THE REPORT OF THE CONSTITUTIONAL COURT OF ROMANIA
For the 4th Congress of the World Conference on Constitutional Justice
THE RULE OF LAW AND CONSTITUTIONAL JUSTICE IN THE MODERN WORLD

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I. DIFFERENT CONCEPTS ON THE RULE OF LAW

1. What are the relevant sources of law (for example, the Constitution, the case-law etc.), establishing the principle of rule of law in your legal system?

The "rule of law" has its constitutional enshrinement in the Constitution, which is the Basic Law. The Constitution of Romania was adopted by referendum on 8 December 1991[1], since its role was, firstly, to enshrine the new political, social and economic order, proclaimed immediately after the events in Romania in December 1989. Its adoption has shaped a profound constitutional reform, both by establishing general principles and reference rules of the organisation and functioning of State powers, as well as mechanisms to ensure observance of the Constitution and of its supremacy.

Title I of the Constitution of Romania[2] is dedicated to the general principles and Article 1 sets out the features and characteristics of the Romanian State, respectively, ***"Romania is a sovereign, independent,***

[1] The Constitution of Romania, in its original form, was published in the Official Gazette of Romania, Part I, No 233 of 21 November 1991 and entered into force after approval by the national referendum of 8 December 1991. To learn more about the Constitution, see, in this regard, *Geneza Constituţiei României 1991, Lucrarile Adunării Constituante,* Autonomous Company "*Official Gazette*".

[2] The Constitution of Romania was amended and supplemented by Law for the revision of the Constitution of Romania no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003; republished, by updating denominations and by a new numbering of the texts, in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003. The Law for the revision of the Constitution of Romania no. 429/2003 was approved by the national referendum on 18 and 19 October 2003 and entered into force on 29 October 2003, the date of publication in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003 of the Decision of the Constitutional Court no. 3 of 22 October 2003 for the confirmation of the result of the national referendum of 18-19 October 2003 concerning the Law for the revision of the Constitution of Romania. Moreover, the revision of the Basic Law was determined by the need to adapt to international rules, in order to integrate Romania into the Euro-Atlantic structures.

unitary and indivisible National State; the form of government of the Romanian State is the Republic; Romania is a democratic and social state governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the Romanian people's democratic traditions and the ideals embodied by the December 1989 Revolution, and shall be guaranteed; the State shall be organised based on the principle of the separation and balance of powers - legislative, executive, and judicial - within the framework of a constitutional democracy; observance of the Constitution, of its supremacy and the laws shall be obligatory in Romania."

Therefore, and as noted by the Constitutional Court in its case law, the constitutional provisions set out the defining characteristics of the Romanian State, which represent supreme values in the spirit of the traditions of the Romanian people[3] and one of the Romanian State characteristics is that ***"Romania is a state governed by the rule of law "***[4].

Of course, the principle of the rule of law is enshrined in the Basic Law as a general principle, ***"which means that its features and guarantees are to be found in the regulations, both directly and indirectly or by way of interpretation***"[5].

The Constitutional Court has played a crucial role in the process of process of constitutionalisation of the principle of the rule of law, which, in addition to its role as ***guarantor of the supremacy of the Constitution***, is also intended to help create the right, by way of interpretation, by developing constitutional case-law. The Constitution makes use of some concepts[6] whose content is not defined by the constituent legislator, being for those called upon to interpret the law to determine their content and, in terms of exclusive interpretation of the Constitution, it is the obligation of the Constitutional Court.[7]

Furthermore, the Romanian law system is composed of all legal rules adopted by the Romanian State

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[3] Decision no. 92 of 13 February 2007, published in the Official Gazette of Romania, Part I, No. 149 of 1st March 2007.

[4] The doctrine revealed that the inclusion of the characteristics of the Romanian State - rule of law, democratic and social - in the Constitution of Romania was essential and necessary since they complete the features of the Romanian State. Thus, *"the definition of the Romanian State as governed by the rule of law was imperative to mark the detachment of the totalitarian system and the promotion of political regime where the law was to have the primary role". See, to that effect, V. Duculescu, C. Calinoi, G. Duculescu, Constitutia Romaniei - comentata si adnotata - Lumina Lex Publishing House, Bucharest, 1997, p. 13-18.*

[5] See, in this regard, I. Muraru, M. Constantinescu, S. Tanasescu, M. Enache, G. Iancu - *Interpretarea Constitutiei* - doctrina si practica, Lumina Lex Publishing House, Bucharest, 2002, p. 101-102.

[6] I. Vida, *Obligativitatea deciziilor curtii constitutional pentru instantele judecatoresti - factor de stabilitate a Constitutiei*, Constitutional Court Bulletin no. 7/2004 — http://www.ccr.ro/nr-7-2004

[7] See, for example, I. Cochintu, *Constitutionalizarea principiului loialitatii constitutional*, https://www.ccr.ro/uploads/cochintu.pdf

and which must be in line with **the principle of the supremacy of the Constitution and the principle of legality**, which is at the heart of the rule of law requirements, principles enshrined in Article 1 (5) of the Constitution, according to which ***"Observance of the Constitution, of its supremacy, and the laws shall be obligatory in Romania***", the country's sole legislative authority being the Parliament, given that the State shall be organised based on the principle of the separation and balance of powers - legislative, executive and judicial - within the framework of constitutional democracy.

