and functioning of the Single National System for Emergency Calls and supplementing Government Emergency Ordinance No 111/2011 on electronic communications, published in Official Gazette of Romania, Part I, No 204 of 13 March 2020*

**The essential aspects of the competition for admission to the magistracy, such as the stages and tests of the competition, the method of determining the results and the possibility of challenging the results of each test, must be governed by organic law. Regulating them by means of acts of an administrative nature, which are infralegal in nature, gives rise to a state of legal uncertainty, since such acts usually are subject to an increased degree of successive changes over time.**

**Keywords:** *organic law, judges' career, prosecutors' careers, foreseeability of the law*

**Summary**

**I. As grounds for the exception of unconstitutionality,** its author argued that the provisions of the law complained of were contrary to the constitutional provisions of Articles 1 (5), 73 (3) (l) and 134 (4), which require that the organisation of the courts be established by organic law. The method and essential criteria for admission to the magistracy are laid down in Law No 303/2004. However, in an unconstitutional and inexplicable manner, the same law, at Article 106 (a) and (d), refers to the adoption of a regulation, an administrative act which is inferior to Constitution, laws, decrees and even government decisions. Thus, admission to the magistracy becomes possible on the basis of a non-transparent and subjective examination and within a framework established on the basis of a legislative act inferior to the organic law, which unlawfully and unconstitutionally supplements the criteria and tests strictly laid down in the organic law.

**II. Having examined the exception of unconstitutionality,** the Court observed that the provisions of Article 106 (a) of Law No 303/2004 were unrelated to the resolution of the case in which the exception of unconstitutionality was raised, since they related to the competition for admission to the National Institute of Magistracy and to the related graduation exam and not to the competition for admission to the magistracy. Since, pursuant to the final sentence of Article 29 (1) of Law No 47/1992, the provisions of law forming the subject matter of the exception of unconstitutionality must be relevant to the settlement of the case, the Court held that the exception of unconstitutionality of the provisions of Article 106 (a) of Law No 303/2004 was inadmissible and was to be dismissed as such.

In its case-law, the Court has established, as a matter of principle, that the status of judges and prosecutors must be governed by organic law. By Decision No 172 of 24 March 2016, published in the Official Gazette of Romania, Part I, No 315 of 25 April 2016, the Court held that the legal status of a category of staff was governed by the provisions of law relating to the entering, enforcement, modification, suspension and termination of the legal employment relationship in which that category belongs. Therefore, in the case of all categories of staff whose status is, according to the Constitution, to be governed by organic law, the essential aspects relating to how positions are to be filled must be governed by organic law and not by administrative acts of a degree lower than the law.

The Court held that Law No 303/2004, in the version prior to the entry into force of Law No 242/2018, provided for certain essential aspects of appointment to the office of judge or prosecutor, which concerned: the participation in a competition, on the basis of professional competence, skills and good reputation, the categories of persons who may take part in the competition and the relevant seniority, the conditions for admission to the magistracy, the criteria on which the competition is based, the conditions for the validation of the competition by the Superior Council of Magistracy, and the conditions for appointing successful candidates to the position of judge or, where applicable, the position of prosecutor. However, Law No 303/2004 does not provide for the stages or tests of the competition, the method for determining the results or the possibility of challenging the marks obtained at each test. These aspects are laid down in a regulation.

The fact that the Organic Law on the Status of Judges and Prosecutors does not provide for essential aspects of the competition for admission to the magistracy, such as the stages and tests of the competition, the method of determining the results and the possibility of challenging the results of each test, is contrary to Article 73 (3) (l) of the Constitution, according to which the organisation and functioning of the Superior Council of Magistracy and the organisation of the courts shall be governed by organic law. The regulation approved by decision of the Superior Council of Magistracy must merely detail the procedure for the organisation and conduct of the competition.

At the same time, as regards the complaint alleging infringement of the provisions of Article 1 (5) of the Constitution, in its part relating to the foreseeability of the law, the Court held that it was also well founded. The rules on admission to the magistracy must comply with certain requirements of stability and foreseeability. The delegation of the power to lay down these rules to the Superior Council of Magistracy, by issuing acts of an administrative nature which are infralegal in nature, gives rise to a state of legal uncertainty, with such acts usually being subject to an increased degree of successive changes over time.

The Court noted that the defect of unconstitutionality still exists in the current form of Law No 303/2004, as amended and supplemented by Law No 242/2018, since essential aspects related to the admission to magistracy are left to the discretion of the Superior Council of Magistracy and are not provided for in the law.

**III. For all these reasons,** the Court unanimously dismissed as inadmissible the exception of unconstitutionality of the provisions of Article 106 (a) of Law No 303/2004 on the status of judges and prosecutors. By a majority vote, the Court upheld the exception of unconstitutionality and found the provisions of Article 106 (d) of Law No 303/2004 to be unconstitutional.

*Decision No 121 of 10 March 2020 on the exception of unconstitutionality of the provisions of Article 106 (a) and (d) of Law No 303/2004 on the status of judges and prosecutors, published in Official Gazette of Romania, Part I, No 487 of 9 June 2020*

**By regulating the possibility for voters to vote at any polling station, the legislator infringed the constitutional provisions of Article 1 (3) and (5) on the rule of law, the obligation to respect the Constitution and the principle of legal certainty. The Court has held that the conditions governing the exercise of the citizen's right to vote are thus altered, with regard to the removal of an essential element relating to his identification (domicile or residence), while the rules establishing one of the principles on which the electoral system in force is based (that of proportional representation) are devoid of legal effect.**

**Keywords:** *electoral rights, legal certainty, Government emergency ordinances, representative mandate of Deputies and Senators, supreme representative body, election of the Chambers of Parliament, clarity of the law, foreseeability of the law, respect for the Constitution*

**Summary**

**I. As grounds for the exception of unconstitutionality,** the Advocate of the People argued that Government Emergency Ordinance No 26/2020 was unconstitutional because its provisions regulated changes to electoral rights (the right to vote and the right to stand as a candidate), for which the Constitution expressly prohibited legislative amendments by means of an emergency ordinance. Furthermore, the method of choosing the supreme representative body of the Romanian people cannot be passed on to the executive by delegation. The Government only has to organise the elections, not to determine the national electoral system.

Another criticism was that the ordinance was adopted less than a year before the parliamentary elections, contrary to the Venice Commission's Code of Good Practice in Electoral Matters. A failure to comply with these recommendations, even in the absence of an intention of manipulation, creates the suspicion that the changes are dictated by the imminent interests of the political parties involved in the legislative process.

Since the legislative amendment is liable to give rise to difficulties in the exercise of the right to vote, which may have the effect of restricting the exercise of that right, the legislative act is unconstitutional in the light of Article 36 of the Constitution. Furthermore, as it changes essential elements in the organisation of parliamentary and early parliamentary elections only a few months before the timely holding of parliamentary elections, the criticised rule creates difficulties both for the authorities and for candidates in the electoral process. The legislative amendment therefore also raises unconstitutional aspects from the point of view of the right to stand as a candidate, as provided for in Article 37 (1) of the Constitution.

In addition, the rule creates the possibility of holding early parliamentary elections on the same date as the general local elections, exceptionally in 2020. However, legal acts at the level of law must be normative in nature and govern for the future all situations which may arise, but not limited to a specific situation. The Advocate of the People therefore argued that such an exception introduced solely on account of the 2020 elections seriously undermines the principle of legal certainty laid down in Article 1 (5) of the Constitution.

Likewise, Article I point 35 of the ordinance gave citizens the opportunity to cast their vote anywhere in the country. Although it appears to create flexibility in the exercise of the right to vote by those who are not at their place of residence, it is thus breached the principle of representativeness of Parliament, laid down at constitutional level by the provisions of Articles 61 (1) and 62 (3).

**II. Having examined the exception of unconstitutionality,** the Court relied on Decision No 334 of 26 June 2013, published in the Official Gazette of Romania, Part I, No 407 of 5 July 2013: "Parliament may[...] adopt legislation in this matter [...], provided that it does not undergo strictly cyclical changes, on the basis of assertions of opportunity or political understanding, which benefit one or other of the political forces represented in Parliament and form a parliamentary majority at a given time". These considerations are all the more relevant when legislating by means of a Government emergency ordinance.

In accordance with Article 115 (6) of the Constitution, the Government has no power to legislate in the field of constitutional laws ("emergency ordinances may not be adopted in the field of constitutional laws") and in that of laws concerning measures for the forced transfer of property into public property ("emergency ordinances may not concern measures of forced transfer of property"), which fall within Parliament's exclusive competence to legislate. The Government has limited law-making powers in areas relating to the system of fundamental State institutions, the rights, freedoms and duties laid down in the Constitution and electoral rights ("emergency ordinances shall not affect"). In that regard, the application of the express constitutional prohibition is conditional on the adoption of rules which suppress, undermine, violate, infringe, adversely affect constitutional rights, freedoms and duties. In the latter case, if the regulations do not produce the legal consequences referred to, the Government shares the power to legislate with the Parliament. There is therefore no absolute prohibition on the competence of the Government to legislate in the matter governed by Government Emergency Ordinance No 26/2020. It is necessary to determine whether the legislative act affects a fundamental institution of the State and fundamental rights of citizens.

With regard to the principle of legal certainty in electoral matters, the Court has found that the stability of the law is an important element of the credibility of the electoral process and that the frequent amendment of the rules and their complex nature may disorientate the voter. The Court also held that the provisions of the Venice Commission's Code of Practice in Electoral Matters cannot be ignored, even if they are not binding. As this Code recommends, what is necessary to avoid is not so much the modification of voting systems, which can always be changed for the better, but changing them frequently or just before (within one year of) the election. The closer the time when legislative changes occur to the date of the elections, the stronger the presumption that the changes are intended to create an advantage for the political party that adopted them, dictated by its imminent interests, and may result in the electorate being manipulated.