Constitutional democracy, in a rule of law, however, it is not an abstraction, but it is a reality of a system under which the supremacy of the Constitution limits the legislator's sovereignty which, in the process of creating legal rules and adopting regulatory acts, must consider certain principles[8], such as the principle of legality, which is constitutional and has general application, namely at the whole infra-constitutional regulatory framework, the principle of free access to justice, the principle of non-retroactivity, the principle of equality etc. and, not least, the rule of primacy/priority of the international treaties on human rights and of the European Union law in the light of Articles 11, 20 and 148 of the Constitution. These latter constitutional provisions oblige the Romanian State to fulfil as such and in good faith its obligations from the treaties to which it is a party, and the Treaties ratified by Parliament, according to the law, are part of national law[9]. The constitutional provisions on the citizens' rights and freedoms shall be interpreted and applied in compliance with the Universal Declaration of Human Rights and the covenants and the other treaties to which Romania is party. Where there are inconsistencies between the covenants and treaties on fundamental human rights to which Romania is party and the national laws, the international rules shall take precedence, unless the Constitution or the national laws comprise more favourable provisions[10]. Following Romania's accession to the Treaties

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[8] It is true that, in accordance with the scope of the rule of law including, inter alia, the legality - the primacy of law, the relationship between international law and national law, legislative procedures, legislative powers of the executive, the emergencies, the private actors exercising public tasks, legal certainty - the accessibility of the legislation and the judicial decisions, predictability, stability and coherence, legitimate expectation, the principle of non-retroactivity, the principle *nulla poena sine lege*, the authority of *res judicata*, preventing of abuse of powers, equality before the law and nondiscrimination, as well as access to justice - the independence and impartiality of the judiciary/judges, the fair trial, including the effectiveness of judgments and autonomy of prosecution authorities - See, in this regard, the Venice Commission report on the Rule of Law (CDL-AD(2011)003rev) 2011, complemented by the detailed List on the rule of law (CDL-AD(2016)007) 2016.

[9] Article 11 (1) and (2) of the Constitution - International law and domestic law. Where a Treaty to which Romania is to become a party includes provisions contrary to the Constitution, its ratification may take place only after the revision of the Constitution [Article 11 (3) of the Constitution].

[10] Article 20 - International human rights treaties: *"(1) The constitutional provisions relative to the citizens ' rights and freedoms shall be interpreted and applied in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is party. (2) Where inconsistency exists between the covenants and treaties on fundamental human rights to which Romania is a party, and national law, the international regulations shall prevail except where the Constitution or domestic laws comprise more favourable provisions."*

establishing the European Union, in view of transferring certain powers to Community institutions, and of exercising in common with the other Member States the powers laid down in these treaties, the provisions of the Treaties establishing the European Union, as well as the other mandatory Community regulations shall take precedence over any conflicting provisions of the national laws, in compliance with the Act of Accession[11].

The Constitution of Romania also provides the possibility to legislate by legislative, constitutional or legal delegation by virtue of an enabling law, through emergency or simple Ordinances of the Government. Thus, as regards the concept of "***law***" used in the constitutional provisions, this concept has been used, on the one hand, in the Constitution, "***in its broadest sense, which also includes the Constitution, as Basic Law, but also all the other regulatory acts, with a legal force equivalent or inferior to law***[12]**,** having several[13] meanings "***depending on the distinction between the formal or organic criterion and the material one, and the law is characterised as being an act of the legislative authority, identifying through the body responsible to adopt and through the procedure to be followed for that purpose"***.

As regards the Government ordinances, it was ascertained both in the doctrine[14] and in the case-law[15]

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[11] Article 148 - Integration into the European Union: *"(1) Romania's accession to the founding Treaties of the European Union, for purposes of transferring certain powers into the hands of Community institutions, as well as for exercising in common with the other Member States the competencies stipulated in such Treaties shall be under a law adopted in a joint session of the Chamber of Deputies and the Senate, by a majority of two-thirds of the number of Deputies and Senators. (2) Following accession, provisions in the founding Treaties of the European Union, as well as other binding regulations under Community law shall prevail over any contrary provisions of domestic law while observing provisions on the accession instrument. (3) Provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to any instrument purporting a revision of the founding Treaties of the European Union. (4) The Parliament, the President of Romania, the Government and the judicial authority shall guarantee that the obligations arising from the accession instrument and from provisions under paragraph (2) are put into effect. (5) The Government shall send the draft for any binding regulations to the Chambers of the Parliament prior to submitting such for approval to the European Union institutions."*

[12] See to that effect Decision no. 799 of 17 June 2011 on the bill for the revision of the Constitution of Romania, published in Official Gazette of Romania, Part I, no. 440 of 23rd June 2011.

[13] Decision no. 120 of 16 March 2004, published in Official Gazette of Romania, Part I, no. 296 of 5 April 2004. "*This conclusion is clear from a combined reading of the provisions of Article 61 (1) second sentence of the Constitution, republished, according to which "Parliament is [...] the sole legislative authority of the country" and of Articles 76, 77 and 78, according to which the law adopted by the Parliament is subject to promulgation by the President of Romania and shall enter into force three days after its publication in the Official Gazette of Romania, if its content does not provide a later date. The material criterion takes into account the content of the regulation, being defined in the light of the subject-matter of the rule, respectively of the nature of social relations regulated."*

[14] Ioan Vida, *Legistica formala, introducere m tehnica si procedura legislativa,* Universul Juridic Publishing House, Bucharest, 2012, pp. 190-209; *Dezvoltari recente m jurisprudent Curjii Constitujionale a Romaniei m privinja limitelor de care este jinut Guvernul m adoptarea ordonanjelor de urgenja* in the Constitutional Court Bulleting no. 1/2009, http://www.ccr.ro/nr-1-2009.

[15] See, for example, Decision no. 146 of 25 March 2004, published in the Official Gazette of Romania, Part I, no 416 of 10 May 2004 or Decision no. 405 of 15 June 2016, published in the Official Gazette no. 517 of 8 July 2016.

that, by developing such regulatory acts, the administrative body (i.e. the Government), exercises a competence through award which, by its very nature, falls within the legislative competence of the Parliament. Therefore, the ordinance is not a law in the formal sense, but an administrative act of law, assimilated to this one by the effects it produces, by complying in this respect with the material criterion.[16] Given therefore that a regulatory act is generally defined both in form and in content, the law, in its broadest sense, is the result of a combination of the formal criterion with the material one[17], thus including also the assimilated acts. Concerning these ones, it was noted that, with regard to the phrase "***only by law***" used by the constitutional provisions, it means to forbid the possibility of establishing taxes and duties for the State budget by inferior regulatory acts with a legal force inferior to law. This category does not include simple or emergency ordinances issued by the Government, which are issued for the organisation of the enforcement of laws, ministerial orders etc. Saying that the expression ***"only by law***" excludes the possibility of adopting ordinances, being an area reserved for organic law, means adding to the Constitution.

The evolution of constitutional democracy in Romania after 1989, in addition to the adoption of the Basic Law, led both to the recognition and constitutional consecration of certain rights and freedoms and which have the rank of constitutional principles, **being supreme values in a rule of law,** by providing also at the same time certain reciprocal obligations, and to the establishment of certain protection instruments and effectiveness of these fundamental rights.

By giving efficiency to the supremacy of the Constitution, **the constituent legislator has also implemented the necessary tools for monitoring the compliance with fundamental rights and freedoms, constitutional review**[18] **being awarded to the Constitutional Court as a guarantor for the supremacy of the Constitution**[19] and the sole authority of constitutional jurisdiction in Romania[20].

The requirements to ensure the supremacy of the Constitution and to observe the rule of law require, inter alia, that the case-law of the Constitutional Court is governed by the imperative of stability and

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[16] See to that effect Decision no. 799 of 17 June 2011 on the bill for the revision of the Constitution of Romania, published in the Official Gazette of Romania, Part I, no. 440 of 23 June 2011.

[17] Decision no. 120 of 16 March 2004, published in the Official Gazette of Romania, Part I, no. 296 of 5 April 2004.

[18] As for the constitutional review, see Lazaroiu, I. Cochintu, *Accesul la justitia constitutionals in materie fiscala si controlul constitutionalitatii legilor in dinamica legislative, paper presented at the National Conference Conferinta of Tax Law, 2016,* http://www.hamangiu.ro/conferinta-nationala-de- drept-fiscal-2

[19] Article 142 (1) of the Constitution.

[20] Article 1 (1) of Law no. 47/1992 on the organization and operation of the Constitutional Court.

legal certainty, so that, according to the constitutional provisions, "***its decisions are generally binding and effective only for the future***".

Moreover, as noted by the Constitutional Court in its case-law[21], an important part of the Romanian State is constitutional justice, achieved by the Constitutional Court, political- jurisdictional public authority outside the scope of the legislative, executive and judicial powers, its role being to ensure the supremacy of the Constitution, as Basic Law of the rule of law. Thus, according to Article 142 (1) of the Constitution: "***The Constitutional Court of Romania shall be the guarantor for the supremacy of the Constitution.***"

The Constitutional Court decision ascertaining the unconstitutionality is part of the normative legal order, by its effect the unconstitutional provision ceasing its application for the future.[22] Both the operative part and are the recitals of this decision are generally binding, according to the provisions of Article 147 (4) of the Constitution and are imposed with the same force to all subjects of law[23]. The Constitutional Court, on several occasions, has underlined the urgency of the observance of the Constitution and of its supremacy, as well as the binding character of the Constitutional Court decisions in both the operative part and the recitals on which it is based. Thus, ignoring the legal effects of the Constitutional Court decisions, conferred by Article 147 of the Constitution, is in breach of the principles of the rule of law and democracy[24].

In conclusion, it follows that the source of law which enshrines the principle of the rule of law in the Romanian legal system is the Constitution and, in its interpretation, the case law of the Constitutional Court.

2. How is the rule of law interpreted in your country? There are different concepts of the rule of law: formal, substantive or other?

Under Article 1 (3) of the Romanian Constitution, ***"Romania is a democratic and social state governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the***

[21] Decision no. 738 of 19 September 2012, published in the Official Gazette of Romania, Part I, no. 690 of 8 October 2012.

[22] Decision no. 799 of 17 June 2011, published in the Official Gazette of Romania, Part I, no. 440 of 23rd June 2011.

[23] See also, in this regard, the Constitutional Court Decision no. 1 of 17 January 1995 on the binding effect of its decisions given in the context of its constitutional review, published in the Official Gazette of Romania, Part I, no. 16 of 26 January 1995, or Decision no. 683 of 27 June 2012.

[24] Decision no. 805 of 27 September 2012, published in the Official Gazette of Romania no. 736 of 31 October 2012.