According to the Court, the regulation of the essential elements of electoral law must enjoy greater stability, which only constitutional law or organic law can confer. The Court expressly identified those elements: the voting system itself, the composition of the electoral commissions, the constituencies and the rules governing the constitution of constituencies. The technical and detailed elements are those relating, for example, to the calendar programme for carrying out the actions needed to conduct the referendum, the budget allocated to it, the model of stamps, ballot papers, electoral lists and minutes to be used.

The Court found that the legislative act amending the law on the election of the Romanian Parliament had been adopted less than a year before the elections it governed.

The provision contained in Article I point 35 refers to the possibility for the home, where he is not at home, to vote in any voting section. This legislative amendment deprives of legal effect the provisions of Article 4 of Law No 208/2015 on the establishment of electoral districts at the level of the 41 counties and the municipality of Bucharest, in conjunction with the provisions of Article 5 of the Law, according to which the number of seats for the Senate and the Chamber of Deputies is determined by reference to the number of inhabitants of each constituency in accordance with the rules on representation laid down

by law. These provisions have remained unchanged, are in force and enshrine the principle of proportional representation as the basis of the voting system in Romania. The Court held that both the amendment of the conditions governing the exercise of the citizen's right to vote in terms of removal of an essential element of his identification (domicile or residence) and the deprivation of effects of the rules establishing one of the principles on which the voting system in force (that of proportional representation) is based relate to essential elements of the electoral law.

Therefore, since both aspects of the principle of legal certainty had been affected, the Court found that, by adopting Government Emergency Ordinance No 26/2020, the legislator had infringed the constitutional provisions of Article 1 (3) and (5) concerning the rule of law, the obligation to respect the Constitution and the principle of legal certainty.

The complaints concerning the infringement of the requirements of quality of the law relate to Article IV (1) of Government Emergency Ordinance No 26/2020, which provide for the organisation of early parliamentary elections "exceptionally in 2020", so that the provision in question regulates a specific case and does not have a regulatory character. In addition, it creates the possibility of holding two types of ballot at the same time.

In its case-law, the Court has held that the law, as a legal act of the Parliament or of the delegated legislator, governs general social relations and is an act of general application. Where the scope of the legislation is specifically determined, and it is not designed to be applied to an indeterminate number of specific cases, depending on whether the legislation is applicable to them, but in a single case, which is unambiguously predetermined, the legislation is of individual scope.

The Court has distinguished between a rule of a regulatory nature and a rule of individual scope from the point of view of the person to whom it is addressed. The finding that the law was unconstitutional concerned the fact that the rule identified, by its very nature, the natural or legal person whose conduct was regulated. The provisions of Article IV (1) of the contested ordinance do not identify the addressee of the law to whom, by way of derogation from the general rules, a special, individual legal regime would be applicable. The specific case referred to by the author of the exception ("early parliamentary elections which cannot be organised at a date other than that of the general local elections of 2020"), apart from the fact that it concerns a hypothetical, possible situation, cannot constitute an individual case within the meaning of the case-law of the Constitutional Court. The rule is rather transitional in nature. The legislator refers to the possibility that the date of the two types of election may coincide. Such legislation is sufficiently clear, precise and foreseeable, so that the addressees of the rule may adapt their conduct to it.

However, the Court found that the provisions of Article IV (1), which govern the possibility of holding early parliamentary elections at the same time as 2020 general local elections, infringe the citizen's right to vote, since it places him in a cumbersome, complicated voting procedure liable to restrict his freedom of expression of political will and, consequently, the effectiveness of the right to vote. The provisions criticised also violate a person's right to be elected as it removes the possibility for a person to stand at the same time for a local elected office (mayor, local councillor, county councillor) and for a national elected office (Deputy or Senator).

The Court has examined the extent to which a person's domicile or residence is decisive for the exercise of the right to vote and the right to stand as a candidate, and thus for the way in which a fundamental State institution is established, the Romanian Parliament. An analysis of the national legal provisions and the recommendations of the Venice Commission shows that the domicile or residence is an element identifying the person entitled to vote in relation to which that person is registered in the official documents underlying the drawing up of electoral lists. This identification element is a key one, as it forms the basis of two European electoral principles: the principle of universal suffrage and the principle of equal voting.

Since, on the one hand, Deputies and Senators represent in the Romanian Parliament the constituency in which they stood for election, with one person being able to stand for election in only one constituency, and, on the other hand, the constituency is defined by reference to the administrative and territorial units in which a certain number of voters have their domicile or residence, the Court has established that the Deputies and Senators are the representatives of those voters in the legislative forum. In order to comply with the principle of representativeness, the citizen's right to stand as a candidate may be exercised only in relation to the persons to be represented, with the result that a Deputy or a Senator may obtain the mandate only after the votes of citizens having their domicile or residence in the constituency which the parliamentarian is to represent.

Since the legislative act of the delegated legislator affects the electoral rights of citizens and the constitutional regime of the Parliament, Government Emergency Ordinance No 26/2020, taken as a whole, is contrary to Article 115 (6) of the Constitution.

**III. For all these reasons,** the Court unanimously upheld the exception of unconstitutionality and found that Government Emergency Ordinance No 26/2020 amending and supplementing certain legislative acts concerning elections to the Senate and the Chamber of Deputies, as well as certain measures for the proper organisation and conduct of early parliamentary elections, was unconstitutional as a whole.

*Decision No 150 of 12 March 2020 on the exception of unconstitutionality of the provisions of Government Emergency Ordinance No 26/2020 amending and supplementing certain legislative acts concerning elections to the Senate and the Chamber of Deputies, as well as certain measures for the proper organisation and conduct of early parliamentary elections, published in Official Gazette, Part I, No 215 of 17 March 2020*

**The decree by which the President establishes the state of emergency is an administrative act of a legislative nature and may not contain primary regulatory provisions. Similarly, administrative fines may not be established by means of an emergency ordinance, since they affect the offender's assets and Article 115 (6) of the Constitution prohibits the restriction of the right to property by an emergency ordinance. Furthermore, the legislation complained of is confusing, incomprehensible and unforeseeable, insofar it refers to acts which are not easily identifiable by the persons to whom the rule is addressed.**

**Keywords:** *administrative offences, decrees of the President of Romania, state of emergency, restriction on the exercise of fundamental rights or freedoms, Government emergency ordinances, state of siege and state of emergency regime, clarity of the law, foreseeability of the law, right to private property, economic freedom, Economic and Social Council, fair trial, right of defence, respect for the Constitution, primacy of the Constitution, observance of laws*

**Summary**

**I. As grounds for the exception of unconstitutionalit**y, the Advocate of the People argued that Article 14 (1) ($c^1$) — (f) of Government Emergency Ordinance No 1/1999 allows the President of Romania to legislate in areas in respect of which the Basic Law requires the primary or delegated legislator to intervene, by amending organic laws and effectively restricting the exercise of human rights. Not even by exceptional legislative delegation, that is to say by emergency ordinances, the Government has the right to restrict the exercise of constitutional rights and freedoms. If the constituent legislator had taken the view that the President may legislate by decree during the state of emergency or the state of siege, it would have expressly provided for a type of legislative delegation, as it provided in the case of the other executive authority, i.e. the Government. In addition, Parliament is required, by Constitution, to operate throughout the declaration of the state of siege or of the state of emergency, being entitled to legislate in any field.

As regards the restriction on the exercise of certain rights referred to in Article 14 (d) of Government Emergency Ordinance No 1/1999, the Advocate of the People has argued that the constitutional provisions of Article 53 are categorical: the exercise of rights or freedoms may be restricted only by law. The role of the legislative power cannot be diverted by the possibility afforded to the President by the contested legislation to adopt, by the decree establishing the state of emergency or the state of siege, mandatory provisions concerning the specific manner in which the rights and constitutional freedoms are to be restricted. By the decree establishing the state of emergency, the President may, at most, arrange for the implementation of the law or to actually implement it, since the decree, as such, cannot have the characteristics of a law.

Similarly, by the provisions of Article 28 of Emergency Ordinance No 1/1999, as amended by Article I (1) of Government Emergency Ordinance No 34/2020, the Government did not provide for any administrative offence capable of being penalised, but merely regulated, in a general manner, that failure to comply with the provisions of Article 9 constitutes an administrative offence. Administrative offences are not defined by law, but by numerous administrative acts of law enforcement (government decisions, military ordinances, orders and other related regulatory acts) the regulatory object of which relates to different fields. The legislator must indicate clearly and unequivocally the material object of the administrative offences within the statutory rule or that material object must be capable of being readily identified by reference to another legislative measure of equal rank.

Therefore, Article 28 of Emergency Ordinance No 1/1999 lacks foreseeability and clarity. The contested rule imposes a general obligation to comply with certain rules, without

incriminating a specific action, and lays down administrative penalties, without providing minimum objective criteria for the application thereof in a differentiated manner. It is clear that such a regulation does not set aside the subjective or discretionary elements that may arise when the law enforcement officer interprets and applies the rules contained in military ordinances or other legislative acts. Thus, the contested legal text does not distinguish any administrative offence, whereas the amount of administrative fines has been considerably increased, which may give rise to penalties disproportionate to the gravity of the offence.

In the absence of a definition of the actions constituting administrative offences, the burden of proof is reversed, the matters referred to in the report on the offence committed being presumed to be genuine, and it is for the natural or legal person to prove the contrary. The insufficient description of the administrative offence does not enable the persons concerned to defend themselves effectively before the law enforcement officer, by putting them in a weaker position vis-à-vis the administrative body. That reversal of the burden of proof has no justification, even during the period of emergency, as it involves a risk of increase in the number of abuses, but also of possible tensions between citizens and the State authorities responsible for establishing administrative offences. Thus, the offender is placed in a much worse situation than he would have been faced in criminal proceedings, in clear breach of the fundamental guarantees of the right of defence.

As regards Government Emergency Ordinance No 34/2020, the Advocate of the People argued that it was unconstitutional, as it contravened the provisions of Article 115 (6) of the Constitution, which makes legislative delegation subject to compliance with the prohibition on affecting the constitutional rights and freedoms and the prohibition of the adoption of measures for the forced passage of goods into public property.