Romanian people's democratic traditions and the ideals embodied by the December 1989 Revolution, and shall be guaranteed."

From this wording it follows that this concept of the rule of law takes into consideration, on the one hand, the observance of the supreme value of the Romanian people - ***human dignity, citizens' rights and freedoms, the free development of human personality, justice and political pluralism*** - which, within the framework of constitutional democracy, shall be organised based on the principle of the separation and balance of powers - legislative, executive and judicial, and the observance of the Constitution, of its supremacy and the laws shall be obligatory. On the other hand, the entire constitutional regulation is subject to the general principles, illustrating the provisions of Article 1 (3) of the Basic Law, such that at the composition of the content of the rule of law the entire configuration of the Constitution participates. The principle of the rule of law, as an universally valid concept, having "the dimension of universality"[25], finds its "extensions" in the Constitution, expressly enshrining certain principles, beginning from the supremacy of the Constitution, law enforcement, equality of citizens before the law, nobody is above the law or by the existence of a constitutional democracy through pluralism, consultation of citizens through referendums on matters of national interest, the respect for fundamental rights and freedoms, the collaboration and reciprocal control of powers, the State responsibility for the damages caused by the judicial errors etc. Furthermore, the Constitution also lists a multitude of guarantees of the rule of law, for example, free access to justice, access to constitutional justice, independence of judges, etc.

Therefore, the principle of the rule of law is interpreted in conjunction with other principles deriving from the constitutional provisions, for example the principle of the separation and balance of powers, whereas in Romania ***"The State shall be organised based on the principle of the separation and balance of powers - legislative, executive, and judicial*** - within the framework of constitutional democracy", in conjunction with the principle of legality and of the supremacy of the Constitution, under which "***Observance of the Constitution, of its supremacy and the laws shall be obligatory in Romania"[26],*** with the principle of free access to justice, of the principle of non-retroactivity, the principle of equality and non-discrimination and the rule of priority/international human rights treaties and of European Union law, the principle of bicameralism etc.

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[25] See S, Popescu, *Din nou despre statul de drept - Concept, trăsături definitorii si motivaţii*, in *Studii de drept românesc*, no. 4, 1992,

[26] Article 1 (4) and (5) of the Constitution.

Furthermore, as regards the provisions Article 1 (3), first sentence of the Constitution, which enshrines the principle of the rule of law, the Court held in its case-law that the requirements concerning the purposes of looming major State in which there is appointed as the rule of law involving the subordination of the State Language law, enabling that law to the media to censor the policy options and, within this framework, weight trends, abusive, discretionary State structures. ***The rule of law ensures the supremacy of the Constitution, linking all laws and regulatory acts, the existence of the separation of public powers which must act within the boundaries of the law, i.e. the law within a general willingness. The rule of law establishes a number of safeguards, including the judicial authorities, to ensure respect for the rights and freedoms of the citizens concerned, by the public authorities within the framework law.***

Thus, 'there is no legal instrument foreseen by the Constitution may be ineffective, emptying of content and that it is illusory, and thus infringement of the constitutional principle of rule of law".

3. Are there any specific areas of law in which your Court ensures respect of the rule of law (for example, criminal law, electoral law etc.)?

The supremacy of the Constitution is a source of its stability[27], being a conquest of legal thinking, which is linked to the political will to effectively guarantee that supremacy **through constitutional jurisdiction**, the principle of supremacy of the Constitution representing a universally valid truth accepted by modern constitutional law[28]. **The supremacy of the Basic Law is therefore at the heart of the requirements of the rule of law,** representing at the same time a legal reality involving consequences and guarantees. Among consequences are the differences between the Constitution and laws and, last but not least, the compatibility of the entire law with the Constitution, and among guarantees can be also the review of constitutionality[29]

The Romanian law system is composed of all the legal rules adopted by the Romanian State and which must be in line with the principle of supremacy of the Constitution and the principle of legality, which

[27] V. Constantin, *Constitutia Romaniei privita din perspectiva suprematiei dreptului (rule of law), m Comentarii la Constitutia Romaniei,* Andreescu G., Bakk M., Bojin L., Constantin V., Polirom Publishing House, Ia§i, 2010, p.200.

[28] See S. Popescu, E. S. Tanasescu in *Constitutia Romaniei - comentariu pe articole,* coordinators I. Muraru, E. S. Tanasescu and other authors, p.1475.

[29] As for aspects related to the supremacy of the Constitution, see I. Cochintu, *Jurisdictia constitutionala - instrument de asigurare a suprematiei Constitutiei,* in „*Studii si Cercetari Juridice Europene (European legal studies and research)",* Universul Juridic Publishing House, 2013, p. 394401.

are at the heart of the requirements of the rule of law, enshrined in Article 1 (5) of the Constitution, according to which ***"Observance of the Constitution, of its supremacy and the laws shall be obligatory in Romania***''. However, the Constitutional Court, bearing in mind that the right is alive and, as the state of constitutionality concerns all branches of the law[30], which in turn must be subject to the same sole constitutional requirements, the Court is entitled to impose, on the one hand, a better legal protection of fundamental rights and freedoms in all these branches of the law, and, on the other hand, to harmonise that protection in the sense that each branch has applied uniformly the requirements arising from the Constitution in its case-law[31].

Moreover, by its role of guarantor of the supremacy of the Constitution[32], the Constitutional Court of Romania has the following tasks: a) decides on the constitutionality of laws, prior to their promulgation, on referral of the President of Romania, of one of the Presidents of the two Chambers, of the Government, of the High Court of Cassation and Justice, of the Ombudsman, of at least 50 deputies or at least 25 senators, as well as, ex-officio, on the initiatives for the revision of the Constitution; b) decides on the constitutionality of treaties or of other international agreements, on referral of one of the Presidents of the two Chambers, of at least 50 deputies or at least 25 senators; c) decides on the constitutionality of Parliament's regulations, on referral of one of the Presidents of the two Chambers, of a parliamentary group or of at least 50 deputies or at least 25 senators; d) rules on the objections of unconstitutionality concerning laws and ordinances, raised before courts of law or commercial arbitration courts; the objection of unconstitutionality may also be raised directly by the Ombudsman; e) decides on legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, of the President of one of the two Chambers, of the Prime Minister or of the President of the Superior Council of Magistracy; f) monitors the compliance with the procedure for the election of the President of Romania and confirms the election results; g) confirms the presence of circumstances justifying the deputising for the position of the President of Romania and reports its findings to the Parliament and the Government; h) issues advisory opinions for the proposal to suspend the President of Romania from office; i) shall ensure compliance with the procedure for the organising and holding of a referendum, and confirms the results thereof; j) shall check whether the conditions are met for citizens to exercise legislative initiative; k) shall rule on any disputes on objections as to the

[30] See Decision no. 308 of 12 May 2016, published in the Official Gazette of Romania, Part I, no. 585 of 2 August 2016.

[31] See, for example, Decision no. 356 of 25 June 2014, published in the Official Gazette of Romania, Part I, no. 691 of 22 September 2014 and Decision no. 766 of 15 June 2011, published in the Official Gazette of Romania, Part I, no. 549 of 3 August 2011.

[32] According to the provisions of Article 142 of the Constitution, „The *Constitutional Court shall be the guarantor for the supremacy of the Constitution".*

constitutionality of a political party; l) carries out any other duties provided for by the Court's organic law.

Based on the above, we would point out that the grounds and the factors that lead to the supremacy of the Constitution are that, in principle, the Constitution, on the one hand, legitimates the power, confers authority to those who govern, determines the functions and the duties, respectively the powers of the public authorities, on the other hand, regulates or "directs" the relations between citizens and the State, respectively public authorities and citizens, enshrining the fundamental rights, freedoms and duties thereof. At the same time, it forecasts and indicates the State activity - outlines the political, ideological and moral values, which are the foundation of the organisation and functioning of the political system, constituting the base and the guarantee of the rule of law, being decisive in assessing the validity of all legal acts and deeds[33]. **Thus, the supremacy of the Constitution is not just about setting the conditions for the validity of legislation[34].**

The constitutional provisions according to which "the Constitutional Court shall be the guarantor of the supremacy of the Constitution" provide that the role of the Constitutional Court is not of ***"guarantor of the Constitution, a very wide category characterising the position of the Head of State, which establishes that the President of Romania monitors the compliance with the Constitution, but guarantor of its supremacy"***[35]. The review of constitutionality represents a guarantee of the supremacy of the Constitution, being a process which brings together certain elements involved in checking the conformity with the Constitution of laws, of other regulatory acts and of other violations of the rules of social conduct, of the respect for human rights, as well as for constitutional principles enshrined in the Basic Law[36].

As such, the Constitutional Court - the Constitutional Court of Romania - "monitors" the entire constitutional system, as governed by the Basic Law.

By presenting examples of case-law in this paper we emphasise the above statements, in that the Constitutional Court, by its role as the guarantor of the supremacy of the Constitution, is not confined to

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[33] See, in this respect, I. Deleanu, *Institutii ţi proceduri constitutional - in dreptul comparat ţi in dreptul roman* - Tratat, C.H.Beck, Bucharest, 2006, p. 221. The author considers that the principle of supremacy of the Constitution may be considerted a „sacred" percept, intangible in the legal system of a State.

[34] V. Constantin, *Constitutia Romaniei privitS din perspectiva suprematiei dreptului (rule of law),* p. 200, in *Comentarii la Constitutia Romaniei,* Andreescu G., Bakk M., Bojin L., Constantin V., Polirom, Ia§i, 2010.

[35] See to this effect I. Muraru, M. Constantinescu, *Curtea Constitutionals a Romaniei,* p. 43.

[36] See I. Cochintu, *Jurisdictia constitutionals - instrument de asigurare a suprematiei Constitutiei,* in „*Studii si CercetSri Juridice Europene (European legal studies and research*)", Universul Juridic Publishing House, 2013, pag. 394-401.

determining the conditions of validity of the legislation, but also covers the whole Romanian constitutional system. These examples can be classified by the powers of the Constitutional Court, the structure of the Basic Law, the scope of the rule of law as stated in the report of the Venice Commission on the rule of law and which includes, inter alia, the legality - the supremacy of law, the relationship between international law and national law, the legislative procedures, the legislative powers of the executive, the emergencies, the private actors exercising public tasks, the legal certainty - the accessibility of legislation and the judicial decisions, the predictability, stability and coherence, the legitimate expectations, the principle of non-retroactivity, the principle ***nulla poena sine lege***, the ***res judicata***, the prevention of the abuse of powers, the equality before the law and non-discrimination, as well as the access to justice - the independence and impartiality of the judiciary/judges, the fair trial, inclusively the effectiveness of judgments and autonomy of the prosecution authorities[37].