Taking into account the extremely evasive and general regulatory arrangements, in the absence of clear and concise determinations, the law enforcement agent will apply both the main administrative penalty consisting of the fine, the amount of which has increased considerably, and an additional administrative penalty of confiscation of goods intended, used or resulting from an administrative offence. It is therefore clear that the cumulative application of both penalties is such as to have an undue adverse effect on the offender's right to property.

Furthermore, the provisions of Article I (5) of Government Emergency Ordinance No 34/2020, inserting Article $33^1$ in Government Emergency Ordinance No 1/1999, suspend the application of legal rules on transparency in decision-making and social dialogue in case of draft legislative measures laying down measures applicable during the state of siege or the state of emergency. Thus, the right to work and the social protection of employment and the right to information, enshrined in Article 53, are infringed by failure to comply with the requirement of proportionality in the temporary restriction on the exercise of rights.

**II. Having examined the exception of unconstitutionality**, the Court has held that, in terms of content, the decree of the President is an administrative measure of a legislative nature. Having regard to the legal nature of the measure, the Court held that he can only implement primary regulatory provisions ruling on the state of emergency, namely Emergency Ordinance No 1/1999. Given the it has lower legal force than the law, the decree

of the President may not derogate from, replace or add to the law and may not therefore contain basic regulatory provisions.

Although the author of the exception criticises the provisions of Article 14 ($c^1$)-(f) of Government Emergency Ordinance No 1/1999, the Court noted that the author does not in any way give reasons for the unconstitutionality of the provisions of Article 14 (e) and (f). This criticism does not meet the condition laid down in Article 10 (2) of Law No 47/1992, according to which "Referral must be made in written and reasoned form".

As regards the complaint relating to Article 14 (d), the Court held that the restriction on the exercise of certain rights cannot be ordered by decree of the President. It is true that, when the Decree establishing the state of emergency was issued and when it was renewed, the President of Romania failed to rely on the provisions which constituted the legal basis for taking measures to restrict fundamental rights. However, that does not mean that the President acted as a legislator able to decide on fundamental rights and freedoms of citizens.

The Court has also held that that Article 14 ($c^1$) does not empower the President to adopt rules having the status of law. However, the Court noted that the President ordered "first emergency measures"which were not provided for in Article 26 of Government Emergency Ordinance No 1/1999 and constituted derogations from the legislation in force when the state of emergency was declared. The President ordered, on the one hand, the suspension or non-application of legal provisions and, on the other hand, the amendment and completion of certain laws, his decisions having an impact on certain fundamental rights and freedoms (right to work, economic freedom, free access to justice, etc.).

If the constituent legislator had considered that the President, as an executive authority, may, by means of a decree, adopt legislative rules during the state of emergency or the state of siege, it would have expressly provided for that legislative delegation, as regulated by Article 115 in the case of the Government.Furthermore, Article 93 (2) of the Constitution provides that "if Parliament does not sit in a session, it shall be convened de jure within 48 hours of the institution of the state of siege or emergency, and shall function throughout this state". The reason for that provision is to create the possibility of legislative intervention as a matter of urgency. The constitutional rule constitutes a guarantee against any excess or abuse on the part of the executive public authorities. Parliament, as the highest representative body of the people, acts as a guarantor of the rights and freedoms of citizens.

However, the Court held that the manner in which the President exercised his constitutional powers, by exceeding the legal framework, was not the consequence of an unconstitutional flaw of the primary regulatory measure by virtue of and within the limits of which the public authority was entitled to act.

In authorising the declaration of the state of emergency, the Parliament of Romania was required to verify whether the constitutional and legal conditions with which the decree of the President had to comply were satisfied. However, the Parliament confined itself to authorising the measure.

As regards the infringement of Article 115 (6) of the Constitution, the Court has held that the legal rules governing the state of siege and the state of emergency, in the current constitutional framework, can be regulated only by a law, adopted in accordance with the

provisions of Article 73 (3) (g) of the Constitution, i.e. as organic law. However, Emergency Government Ordinance No 1/1999 was adopted before the revision of the Constitution in 2003. At the time when the contested legislative measure was adopted, the constitutional rule did not require the Government not to affect by ordinance the regime of the fundamental institutions of the State or the rights and freedoms provided for by the Constitution. The Government emergency ordinance was therefore adopted in compliance with the constitutional framework in force at that date.

On the other hand, as regards Government Emergency Ordinance No 34/2020, the Court found that it had been adopted in breach of Article 115 (6) of the Constitution. The legislative measure alters the legal regime governing the state of siege and the state of emergency as regards liability for administrative offences in the event of failure to immediately comply with or apply the measures laid down in Government Emergency Ordinance No 1/1999.

As regards the criticism expressed with regard to the legal nature of administrative penalties and their effects on the offender's assets, it appears that the regulation in this matter affects the right to property, enshrined in Article 44 of the Constitution, and the economic freedom provided for in Article 45 of the Constitution.

In addition, Article I (5) of Government Emergency Ordinance No 34/2020 provides that the legal rules relating to transparency in decision-making and social dialogue for the duration of the state of siege and state of emergency are not to apply. That social dialogue is conducted by the Economic and Social Council, which is a constitutional body, and is expressly enshrined in Article 141 of the Basic Law. It is clear that the suspension of those rules affects the fundamental rights protected by them as well as the regime of a fundamental State institution, with the result that the emergency ordinance establishing such suspension runs counter to the prohibition laid down by Article 115 (6) of the Constitution.

As regards the complaints concerning the unclear regulation of actions constituting administrative offences, the Court has stated that Article 9 (1) of Government Emergency Ordinance No 1/1999 does not present any drafting deficiency in terms of clarity. The confusing, unclear and unforeseeable nature is apparent from a combined reading with Article 28 (1) of the ordinance, which establishes that failure to comply with the provisions of Article 9 (1) constitutes an administrative offence. The relevant offences and penalties must be clearly defined by law. It is necessary for the addressee of the rule to know from its very wording what acts, actions or omissions may give rise to administrative liability.

The provisions of Article 28 (1), read in conjunction with Article 9 (1), do not indicate clearly and unequivocally what acts, actions or omissions constitute administrative offences, nor do they enable for them to be easily identified, by reference to legislative acts related to the criminalisation text. Thus, Article 9 (1), which refers to "all measures laid down in the present emergency ordinance, in related legislative acts, as well as in military ordinances or orders, specific to the declared state", cannot be regarded as a reference rule. It is practically impossible to determine specifically in the primary legislative measure concerning the general regime of the state of emergency what measures may be taken in each individual case, since the measures taken by the authorities during the period of emergency concern different areas.

The legislator has thus adopted legal provisions which are incapable of achieving the objective for which they were introduced. The Court noted that the provision refers to Government Emergency Ordinance No 1/1999, but that that legislative measure, apart from the provisions of Article 28 (1), contains no other rule expressly governing an administrative offence. Related regulatory acts are not defined anywhere and cannot easily be identified by the addressees of the rule who, by reason of the general nature of the regulation, represent the whole population of the country.

The determination of the facts the commission of which constitutes administrative offences is arbitrarily left to the discretion of the law enforcement officer. Similarly, in the absence of clear representation of the constituent elements of the offence, the court does not have the guidance necessary for the application and interpretation of the law when dealing with the complaint against the report establishing the administrative offence and the related penalty.

Moreover, the contested legal provisions also fail to comply with the principle of proportionality. Not only do the provisions of Article 28 of Government Emergency Ordinance No 1/1999 not specifically provide for the actions giving rise to liability for administrative offences, but establish without distinction, for all such actions, irrespective of their nature or seriousness, the same main administrative penalty.

The Court therefore found that the provisions of Article 28 of the ordinance, characterised by a flawed legislative technique, do not meet the requirements of clarity, precision and foreseeability and are thus incompatible with the fundamental principle of compliance with Constitution, its primacy and the laws, laid down in Article 1(5) of the Constitution and the principle of proportionate restriction of fundamental rights and freedoms laid down in Article 53 (2) of the Constitution. Similarly, the imprecision of that legislative text also affects the constitutional guarantees which characterise the right to a fair trial, enshrined in Article 21 (3), including its aspect relating to the right of defence, a fundamental right laid down in Article 24.

As regards the complaint concerning the reversal of the burden of proof, the Court has held that no rule of the Emergency Ordinance No 1/1999 ascribes absolute probative force to the report establishing the administrative offence.

**III. For all those reasons,** the Court unanimously dismissed the exception of unconstitutionality and found constitutional, in relation the complaints made, the provisions of Article 14 (1) ($c^1$) to (f) of Government Emergency Ordinance No 1/1999 on the rules governing the state of siege and the rules governing the state of emergency, and against the emergency ordinance, as a whole. The Court unanimously upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 28 of the same ordinance. The Court unanimously upheld the exception of unconstitutionality and found unconstitutional, as a whole, Government Emergency Ordinance No 34/2020.

*Decision No 152 of 6 May 2020 on the exception of unconstitutionality of the provisions of Article 9, Article 14 ($c^1$)-(f) and of Article 28 of Government Emergency Ordinance No 1/1999 on the rules governing the state of siege and rules governing the state of emergency, and against the emergency ordinance, as a whole, as well as against Government Emergency*

*Ordinance No 34/2020 amending and supplementing Government Emergency Ordinance No 1/1999 on the rules governing the state of siege and the rules governing the state of emergency, as a whole, published in the Official Gazette, Part I, No 387 of 13 May 2020*

**Fundamental rights or freedoms may be restricted only by law, as a formal act of Parliament. Since acts emanating from structures empowered to manage emergency situations are administrative acts implementing an emergency ordinance, it is clear that these acts cannot affect fundamental rights and freedoms. The delegated legislator may not delegate in turn to an administrative authority something it itself has no competence over.**

**Keywords:** *restrictions on the exercise of certain fundamental rights or freedoms, state of emergency, Government emergency ordinances, quality of law, application and interpretation of the law, supremacy of the Constitution*

**Summary**

**I. As grounds for the exception of unconstitutionality**, the Advocate of the People argued that the provisions of Government Emergency Ordinance No 21/2004 infringe Article 1 (4) and (5), Article 53 and Article 61 (1) of the Constitution, in that they allow that measures restricting the exercise of fundamental rights be ordered by administrative measures.