Of course, the constitutional reform carried out in Romania aimed, on the one hand, at the adoption of new regulations in various fields that were not "recognised" by the old State order, for example the field of market economy, and, on the other hand, the adaptation of the legal pre-constitutional provisions at the requirements of the Basic Law, for example in the criminal, civil matter etc. In this respect, new regulations have been adopted such as the Criminal Code, the Criminal Procedure Code - Law no. 287/2009, Civil Code - Law no. 287/2009, Civil Procedure Code. The provisions of these codes have been subject to constitutional review. The Court, issuing a large number of decisions admitting the exceptions of unconstitutionality, particularly with regard to the Criminal Code and Criminal Procedure Code.

4. Is there case-law on the content of the principle of the rule of law? What are the main elements of this principle according to the case-law? Please provide relevant examples in the case-law.

In its case-law, for example, Decision no. 383 of 30 September 2004, published in Official Gazette of Romania, Part I, no. 1026 of 5 November 2004, the Constitutional Court noted that "***by definition, the rule of law requires the obligation to comply with the Constitution and the laws, as also laid down by the provisions of Article 1 (5)[38] of the Basic Law."*** The rule of law is a mechanism whose functioning

[37] See, to this effect, the report of the Venice Commission on the rule of law (CDL-AD (2011)003rev) 2011, completed by the Detailed List on the rule of law (CDL-AD (2016)007) 2016.

[38] Pursuant to Article 1 (5), *"Observance of the Constitution, of its supremacy and the laws shall be obligatory in Romania*."

requires the establishment of an order climate, in which the recognition and appreciation of an individual's rights cannot be designed in an absolute and discretionary manner, but only in connection with the respect for the rights of others and of the community as a whole (Decision no. 659 of 11 May 2010, published in the Official Gazette no. 408 of 18.06.2010). The rule of law ensures the supremacy of the Constitution, the correlation of all the laws and regulatory acts (Decision no. 22 of 27 January 2004, published in the Official Gazette of Romania, Part I, no. 233 of 17 March 2004).

The essential feature of the rule of law is the supremacy of the Constitution and the obligation to comply with the law (Decision no. 234 of 5 July 2001, published in the Official Gazette of Romania, Part I, no. 558 of 7 September 2001). Thus, **the principle of the supremacy of the Constitution and the principle of legality** are the core requirements of the rule of law, for example, within the meaning of the constitutional provisions of Article 16 (2), according to which ***"No one is above the law***" (Decision no. 53 of 25 January 2011, published in the Official Gazette of Romania, Part I, no. 90 of 3 February 2011).

For example, having examined the exception of unconstitutionality of certain provisions on "***the conditions laid down by law for the qualification as unlawful of the commercial activities***", the Court held that the criticised legal provisions cannot be regarded as contrary to the provisions of Article 1 (3) of the Constitution, according to which ***"Romania is a state governed by the rule of law***", since the reference itself to the non-compliance with "the ***conditions laid down by law "*** for the qualification as "***unlawful "*** of the commercial activities, with the consequence of the contraventional or criminal responsibility set out in these provisions, it is obvious the legislator's concern for **the compliance with the law**, **a key requirement of the rule of law**[39].

5. The concept of the rule of law has changed over time by case-law in your country? If yes, please describe these changes, providing relevant examples.

As indicated above, constitutional democracy in Romania has started after the events of December 1989, the "rule of law" finding its constitutional enshrinement in the Constitution which is the Basic Law of the country and which was adopted by referendum on 8 December 1991[40], its role being primarily to

[39] See, for example, Decision No. 232 of 5 July 2001, published in the Official Gazette of Romania, Part no. 727 of 15 November 2001.

[40] The Constitution of Romania, in its initial form, was published in the Official Gazette of Romania, Part I, No. 233 of 21 November 1991 and entered into force following its approval by the national referendum of 8 December 1991. For details referring to the Constitution, see in this respect *Geneza Constituţiei României 1991*, *Lucrările*

enshrine the new political, social and economic order, proclaimed immediately after the events passed in Romania in December 1989. Its adoption has shaped a profound constitutional reform, both by establishing the general principles and the reference rules of the organisation and functioning of State powers, as well as concerning the mechanisms to ensure the observance of the Constitution and of its supremacy.

Having regard to the elements making up the rule of law, even when they are used without an express reference to this principle, the concept of "rule of law" has evolved over time and by case-law. For example, examining the constitutional framework concerning the scope of the fundamental rights, through interpretation, the Court, "***ascertaining that the law is alive, has imposed the reference rules for the realization of the constitutional review, in order to provide for greater legal protection of the subjects of law. The upward evolution of such protection is evident in the case-law of the Constitutional Court, which allows it to establish new requirements for the legislator or to adapt the existing constitutional requirements in various areas of the law. Therefore, as the state of constitutionality concerns all branches of law, which in turn must be subject to the same sole constitutional requirements, the Court is entitled to impose, on the one hand, a better legal protection of fundamental rights and freedoms in all these branches of law, and, on the other hand, to harmonise that protection in the sense that each branch of has uniformly applied the requirements arising from the Constitution***[41]**.**

6. Does international law have any effect on the interpretation of the principle of the rule of law in your country?

In its case-law the Court held that[42]., "***if, while Romania has not been a member of the Council of Europe and has not acceded to the European Convention on Human Rights, the interpretation of Article 8 of the Convention, through the decisions of the European Court of Human Rights in Strasbourg, did not have any relevance for the Romanian legislation and case-law, after the entry of Romania in the Council of Europe and after the accession to the European Convention on Human Rights (Law no. 30/1994, published in Official Gazette of Romania, Part I, no. 135 of 31 May 1994)***

Adunării Constituante, Autonomous Company „*Official Gazette*".

[41] See, for example, Decision, no. 308 of 12 May 2016, published in the Official Gazette of Romania, Part I, , no. 585 of 2 August 2016, Decision , no. 356 of 25 June 2014, published in the Official Gazette of Romania, Part I, no. 691 of 22 September 2014 and Decision no. 766 of 15 June 2011, published in the Official Gazette of Romania, Part I, no. 549 of 3 August 2011.

[42] See, in this respect, Decision, no. 81 of 15 July 1994, published in the Official Gazette of Romania, Part I, no. 14 of 25 January 1995.

the situation changed fundamentally. This change is also required by the Constitution of Romania itself, which in Article 20 (1) specifies that its provisions, on the citizens' rights and freedoms, shall be interpreted and applied in compliance with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is part, or the European Convention on Human Rights, as from 31 May 1994, became such a treaty".

The principle of primacy/priority of international human rights treaties and of EU law is provided as such in the Constitution of Romania at Article 11 - ***International law and domestic law***, Article 20 - ***International human rights treaties*** and Article 148 - ***Integration into the European Union.*** Pursuant to Article 11 of the Constitution, with the marginal title - International law and domestic law - ***"(1) The Romanian State pledges to fulfil as such and in good faith any obligations as may derive from the treaties to which it has become a party. (2) Once ratified by Parliament, subject to the law, treaties shall be part of domestic law. (3) Where a treaty to which Romania is to become party comprises provisions contrary to the Constitution, ratification shall only be possible after a constitutional revision". Furthermore, Article 20 of the Basic Law, with the marginal title - International human rights treaties - states that "(1) The constitutional provisions relative to the citizens' rights and freedoms shall be interpreted and applied in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party. (2) Where inconsistency exists between the covenants and treaties on fundamental human rights to which Romania is a party, and national law, the international regulations shall prevail except where the Constitution or domestic laws comprise more favourable provisions".*** Thus, as regards the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (amended by Protocols no. 3 of 6 May 1963, no. 5 of 20 January 1966 and no. 8 of 19 March 1985 and supplemented by Protocol No. 2 of 6 May 1963), this one was ratified by Romania by Law no. 30/1994[43], on which occasion other protocols were ratified, for example, the first additional Protocol to the Convention (concluded at Paris, 20 March 1952); Protocol No. 4 recognizing certain rights and freedoms, other than those already included in the Convention and in the first additional Protocol to the Convention (concluded at Strasbourg, 16 September 1963); Protocol no. 6 concerning the abolition of the death penalty (concluded at Strasbourg, 28 April 1983); Protocol no. 7 (concluded at Strasbourg, 22 November 1984); Protocol no. 9 (concluded at Rome, 6 November 1990); Protocol no. 10 (concluded at Strasbourg, 25 March 1992). It should be noted that both before and after the ratification of the Convention, Romania has ratified a number of Protocols to the Convention, for example Protocol No.

[43] Published in the Official Gazette of Romania, Part I, no. 668 of 26 July 2004

11 on the restructuring of the control mechanism established by the Convention (concluded at Strasbourg, 22 November 1984), Protocol no. 12 on the general forbiddance of discrimination, Protocol no. 13, Protocol no. 14, Protocol no. 15 etc.

The provisions of Article 148 of the Constitution, which were introduced in the Basic Law by the revision of the Constitution in 2003, revision which aimed to preparing the constitutional framework for Romania's accession to the Euro-Atlantic structures, also stipulate that: ***"(1) Romania's accession to the founding Treaties of the European Union, for purposes of transferring certain powers into the hands of community institutions, as well as for exercising in common with the other Member States the competencies stipulated in such Treaties, shall be under a law adopted in a joint session of the Chamber of Deputies and the Senate, by a majority of two-thirds of the number of Deputies and Senators. (2) Following accession, provisions in the founding Treaties of the European Union, as well as other binding regulations under community law shall prevail over any contrary provisions of domestic law, while observing provisions in the accession instrument. ((3) Provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to any instrument purporting a revision of the founding Treaties of the European Union. (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that any obligations arising from the accession instrument and from provisions under paragraph (2) are put into effect. (5) The Government shall send the draft for any binding regulations to the Chambers of the Parliament prior to submitting such for approval to the European Union institutions."***

For example, by Decision no. 148 of 16 April 2003 on the constitutionality of the legislative proposal for the revision of the Romanian Constitution, published in the Official Gazette of Romania, Part I, no. 317 of May 2003, the Court noted that ***"the accession to the European Union, once completed, entails a number of consequences which could not take place without an appropriate regulation, at constitutional level. The first of these consequences required for the Community acquis to be incorporated into national law and also for the relation between regulatory acts and national law to be determined. The solution proposed by the authors of the initiative of revision envisages the implementation of Community law into the national area and the establishment of the rule of prior application of the Community law priority to any conflicting provisions of the national laws, in compliance with the act of accession. The consequence of accession is based on the fact that the Member States of the European Union agreed to put the Community acquis - the founding Treaties of the European Union and the regulations derived from them - in an intermediate position between the Constitution and the other laws, when it comes to binding European legislation".*** The Constitutional Court found that this provision does not affect the constitutional provisions on the limits

of revision or other provisions of the Basic Law, ***"being a specific application of the provisions of Article 11 (2) of the Constitution, under which the treaties ratified by Parliament, according to the law, form part of national law".***