The delegated legislator also regulates the state of alert, but defines it poorly, in breach of Article 1 (5) of the Constitution, in its component relating to the foreseeability of the law. As it is not regulated in the Constitution, the state of alert requires a detailed establishment, at infra-constitutional level, of the cases in which it may be declared. The foreseeability of the legal framework governing the state of emergency constitutes not only the premiss of the lawfulness of the measures ordered, but also the guarantee of respect for fundamental rights and freedoms, the limitation of which may be made only by law and within the limits imposed by the provisions of Article 53 of the Constitution. In the absence of a clear and complete definition of the state of alert and of a procedure to ensure the legality of the measures ordered, there are no objective legal criteria for declaring it, since the legislator merely determines, in general terms, the conduct subsequent to its declaration.

The elliptical nature of the legislative act and the lack of rigour are unacceptable in an area as important as that of restriction on the exercise of constitutional rights and freedoms. The provisions of Government Emergency Ordinance No 21/2004 do not comply with the condition that the measure restricting the exercise of certain rights be provided for by law. Only a rule laid down with sufficient precision to enable individuals to regulate their conduct may be regarded as a law.

The issuing of administrative acts of an infralegal rank creates a state of legal uncertainty, since the imprecise primary legislation gives the administrative authorities an extremely wide margin of discretion and, at the same time, discretion as to the actions and measures that may be ordered. In addition, secondary regulatory acts usually have a high degree of instability and are frequently amended.

The Advocate of the People argued that the contested legislative act also did not comply with the condition of proportionality of the measure restricting the exercise of certain rights and freedoms, as it did not set a time limit until which the state of alert is to be maintained. Article 53 of the Constitution governs the exceptional nature of restrictions on the exercise of fundamental rights or freedoms, which also implies their temporary nature. In the absence of a time limit until which the state of alert may be ordered, and by laying down the possibility of extending it by means of an administrative act, a temporary restriction on the exercise of fundamental rights and freedoms becomes a permanent restriction on the exercise of those rights and freedoms.

The Advocate of the People took the view that the provisions of Government Emergency Ordinance No 21/2004 affect Parliament's status as the sole legislative authority. The Parliament and, by legislative delegation, under the terms of Article 115 of the Constitution, the Government have the power to adopt, amend and repeal rules of general application. Public authorities do not have such competence, their task being to ensure the implementation of the laws. The body which decides, with the agreement of the Prime Minister, on the state of alert at national level or at the level of several counties is the National Committee for Emergency Situations. In view of its purely administrative character, the delegation of legislative powers to this body, the purpose of which is to restrict the exercise of fundamental rights or freedoms, is clearly unconstitutional, since it infringes the principle of the separation of powers in the State, enshrined in Article 1 (4) of the Constitution.

**II. Having examined the exception of unconstitutionality**, the Court found that the state of alert is a measure taken during an existing or potential emergency situation and can only be ordered if the risk is imminent. The purpose of the measure is therefore primarily preventive.

The procedure for declaring a state of alert is established, pursuant to Article 4 (4) of Government Emergency Ordinance No 21/2004, by means of regulations, plans, programmes or operational documents approved by decisions, orders or provisions issued, in accordance with the regulations in force, by the National Emergency Management System. According to the provisions of Law No 554/2004 on administrative proceedings, these are administrative acts issued by administrative bodies for the purpose of organising the enforcement of the law or the actual enforcement of the law.

The Court found that it is sufficiently clear from the analysis of the legal framework governing the alert state regime what the alert state is and what the procedure for its declaration is. The Court therefore held that the provisions of Article 2 (f), in conjunction with those of Article 2 (a) and Article 4 of Government Emergency Ordinance No 21/2004, comply with the requirements of quality of the law relating to clarity and foreseeability. Many laws use more vague wording to avoid excessive rigidity and be able to adapt to changing circumstances.

With regard to measures restricting the exercise of fundamental rights by administrative acts, the Court noted that Article 4 (1) expressly lists the measures which may be ordered by a decision declaring the state of alert. Next, the provisions of Article 4 (2) and (3) of the

Emergency Ordinance further state that "all measures necessary to remove the state of force majeure may be ordered" and the measures "must be proportionate to the situations which have determined them and shall be applied in accordance with the conditions and limits laid down by law".

The Court found that the application of some of the measures could affect fundamental rights of citizens. Thus, evacuation from the area where the life or health of the individual, the environment, material and cultural values are threatened is a measure involving the removal of a person or group of persons from a place exposed to a danger. By the very way in which it is implemented, that measure is liable to affect a number of fundamental rights such as freedom of movement, personal, family and private life, inviolability of the home, right to work, right to private property or economic freedom. As regards the establishment of "obligations of citizens and economic operators with regard to participation in activities for the benefit of local communities", the Court held that it may concern another fundamental right, the right to work, in conjunction with the prohibition on forced labour, laid down in Article 42 of the Basic Law.

The Court held that the constitutional prohibitions laid down in Article 115 (6) not to adopt emergency ordinances which "affect" the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, were intended to restrict the Government's power to legislate in these essential areas instead of Parliament, and not to completely deprive Parliament of the power to legislate in this area.

In legislating on the legal regime governing the state of alert, Government Emergency Ordinance No 21/2004 is the primary regulatory act ordering the actions and measures necessary to manage emergency situations, on the basis of which the entities with powers in the management of the emergency situation issue administrative acts of a legislative or individual nature implementing the primary rule. Given that the measures aimed at "a decision on eviction from the affected or partially affected area", namely "the obligations of citizens and economic operators as regards participation in activities for the benefit of local communities", may concern restrictions on the exercise of certain fundamental rights and freedoms, the Court found that the legislative act criticised falls within the scope of the prohibition laid down in Article 115 (6) of the Constitution.

In its case-law, the Court has held that, where the legislative text subject to review, by its contradictory wording, gives rise to different interpretations and only one of those interpretations is consistent with the Constitution, in order to ensure the primacy of the Basic Law, the Constitutional Court must intervene in order to rule out any possible interpretation of the law liable to disregard constitutional provisions. Similarly, the Court penalised the unconstitutionality of legal provisions in their interpretation by the public authorities responsible for their application (Decisions Nos 223 and 224 of 12 March 2012, published in the Official Gazette of Romania, Part I, No 256 of 18 April 2012).

The Constitutional Court therefore gave the contested provisions the interpretation which ensured their compliance with constitutional rules and found that the provisions of Article 4 of Government Emergency Ordinance No 21/2004 were constitutional only in so far as the actions and measures ordered during the state of alert did not seek to restrict the exercise of certain fundamental rights or freedoms.

In view of the legal nature of measures emanating from the structures empowered to manage emergencies, it is clear that those acts cannot affect fundamental rights and freedoms. As acts subsequent to the law, establishing specifically the measures to be taken in order to manage the emergency situation, they can only transpose the legal rules. The administrative act implementing the law cannot derogate from, replace or add to the law.

It is undeniable that legislation providing for the legal regime of crisis situations requiring exceptional measures to be taken requires a greater degree of generality than the legislation applicable during the normal period, precisely because the crisis situation is characterised by a deviation from normal. However, the generality of the primary rule cannot be mitigated by infralegal acts that would supplement the existing regulatory framework.

Therefore, with regard to the complaint concerning the possibility of imposing restrictive measures on fundamental rights by administrative acts, the Court held that actions and measures ordered during the state of alert, on the basis of the provisions of Government Emergency Ordinance No 21/2004, cannot relate to fundamental rights or freedoms. The Court also found that the delegated legislator cannot delegate in turn to an administrative authority something it does not itself have competence over. As the Court has consistently held, it follows from a combined reading of the constitutional rules contained in Articles 53 (1) and 115 (6) that the interference with/restriction of fundamental rights or freedoms can only be effected by law as a formal act of Parliament.

The Court held that, as long as Government Emergency Ordinance No 21/2004 complies with the above prohibition, it cannot be held that the legislative act complained of ignores the condition relating to the proportionality of the measure restricting the exercise of fundamental rights and freedoms, owing to the absence of a time-limit for which the state of alert is declared. In addition, with regard to the measures which may be ordered during the state of alert, Article 4 (3) of the Ordinance provides that they must be "proportionate to the situations which determined them" and Article 4 (5) (b) stipulates that the decision declaring the state of alert shall include the "period of application".

**III. For all these reasons**, the Court unanimously dismissed the exception of unconstitutionality and found that the provisions of Article 2 (f) of Government Emergency Ordinance No 21/2004 on the National Emergency Management System were constitutional in relation to the criticisms made. By a majority vote, the Court upheld the exception of unconstitutionality and found that the provisions of Article 4 of aforementioned Ordinance are constitutional in so far as the actions and measures ordered during the state of alert are not intended to restrict the exercise of certain fundamental rights or freedoms.

*Decision No 157 of 13 May 2020 on the exception of unconstitutionality of the provisions of Article 2 (f) and Article 4 of Government Emergency Ordinance No 21/2004 on the National Emergency Management System, published in Official Gazette of Romania, Part I, No 397 of 15 May 2020*

**3. Constitutional review of resolutions of the plenary of the Chamber of Deputies, of the plenary of the Senate and of the plenary of the two Chambers of the Parliament [Article 146 (l) of the Constitution]**

**The purpose of establishing the rule providing for the right of each parliamentary group to make a single proposal for a candidate for the office of President of the Chamber was to ensure ideological competition, based on party doctrines, which attracted the votes of citizens in parliamentary elections. The instrument for achieving that aim is the possibility, established by the regulation, that the parliamentary group name a candidate, that is to say a person who is a member of the group. If a parliamentary group were to propose a candidate who is a member of another parliamentary group, the aim pursued by the legislator would be diverted.**

**Keywords:** *Regulation of the Senate, election of the President of the Senate, parliamentary groups, Parliament's political configuration, Parliament's resolutions, political pluralism, organisation of the Chambers of Parliament, supremacy of the Constitution, respect for laws*

**Summary**

**I. As grounds for the referral of unconstitutionality,** it was alleged that, on 26 August 2019, the Protocol establishing the Governance Coalition for Development and Democracy P.S.D.-ALDE dated 19 December 2016 had been unilaterally denounced and the Alliance of Liberals and Democrats for Europe (ALDE) Party had withdrawn from the governing coalition. As a result, ALDE President Călin Popescu-Tăriceanu, proposed and elected President of the Senate by the governing coalition, announced his resignation from that position. In view of the vacancy, the procedure for electing a new President of the Senate was initiated, in accordance with Article 23 (1) of the Regulation of the Senate, which provides that "The President of the Senate shall be elected, by secret ballot, using ballot papers containing, in descending order according to the size of the parliamentary group, the surname and first name(s) of all the candidates proposed by the leaders of the parliamentary groups. Each group shall be able to make only one proposal". Although the proposed candidate must be a member of that group, P.S.D. Senatorial group proposed Senator Teodor Meleșcanu, a member of the ALDE parliamentary group. He was elected President of the Senate, which was confined by Resolution No 36 of 10 September 2019 of the Senate of Romania. This resolution infringes the principle of political configuration laid down in Article 64 (5) of the Constitution.

The Constitutional Court has consistently held that the standing office of each Chamber must respect the political configuration of Parliament. The President of the Senate is also a member of the Standing Bureau and is not excluded from the application of that principle.

In parliamentary practice there have been cases where one parliamentary group supported a candidate of another parliamentary group without nominating its own candidate. Such a situation is not contrary to the purpose envisaged by the Constitution. Nothing prevents a parliamentary group from making a coalition or merely a political understanding with another parliamentary group, so that they together support a single candidate. However, in

such a situation, the proposal will be made by the parliamentary group to which the candidate belongs and the second group will only support that candidate. Otherwise, this could lead to two candidates standing from the same parliamentary group: one proposed and supported directly by its own parliamentary group and one proposed and indirectly supported by another parliamentary group, which runs counter to the aim pursued by the legislator. Clearly, Senator Teodor Meleșcanu was not the single and common proposal of a parliamentary coalition P.S.D. and ALDE, as this coalition no longer existed and the ALDE parliamentary group proposed Senator Ioan Popa, a member of this group.

**II. Having examined the referral of unconstitutionality,** the Court held that Article 27 of Law No 47/1992 did not establish any distinction between parliamentary resolutions which may be subject to review by the Constitutional Court as regards the area in which they were adopted or whether they were legislative or individual. Accordingly, referrals of unconstitutionality relating to resolutions of individual scope are also admissible. Provisions contained in the Constitution must also be relied on in support of the complaint of unconstitutionality. Reliance on those provisions must not be formal but effective. However, parliamentary resolutions concerning the organisation and functioning of constitutional authorities and institutions may be subject to constitutional review, even if the legislative act allegedly infringed has infraconstitutional value. The Court found that the referral met the conditions for admissibility.

According to the Court, the conflict arises from the interpretation of Article 23 (1) of the Senate's Regulation. On the basis of the meaning of the words used and the link between them, the parliamentary group of the P.S.D. interpreted the text in its literal sense, namely that it gives the parliamentary group the right to make a single proposal, irrespective of whether the candidate in question is a member of the parliamentary group or not. The objectors to the Senate's resolution preferred the method of systematic interpretation, which consists of clarifying the meaning of a legal provision in conjunction with other legislative provisions of the same branch of law.

The Court has relied on its case-law on the appointment of candidates for the office of President of the Chambers of Parliament.

By Decision No 1631 of 20 December 2011, the Court held that, in the event of the dissolution of the initial parliamentary group which nominated the candidate for the office of President of the Senate, it implicitly loses the right to propose a candidate for the office of President of the Chamber. Only parliamentary groups constituted at the beginning of the Chamber's term of office, i.e. in the original political configuration, may nominate candidates for the office of President of the Chamber.

By Decision No 467 of 28 June 2016, the Court established that "In the absence of a mechanism of control by the political party/parliamentary group of its member(s) in the Standing Bureau, it may be very easy to disregard the political configuration of the Standing Bureau as it resulted from the elections and that, in a more or less transparent manner, the President of the Chamber could migrate to a new political party/parliamentary group which would support him more or less openly and that the meaning of the political vote in his or her election to the office would be distorted, and the political configuration resulting from

elections would be compromised. The Court therefore considers as constitutional the choice expressed in the contested resolution to the effect that the loss of membership of the parliamentary group and the withdrawal of political support constitute grounds for the legal termination of the mandate resulting from the need to respect the principle of political configuration."

The Court pointed out that the two Chambers of the Parliament have the right to establish, by virtue of their parliamentary autonomy, a set of rules on the basis of which parliamentarians, in the exercise of their representative mandate, may organise themselves in parliamentary groups. In accordance with the political configuration and the principle of majority decision, parliamentarians may nominate their representatives in parliamentary committees and standing bureaus and elect the President of each Chamber.

Since only one person is elected as President, it follows that he or she cannot reflect the political configuration of that Chamber. If the principle of political configuration were also applied to the President of the Chamber, he/she would necessarily have to represent the political majority resulting from the elections or subsequently formed by negotiations. However, if only that majority were able to appoint a single candidate, no election would take place. The position of President of the Chamber is the result of political negotiations between the leaders of the parliamentary groups, and decisive in the matter is the majority vote in the Chamber, i.e. the principle of majority decision.

As regards the interpretation of Article 23 (1) of the Senate's Regulation, the systematic method is supported by the case-law of the Constitutional Court, which is demonstrated by its direct and constant references to the principle of political configuration.

The Court added that the purpose of establishing the rule providing for the right of each parliamentary group to make a single proposal for a candidate for the office of President of the Chamber was to ensure ideological competition, based on party doctrines, which attracted the votes of citizens in parliamentary elections. A real, genuine representation of political interests proclaimed by a particular party, whose members have organised themselves in a parliamentary group, can only be ensured by a person affiliated to that group, with whom he/she shares the same political views and principles. The instrument for achieving this aim is the possibility laid down in the regulation that the parliamentary group would nominate its own candidate, i.e. a person who is a member of the group. If a parliamentary group were to propose a candidate who is a member of another parliamentary group (grammatical interpretation), the aim pursued by the legislator would be distorted.

On the other hand, grammatical interpretation may lead to a situation where a parliamentary group would have two members standing for the office of President of the Senate, one proposed by the parliamentary group itself and the other proposed by another parliamentary group, as in the present case. Such a situation is manifestly at odds with the prohibition implicitly laid down in the regulation, according to which a parliamentary group may make only one proposal.

In addition, under Article 32 (3) of Law No 96/2006 on the status of Deputies and Senators, "the loss of political support by a Senator shall automatically entail the cessation of the capacity of holder of any office obtained through political support", including that of President of the Senate. It follows that a parliamentary group can only propose a Senator

who is a member of that political group, since only to a member can be subject to withdrawal of the political support given at the time of the proposal and the vote. An interpretation to the contrary would be tantamount to depriving that rule of legal effect, which is inadmissible.

In conclusion, the Court found that Resolution No 36 of 10 September 2019 of the Senate of Romania, by which Senator Teodor Meleșcanu was elected President of the Chamber, from the position of candidate proposed by a parliamentary group other than that of which he was a member, contravenes the constitutional provisions of Article 1 (5), which enshrine the principles of legality and supremacy of the Basic Law, Articles 8 (2) and 64 (1), (3) and (5), which enshrine the principle of political pluralism and the principles of parliamentary activity.

The Court stated that there is nothing to prevent the parliamentary group from supporting the candidature of a person proposed by another parliamentary group if it does not exercise its right to appoint an own parliamentarian to the management function.

**III. For all those reasons,** by a majority vote, the Court upheld the referral of unconstitutionality and found unconstitutional Resolution No 36 of 10 September 2019 of the Senate of Romania on the election of President of the Senate.

*Decision No 25 of 22 January 2020 on the referral of unconstitutionality of the provisions of Resolution No 36 of 10 September 2019 of the Senate of Romania on the election of President of the Senate, published in the Official Gazette, Part I, No 122 of 17 February 2020*

## III. Decisions issued in the resolution of legal disputes of a constitutional nature [Article 146 (e) of the Constitution]

**Opinions, value judgements or statements made by the holder of a public office with regard other public authorities do not in themselves constitute legal conflicts between public authorities. Opinions or proposals concerning the manner in which a particular public authority or its structures acts or should act, even if critical, do not trigger institutional blockages unless they are followed by actions or omissions that would hinder the fulfilment of the constitutional tasks of those public authorities. Likewise, the disclosure by the Minister of Justice of information from a criminal investigation file does not give rise to a legal dispute of a constitutional nature, as long as it is a single act, not a systematic practice, and does not affect the criminal investigation.**

**Keywords:** *legal disputes of a constitutional nature, role of the Superior Council of Magistracy, role of the Public Ministry, Minister of Justice, hierarchical control, prosecution*

**Summary**

**I. As grounds for the request for resolution of the dispute,** the President of the Superior Council of Magistracy argued that the Minister of Justice, Ana Birchall, caused a

serious interference in the prosecution activity carried out by prosecutors and undermined the independence of the Romanian judiciary by negotiating a rule of law "roadmap" with the representative of a foreign state, outlining the idea that justice problems in Romania are not managed by the competent constitutional bodies, but by certain external factors. Also, with the repeated actions of the Minister of Justice, the Superior Council of Magistracy lost its credibility.

The author of the referral pointed out that, by Decision No 53 of 28 January 2005, the Court held that public statements made by representatives of the various public authorities, having regard to the context in which they were made and their specific content, could also give rise to confusion, uncertainty or tension, which could subsequently lead to conflicts between public authorities.

With regard to the serious interference by the Minister of Justice in the prosecution, it was stated that it took place in connection with the criminal investigation conducted in the "Caracal" case, in that the Minister of Justice had communicated to the family of a victim information on the content of the evidence adduced in the case. The Minister of Justice could not have known the information contained in a piece of evidence adduced during the investigation stage, which was not public, and could have communicated that information in lieu of the competent prosecuting body only by going beyond the powers lawfully conferred on her as Minister.

On the second aspect of the request, it was noted that on 5 September 2019, at a press conference in Bucharest, Mr Gordon Sondland, Ambassador of the United States of America to the European Union, stated that the US Attorney General William Barr had invited Minister Ana Birchall to Washington to continue working with him and his team directly for a roadmap on the rule of law in Romania. When asked by the President of the Superior Council of Magistracy about the existence of that document, the Minister of Justice did not deny the existence of that "roadmap" and did not answer the questions relating to the interference with the independence of the judiciary in that regard. Through her public position, the Minister of Justice created the appearance of her own justice agenda, debated at external level, but not discussed with the institution which has the constitutional role as guarantor of the independence of the judiciary.

With regard to the repeated actions aimed at blocking the activity of the Superior Council of Magistracy, the author indicated the Council's referrals regarding the need to initiate or amend legislative acts addressed to the Minister of Justice, how the Minister of Justice decided to make public some issues relating to her participation in plenary sessions of the Council as a member as of right, the way in which the Minister of Justice expressed herself with regard to the Section for the Investigation of Offences in the Judiciary, and the approach taken by the Minister of Justice to the situation of the Council's seat.

As regards the Superior Council of Magistracy's referrals to the Minister of Justice, it was noted that they were either unexamined or rejected without reasonable justification. Thus, the principle of sincere cooperation between the State authorities was infringed.

Furthermore, through public statements, the Minister of Justice talked about difficulties encountered in participating in plenary sessions of the Council, as a result of the way in which they were planned by the institution's management. Those statements create in the

public perception the idea that there is an obligation to consult members with regard to the setting of sessions and the draft agenda, an obligation not respected by the Council.

With reference to the way in which the Minister of Justice spoke about Section for the Investigation of Offences in the Judiciary, it was noted that the Minister of Justice's grievances concerned the procedure for appointing prosecutors in this structure and the role of the Prosecutor General, who, in her view, would no longer be able to censor that section's prosecution measures. These allegations were considered to be completely false in view of the legal provisions governing the hierarchical control of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice of the solutions, acts or measures ordered by the Chief Prosecutor of the Section for the Investigation of Offences in the Judiciary. Since in the present case the Council does not have the necessary tools to prevent the impairment of public confidence in the activity carried out by the aforementioned section of the prosecution service, as a result of the statements made by the Minister of Justice, an institutional deadlock has been created requiring the intervention of the Constitutional Court.

The Minister of Justice also asked the Council to take a decision on its seat, in the sense that either it will be part of the "Justice District" project or that the procurement procedure for new premises outside this district is to be completed, stressing that the project in question is delayed and cannot proceed until a clear reply from the Council has been received. However, under Government Decision No 949/2018, the Council was made available the amount necessary to purchase an establishment corresponding to its operational needs. Thus, the attempt by the Minister of Justice to prevent the acquisition of an establishment for the Council is liable to affect its very functional capacity, whereas the difficulties it faces in this respect have been known as from the time when this body was set up.

**II. Having examined the request for a settlement of the dispute,** the Court held that Ms Ana Birchall's mandate as Minister of Justice had ended on 4 November 2019, with the result that the question arises as to whether the request of the President of the Superior Council of Magistracy could still be considered where that conflict did not appear to exist anymore.

In its case-law, the Court has held that a finding that there is no conflict at the time of delivery of the decision does not, however, lead to the implicit finding that the conflict did not exist before, that is to say, at the time when it was notified on the same. By Decision No 158 of 19 March 2014, published in the Official Gazette of Romania, Part I, No 292 of 22 April 2014, the Court stated that the proceedings before the Constitutional Court have all the characteristics of judicial proceedings governed by public law and that they are not compatible with the principle of availability specific to the rules of civil procedure. By Decision No 148 of 16 April 2003, published in the Official Gazette of Romania, Part I, No 317 of 12 May 2003, the Court emphasised that the remedying or disappearance of the situation giving rise to the conflict, after the matter was referred to the Court, cannot, in the absence of an express provision to that effect, render the request devoid of purpose and be dismissed as such.

Therefore, even if some aspects of the present conflict concern the personal conduct of the former Minister of Justice, Ana Birchall (communication of the result of the genetic tests

to the family of the victim in the "Caracal" case, negotiation of a rule of law "roadmap", issues relating to the determination of the date of Council sessions, statements made in relation to the activity of the Section for the Investigation of Offences in the Judiciary), the Court has jurisdiction to rule on the acts/action of which she was accused.

The Court found that the request concerns a contentious situation, since it relates to a dispute between the Minister of Justice/Ministry of Justice and the Superior Council of Magistracy concerning the limits of their competence and the way in which the relationship between the executive and judicial authorities is conducted.

Exception to the above finding is the allegation made by the President of the Superior Council of Magistracy that the Minister of Justice would have negotiated a rule of law "roadmap" with the representative of a foreign state. The Court found that this allegation is not substantiated. Therefore, even if a legal question with possible constitutional relevance is raised, it is not a present one and is hypothetical. However, in the context of the power set forth in Article 146 (e) of the Constitution, the Court cannot analyse hypothetical legal disputes of a constitutional nature. Consequently, the existence of a contentious situation cannot be accepted since it must, by definition, relate to specific acts or actions committed by the public authorities. The situation at issue is also of a legal nature, since the Minister of Justice/Ministry of Justice is accused of conduct which, on the one hand, undermines the constitutional role of the Public Ministry and, on the other hand, affects the work and role of the Superior Council of Magistracy as guarantor of judicial independence.

An exception to the above finding concerning the legal nature of the disputed situation are the statements made by the Minister for Justice in connection with the dissolution/ reorganisation of a public prosecutor's structure, as these statements did not produce any legal effect. Opinions, value judgements or statements made by the holder of a public office with regard other public authorities do not in themselves constitute legal conflicts between public authorities. Opinions or proposals concerning the manner in which a particular public authority or its structures acts or should act, even if critical, do not trigger institutional blockages unless they are followed by actions or omissions that would hinder the fulfilment of the constitutional tasks of those public authorities. Such views or proposals remain within the limits of freedom of expression of political opinions, with the restrictions laid down in Article 30 (6) and (7) of the Constitution.

The Court pointed out that, in carrying out their constitutional mandates, representatives of public authorities, through their positions, are required to avoid the creation of conflict between powers. In the present case, the statements of the Minister of Justice were of a political nature, which fell within the limits of her freedom of expression. They have not produced any legal effects capable of leading to an institutional deadlock or hindering the exercise of the constitutional prerogatives of any public authority. Moreover, since the Government has the right to legislative initiative, in accordance with Article 74 of the Constitution, and is at the same time a delegated legislator, in accordance with Article 115 of the Constitution, its members may propose various legislative solutions for the completion of a draft law or an ordinance.

The Court then assessed whether the legal situation at issue was constitutional or legal in nature.

As regards the "Caracal" case, the Court has held that the judicial activity actually carried out by a public prosecutor in a particular criminal case does not relate to the authority of the Minister for Justice, as these are two separate issues. Thus, in judicial activity, as concerns the solutions adopted, the prosecutor is independent, under the conditions laid down by law. The Venice Commission took the view that the application of a policy in no way presupposes the existence of specific orders personally given to prosecutors in a particular case.

Therefore, the fact that the Minister for Justice has communicated by telephone to the family of a victim information relating to the content of the evidence adduced in the case, which the Minister for Justice herself confirms in her viewpoint, cannot be classified as an expression of the authority which she enjoys in terms of the activities of the prosecutors, but appears to be an interference by the Minister for Justice in the investigation of the case by the prosecutor of the case.

Having analysed Article 94 of the Code of Criminal Procedure, the Court found that the public prosecutor has the power to restrict on reasoned grounds the consultation of the file at the pre-trial stage, if this could undermine the proper conduct of the criminal prosecution. Therefore, the case prosecutor or the superior prosecutor decides to what extent such consultation compromises the conduct of the criminal prosecution. As regards access to the criminal investigation file for other persons who, by reason of their constitutional or legal functions, become aware of information contained in the file, they are under an obligation not to disclose it and, if they consider that it must be made known to the public, they must address a request to the prosecutor investigating the case or to the superior prosecutor, as the case may be. Contrary conduct risks compromising the prosecution phase of the criminal proceedings and affect the constitutional role of the Public Ministry.

It is not within the competence and role of the Constitutional Court to investigate the precise manner in which the Minister for Justice had access to evidence in a criminal investigation file, and the possible deviation of the Minister for Justice from the rules of criminal procedure was covered by the fact that, subsequently, the prosecutor took the view, by issuing a press release, that that information did not call into question the proper conduct of the criminal investigation. However, in principle, it is not for the Minister for Justice to determine himself whether or not information in a criminal investigation file is information of public interest. This assessment shall be carried out by the prosecutor.

Therefore, even if from the point of view of the procedure a wrong route was chosen, the result reached was not outside the law. Since no legal practice has emerged in the present case for the purposes of the constant communication of information from the prosecution files by the Minister for Justice, the singular action of the Minister for Justice does not point to an institutional deadlock and has not affected the criminal investigation, with the result that there can be no legal dispute of a constitutional nature.

As regards the relationship between the Ministry of Justice and the Superior Council of Magistracy with regard to the initiation of legislative acts or the inclusion or not of the seat of the Superior Council of Magistracy in the "Justice District", as well as the public statements made by the Minister of Justice on the way in which the date and agenda of Council sessions are determined, they do not call into question constitutional relations, even

if they indicate a certain situation of tension and lack of collegiality in the conduct of institutional relations between the Minister of Justice/Ministry of Justice and the Superior Council of Magistracy.

**III. For all these reasons,** by a majority vote, the Court found that there was no legal dispute of a constitutional nature between the Minister of Justice and the Superior Council of Magistracy arising from the conduct of the Minister of Justice in relation to the activity of the Public Ministry, consisting of interfering with the prosecution activity carried out by the Public Ministry and challenging the authority of the provisions of Article $88^{1\text{-}11}$ of Law No 304/2004 on the organisation of the judiciary. The Court also decided, unanimously, that there was no legal dispute of a constitutional nature between the Minister of Justice and the Superior Council of Magistracy, arising from an alleged negotiation by the Minister of Justice of a rule of law "roadmap" with the representative of a foreign State and the way in which the Minister of Justice decided to make public some issues relating to her participation in plenary sessions of the Council as a member as of right. The Court unanimously found that there was no legal dispute of a constitutional nature between the Ministry of Justice and the Superior Council of Magistracy, arising from the way in which the Council's referrals to the Ministry of Justice concerning the need to initiate or amend legislative acts and the approach taken by the Ministry of Justice to the legal situation of the Council's seat were dealt with.

*Decision No 26 of 22 January 2020 on the request for resolution of the legal dispute of a constitutional nature between the Minister of Justice and the Ministry of Justice, on the one hand, and the Superior Council of Magistracy, on the other, published in Official Gazette of Romania, Part I, No 168 of 2 March 2020*

**Whenever a law does not regulate a particular procedure through which a measure or purpose provided for by law is to be attained, the normative administrative act must regulate it, without such a procedure constituting an addition to the law.**

**Keywords:** *legal disputes of a constitutional nature, High Court of Cassation and Justice, impartial and independent court*

**Summary**

**I. As grounds for the request for resolution of the dispute,** the President of the Senate argued that the High Court of Cassation and Justice, through the Governing Board, had arrogated the power to legislate in the matter of the organic law with regard to the way in which 3-Judge Panels of the Criminal Chamber were to be formed, in breach of Parliament's constitutional competence.

It was pointed out that Articles 19 ($a^1$) and 32 (1) of the Regulation on the organisation and administrative functioning of the High Court of Cassation and Justice, a unilateral administrative act of a normative nature, provide that the composition of 3-Judge Panels

shall be approved by the Governing Board, and the presidents of sections shall determine the judges comprising the panels of the chambers. However, Law No 304/2004 does not contain any power for the Governing Board to approve the composition of the 3-Judge Panels of the Chambers of the High Court of Cassation and Justice, nor does it regulate the specific method of composition of those panels. Therefore, the aforementioned provisions of the regulation do not correspond to Law No 304/2004, adding to it, which leads to an infringement of Articles 1 (3) and (5), 73 (3) (l) and 126 (4) of the Constitution.

A situation has thus been reached where the composition of the panels is governed by an administrative act, issued by the management of the court itself. Rules for the composition of courts should enjoy accessibility, foreseeability and stability. The delegation of the power to lay down these rules to the Governing Board of the High Court of Cassation and Justice gives rise to a state of legal uncertainty, as infralegal acts are subject to frequent changes over time.

The composition of the panels, consisting of the nominal appointment of the judges to form a panel, is a question of judicial nature which relates to the actual administration of justice and must therefore be carried out by means of a legal procedure designed to ensure the independence and impartiality of judges. By Decision No 685 of 7 November 2018, the Constitutional Court held, with regard to the 5-Judge Panels, that the presumption of impartiality of the court is rebutted if it is found that the members of the panel were not appointed by drawing lots, but at random in open court.

Moreover, it was argued that these provisions of the regulation establish a differentiated and discriminatory regime as regards the composition of the 3-Judge Panels compared to the 5-Judge Panels, in the sense that within the latter the judges of which they are composed are drawn by lot, whereas in the case of the 3-Judge Panels, the presidents of the chambers determine their composition and the Governing Board approves it.

**II. Having examined the request for a settlement of the dispute,** the Court held that, in cases where the legislator intended the composition of a panel to be determined according to a particular procedure, it had expressly regulated it. Thus, for example, with regard to the 3-Judge Panels of the supreme court, in a particular case, Article 31 (3) of Law No 303/2004 established that “if the number of judges required to form the panel of judges cannot be ensured, it shall be constituted from amongst judges from the other chambers, appointed by drawing lots by the President or one of the 2 Vice-Presidents of the High Court of Cassation and Justice”. As regards the 5-Judge Panels of the supreme court, Article 32 (4) of Law No 303/2004 established that “the judges forming part of these panels shall be appointed by drawing lots, in open court, by the President or, in his absence, by one of the 2 Vice-Presidents of the High Court of Cassation and Justice”.

Therefore, if the law does not lay down any procedure to be followed in order to determine the composition of the panels, it is for the governing bodies of the High Court of Cassation and Justice to regulate a procedure for the actual enforcement of the law.

The author of the case took the view that the Regulation on the organisation and administrative functioning of the High Court of Cassation and Justice could not establish a regulatory solution for the appointment of the members of the panel, on the one hand,

because the issuer of the regulation did not have that power and therefore added to the law, and, on the other hand, because the requirements laid down by law for the composition of panels of judges and their objective independence and impartiality are thus infringed.

The Court found that the High Court of Cassation and Justice is a legal person governed by public law which, in addition to the judicial functions of its activity, also has an administrative function, which concerns its organisation and its actual operation. The two functions — judicial and administrative — must remain separate. None may take over the object of the other. Thus, the administrative acts issued cannot determine or influence the composition of the panels or the proceedings before the High Court of Cassation and Justice, just as judicial decisions cannot replace administrative acts, but rather review their legality.

Decisions of the Governing Board of the High Court of Cassation and Justice are unilateral administrative acts of a normative nature, issued for the purpose of enforcing the law. They cannot, therefore, govern social relations in primary terms.

Therefore, whenever a law does not regulate a particular procedure for carrying out a measure or purpose provided for by law, the regulatory administrative act must regulate it, without such a process constituting an addition to the law. Therefore, the regulation of the designation of the members of the 3-Judge Panels of the High Court of Cassation and Justice by a subsequent administrative act of a normative nature is not contrary to Law No 304/2004, since the law in question did not lay down just one method of designation.

The legislator considered that the determination of the procedure relating to the composition of panels is a matter for the administration of justice falling within the jurisdiction of the High Court of Cassation and Justice. It is only where the legislator has expressly regulated a particular designation procedure that the High Court of Cassation and Justice cannot establish another procedure.

The Court found that the method of designation of members of 3-Judge Panels by means of an administrative act of a normative nature did not infringe the constitutional requirements of Article 126 (4), since the administrative act merely organises the enforcement of the law. Therefore, the requirement for the composition of panels to be regulated by law is not affected.

In determining whether the court is independent, the appearance plays a particular role, since the trust which the courts must inspire to the public in a democratic society is at issue. It is also apparent that the independence of the court is assessed on the basis of how its members are appointed, the length of their term of office and guarantees against external pressures.

The Court found that the solution chosen by the normative administrative act is not such as to affect the requirement of independence and objective impartiality of the 3-Judge Panels. The designation by drawing lots of the members of the panels is not the only way to ensure their objective impartiality. The current procedure, which involves double filtering by both the President of the Chamber and the Governing Board of the High Court of Cassation and Justice, in principle, ensures the necessary transparency. The proposals of the president of the chamber cannot be arbitrary, since they must also take account of objective criteria in order to ensure the quality of justice.

**III. For all these reasons,** the Court unanimously found that there was no legal dispute of a constitutional nature between the Romanian Parliament and the High Court of Cassation and Justice arising from the composition of the 3-Judge Panels of the Criminal Chamber of the High Court of Cassation and Justice.

*Decision No 27 of 22 January 2020 on the request for resolution of the legal dispute of a constitutional nature between the Romanian Parliament, on the one hand, and the High Court of Cassation and Justice, on the other, published in Official Gazette, Part I, No 166 of 28 February 2020*

**The designation of a candidate for the position of Prime Minister in order to provoke a political crisis leading to early elections is grossly at odds with the spirit of the Constitution and constitutional loyalty. By nominating a candidate on whom a motion of censure was voted only a day before, the President of Romania exercised his power in a discretionary manner and ignored parliamentary will.**

**Keywords:** *legal disputes of a constitutional nature, dissolution of Parliament, nomination of the candidate for the position of Prime Minister, vote of confidence, consultation of parties, motion of censure, principle of separation and balance of powers, rule of law*

**Summary**

**I. As grounds for the request for resolution of the dispute,** the President of the Chamber of Deputies and the President of the Senate argued that the President of Romania had exercised his powers in a discretionary manner, as he nominated, on 6 February 2020, the candidate Ludovic Orban for the position of Prime Minister, although Parliament had just voted a motion of censure against him.

The President of Romania ignored and circumvented the mandatory provisions laid down in Article 114 (2) of the Basic Law in terms of the purpose laid down by the constituent legislator, according to which the Government is to be dismissed if a motion of censure, submitted within 3 days of the submission of the draft law, has been voted in accordance with Article 113. By rejecting the proposal for a Prime Minister made by a parliamentary majority, the President of Romania will, as he stated, trigger a legal dispute of a constitutional nature, preventing the formation of a government, with the aim of dissolving Parliament and forcing early elections.

The President of Romania breached the principle of sincere cooperation between public authorities and institutions and applied in bad faith the constitutional provisions of Article 103 (1) as regards the nomination of the candidate for the position of Prime Minister. It must be borne in mind that the support of the parliamentary majority is binding in order for the government to be able to ensure that the country's internal and external policy is carried out. No parliamentary party, even PNL, would vote for a new government led by Ludovic Orban, as stated by all heads of parties with parliamentary representation. By nominating the same candidate for the position of Prime Minister, who was dismissed only a day before

following a crushing vote in Parliament, the President of Romania has positioned himself outside the constitutional prerogatives, clearly disregarding Parliament's role, fully disregarding the role and powers laid down in Article 80 of the Constitution.

The procedure for the investiture of the Government involves two public authorities which represent distinct powers of the State. The President of Romania is responsible for nominating a candidate for the position of Prime Minister. The fact that he has that power does not mean that he can exercise it at his discretion. The President of Romania is required to consult, before nominating the candidate for the position of Prime Minister, the party with an absolute majority in Parliament or, if there is no such majority, the parties represented in Parliament. This obligation must be respected because the Chamber of Deputies and the Senate have the exclusive power to give a vote of confidence on the programme and on the entire list of the Government. The designation by the President of Romania of a person other than that for whom an option was expressed during consultations entails the foreseeable risk that he or she will not have parliamentary support and will therefore not be granted a vote of confidence by Parliament. As a result of this mechanism for sharing competences, none of the public authorities concerned can fully exercise them without the assistance of the other authority.

By Decision No 48 of 17 May 1994, published in the Official Gazette of Romania, Part I, No 125 of 21 May 1994, the Constitutional Court held that the Parliament's power to invest the Government could not be exercised under pressure of loss of Parliament's mandate. The Constitution therefore obliges the President to consult with parliamentary parties in order to designate the person most likely to obtain the support of a parliamentary majority. The obligation of the President is not a formal one, but a genuine duty of diligence, otherwise the Constitution would be meaningless and ineffective. Early elections are to take place if the Parliament does not function, without being based on the reason to change the parliamentary majority.

**II. Having examined the request for a settlement of the dispute,** the Court held that the authors of the referrals had invoked a deadlock owing to the impossibility of the natural exercise of constitutional prerogatives, in the sense that the Parliament was called upon to grant a vote of confidence to a government "under the pressure of the loss of the mandate". The referrals were therefore precisely determined by the fact that the adjustment mechanisms operating under a natural interpretation of the Constitution would be ineffective due to the deformation of the meaning of the constitutional provisions or the use of a constitutional procedure (the designation of the candidate for the position of Prime Minister) contrary to the purpose for which that procedure was established (to form a new government).

From that point of view, it is irrelevant that the parliamentary procedure for the Government's investiture was initiated after the referral to the Constitutional Court. The continuation of the parliamentary procedure does not mean that Parliament agreed to the method of nomination of the candidate for that position. At the same time, the continuation of that procedure cannot be interpreted as a lack of consistency between the will of the Parliament as a whole, on the one hand, and that of the authors of referrals, on the other. The referral to the Constitutional Court is not made by the Presidents of the two Chambers of Parliament in their own name, as natural persons, but by virtue of their function.

As regards the alleged absence of a conflict situation, the Court observed that both parties to the conflict use public statements of a political nature in order to prove either the existence or non-existence of the conflict. This does not, in itself, demonstrate that only political opinions or statements are at issue, since they were followed by legal acts capable of giving concrete expression to them.

From a combined analysis of the statements made by the President of Romania and the dismissed Prime Minister of the Government, it follows that they decided that "return to the electorate" was the solution, meaning the dissolution of Parliament and early elections.

The nomination of the Government entails the exercise of a shared competence between the President and the Parliament. This procedure is thus initiated (designating the candidate for the position of Prime Minister) and finalised (nomination of the Government on the basis of a vote of confidence by the Parliament) by acts of the President of Romania. However, nomination of the Government is subject to the Parliament's vote of confidence. It follows that the purpose of the procedure is to obtain that vote of confidence. This is the only way to interpret the constitutional provisions, that is to say, as achieving the aim for which they were regulated, and not as not achieving the same.

Even though the procedure laid down in Article 103 (1) of the Constitution is flexible, it does not allow for the discretionary exercise of the power by the President of Romania. He does not act as a decision maker in this procedure, but as arbiter and mediator between political forces.

The Court held that the first situation envisaged in Article 103 (1) of the Constitution, namely that in which there is a political party/political alliance which holds the absolute majority of parliamentary mandates, is very clear as regards the conduct to be followed by the President of Romania. In this case, the President only has the power to nominate as a candidate for the position of Prime Minister the person proposed by the respective party/alliance.

The second situation envisaged in Article 103 (1) of the Constitution is applicable in the present case, namely the absence of such a majority, when the President appoints a candidate for the position of Prime Minister, following consultation of the parties represented in Parliament. In this case, the President only has the power to nominate the representative proposed by the political alliance or political party who can provide the parliamentary support necessary to secure the vote of confidence by the Parliament.

As regards the obligations incumbent on the parties in the context of the consultations, the Court pointed out that this is not a formal act, but must be carried out sincerely and responsibly. As a result, the view expressed in this case by the President of Romania that the statements made by the political parties in the context of the consultations are mere "political opinions", expressed at an "eminently political" stage, cannot be accepted. Even if, according to the same point of view, those declarations do not immediately turn into a vote, the presumption from which any consultation required by the Constitution must start is that of genuine dialogue, undertaken by both parties. Any other approach would have the meaning that the consultation procedure becomes derisory, being reduced to a mere obligation to undergo this mandatory stage, deprived however of content and, therefore, of the role assigned to it by the constituent legislator. In conclusion, the consultation to which the constitutional rules refer is not an act of courtesy, it is not a mere exchange of views, but

a genuine and responsible dialogue, which has important effects in the framework of the procedure provided for in Article 103 (1) of the Constitution.

Although, in principle, there was nothing to prevent the nomination as a candidate for the position of Prime Minister of the person who had occupied the position of Prime Minister of a Government who had been dismissed by a motion of censure, the President had to bear in mind that, in the present case, the Government had been dismissed only a day before, which makes it unlikely that elements likely to lead to a vote of no confidence by Parliament turn into a vote of confidence. This act demonstrates a disregard for Parliament's role and will expressed by the adoption of the motion of censure, thus using the procedure provided for in Article 103 (1) of the Constitution contrary to the purpose for which it was established.

The President of Romania also supported, through public statements and the act of nomination, a candidate for the position of Prime Minister who declared publicly that he was seeking a situation where Parliament would reject two requests for investiture of the Government, which would trigger the dissolution of Parliament under the conditions of Article 89 of the Constitution. It is true that the referrals concern a legal dispute of a constitutional nature between the President and the Parliament, with the result that, apparently, the conduct of the candidate for the position of Prime Minister is not the subject-matter of this case. However, this conduct is relevant to the assessment of the constitutional conduct of the President of Romania. he should have excluded, as a matter of principle, a candidate who issues such statements on the matter before, during and after the consultations. Furthermore, the appointment of a candidate for the position of Prime Minister in order to provoke a political crisis leading to early elections is grossly contrary to the spirit of the Constitution and constitutional loyalty.

The Court held that, in order to ensure the achievement of the role and proper functioning of the political institutions, the constituent legislator provided for certain safeguards of institutional stability. In the case of public authorities for which mandates have been foreseen, the termination of mandates before their expiry may take place in exceptional cases, strictly and exhaustively regulated at constitutional level, in order to prevent possible abuses. The dissolution of Parliament constitutes such an exceptional case and is provided for by the constituent legislator as an extreme solution to a crisis situation. Even in a crisis situation within the meaning of Article 89 of the Constitution, the dissolution of Parliament shall be ordered only when any attempt to resolve the institutional deadlock has failed. In practice, the Constituent legislator ruled out the possibility of dissolution of Parliament be "provoked" by the President. On the contrary, it has established a duty of diligence for the President of Romania, in the sense of making every effort to preserve parliamentary stability, bringing forward the mandate obtained through elections rather than shortening it by forcing early elections.

In his view presented in this case, the President of Romania argued that he had complied with Article 103 (1) of the Constitution, taking the view that, in the case under consideration in the present case, it merely required the President to hold consultations and that that obligation had been fulfilled. However, the Court has held that respect for the supremacy of the Constitution is not limited to compliance with the letter of the Constitution alone. If that were the case, a Constitution would never be sufficient, as it could never explicitly regulate solutions for all situations that may arise in practice, including in relations between constitutional public authorities. Accepting a strictly literal and

fragmented interpretation of the Constitution could lead to the conclusion that any conduct that is not expressly prohibited by the constitutional text is *per a contrario* allowed by the same, even if it would clearly run counter to the logic and spirit of the Constitution, and such a conclusion is unacceptable as it is incompatible with the principles of the rule of law.

In the present case, loyal constitutional behaviour consists of the designation by the President of Romania of a candidate for the position of Prime Minister in order to achieve the purpose for which the constitutional procedure for the nomination of the Government was set up, that is to say, in order to achieve the common aim of promoting the interests of the country as a whole, not the narrow interests of a single institution or of a political party which has designated the holder of the office. In order render possible the achievement of that aim, the procedure of investiture must be effective and not purely formal. This requires consideration of the motion of censure and its effects, consultations with political parties and assessment of the options for the candidate for the position of Prime Minister in a serious, sincere and responsible manner.

The nominee must also make this commitment seriously, sincerely and responsibly. The support of the President of Romania for a candidate designated for the office of Prime Minister, who is himself against the government which he proposes, constitutes a distortion of the constitutional provisions. The designation thus appears as a unilateral act of will, an expression of the exclusive will of the President of Romania, thus departing from the logic of the constitutional relationship of separation and balance between the public authorities. The antagonistic positioning of the President in relation to Parliament has led to a legal dispute of a constitutional nature between these two institutions.

The Court noted that the President of Romania must start a new procedure for the nomination of the candidate for the position of Prime Minister. This designation must comply with both the letter and the spirit of the Constitution and the duty of loyal constitutional behaviour. As a result of this Decision, the designation of Mr Ludovic Orban as a candidate for the position of Prime Minister, followed by a request for a vote of confidence for the programme and the Government list submitted by him to Parliament, does not constitute the "first request" for a investiture within the meaning of Article 89 (1) of the Constitution and, therefore, does not constitute the point from which the 60-day period laid down in the same constitutional text is calculated.

**III.For all these reasons,** by a majority vote, the Court found that there was a legal dispute of a constitutional nature between the President of Romania and the Romanian Parliament concerning the designation by the President of Romania of the candidate for the position of Prime Minister by Decree No 82/2020, published in the Official Gazette of Romania, Part I, No 88 of 6 February 2020. In carrying out the task provided for in Article 103 (1) of the Constitution, the President of Romania shall make a new designation as to the candidate for the position of Prime Minister.

*Decision No 85 of 24 February 2020 on the requests for settlement of legal disputes of a constitutional nature between the President of Romania and the Romanian Parliament, submitted by the President of the Chamber of Deputies and the President of the Senate, published in the Official Gazette, Part I, No 195 of 11 March 2020*