Thus, constitutional provisions oblige the Romanian State to fulfil as such and in good faith its obligations from the Treaties to which it is a party, and the Treaties ratified by Parliament, according to the law, are part of national law[44]. The constitutional provisions on the citizens' rights and freedoms shall be interpreted and applied in compliance with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party. Where there are inconsistencies between the covenants and treaties on fundamental human rights to which Romania is a party and national laws, the international rules shall take precedence, unless the Constitution or the national laws comprise more favourable provisions[45]. Following Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to Community institutions, and to exercise in common with the other Member States the powers laid down in the treaties, the provisions of the constituent treaties of the European Union, as well as the other binding Community regulations shall take precedence over any contrary provisions of the national laws, in compliance with the act of accession[46].
We would point out that in many cases in which exceptions of unconstitutionality were raised, the author argue, in addition to constitutional provisions allegedly infringed, certain provisions of international regulatory acts in the light of the relevant constitutional provisions of Articles 11, 20 and 148 of the Constitution and without reference to them, being for the Constitutional Court to determine the international legal framework within which falls the right allegedly infringed.

Moreover, the Court, in its case-law, has held that Article 2 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded, part of the Treaty of Accession, ratified by Law no. 157/2005, published in the Official Gazette of Romania, Part I, no. 465 of 1 June 2005, provides that ***"From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on Bulgaria and Romania and shall apply in those States under the conditions laid down in those Treaties and in this Act"***. Therefore, adhering to the legal order of the European Union, Romania has also accepted that, in those areas where exclusive jurisdiction is conferred on the European Union, regardless of international treaties which it has

[44] Article 11 - International law and domestic law
[45] Article 20 - International human rights treaties
[46] Article 148 - Integration into the European Union

concluded, in implementing its obligations arising from them, it is subject to the rules of the European Union. Otherwise, this would lead to the undesirable situation that, through bi or multilateral international obligations, the Member State could seriously affect the Union's competence and, in practice, to replace it in its fields of competence. Therefore, in the application of Article 11 (1) and Article 148 (2) and (4) of the Constitution, Romania applies in good faith the obligations resulting from the accession act, not interfering with the exclusive competence of the European Union and, as established in its case-law, by virtue of the compliance clause contained in the text of Article 148 of the Constitution, Romania cannot adopt a regulatory act contrary to the obligations undertaken by the Member State. All those already highlighted know of course a constitutional limit, expressed in which the Court has classified as ***"constitutional identity***"[47].

As such, international law touches upon national law, under the conditions laid down by the texts mentioned above, and has influence on the interpretation of the rule of law in the light of the constitutional provisions.

II. NEW CHALLENGES TO THE RULE OF LAW

7. Are there any major threats to the rule of law at national level or have been such threats in your country (e.g. economic crises)?

Like other States, Romania was also faced with an economic crisis, measures having been taken in legislative terms in this respect, such as adopting regulatory acts with the aim of reducing public expenditure by the assuming responsibility by the Government[48], for example, the Law on the reorganisation of some public authorities and institutions, the rationalisation of public expenditure, the development of the business environment and compliance with the framework agreements with the European Commission and the International Monetary Fund.

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[47] See Decision no. 683 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 479 of 12 July 2012, or Decision no. 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015.

[48] The procedure of assuming responsibility by the Government is provided by Article 114 of the Constitution as follows: *"(1) The Government can assume its responsibility before the Chamber of Deputies and the Senate, in a joint session, with respect to a programme, statement of general policy, or bill. (2) The Government shall be dismissed if a motion of censure, tabled within three days after presentation of the programme, statement of general policy or bill, is passed in accordance with Article 113. (3) Unless the Government is dismissed in accordance with paragraph (2), the bill presented, be it modified or supplemented with the amendments consented by the Government, is deemed to have been passed, while the implementation of the programme or statement of general policy becomes binding on the Government. (4) In case that the President of Romania demands reconsideration of the law passed according to paragraph (3), its debate shall be carried in a joint session of the Chambers.*"

However, this law was subject to ***a priori*** review of constitutionality, being may times criticised. Thus, a first complaint of unconstitutionality is that the law was adopted contrary to the provisions of Article 117 (2) of the Constitution, according to which ***"The Government and its Ministries may, on the authorization by the Court of Auditors, establish specialized bodies in their subordination, but only where such competence is acknowledged to them under the law***", whereas, by the procedure of assuming responsibility by the Government, a law was adopted establishing such specialised bodies, without the opinion of the Court of Auditors. In response to this complaint, the Court, on the one hand, examining the provisions of Article 114 of the Constitution, pursuant to which the criticised law was adopted, has found that they do not provide any express conditions on the bill on which the Government assumes its responsibility - in terms of the scope, nor in terms of structure, aspect identified otherwise by the Constitutional Court in its previous case-law[49]. However, as long as the constituent legislator did not intend to distinguish, it is up to the Government to shape the dimensions and the content of the bill. No constitutional rule therefore prevents the Government to promote, in this way, a bill to reorganise its expert bodies, if this is the action which it considers essential for the purposes of implementing its government programme and if it considers that only by an act with legal force of law can achieve its objectives. On the other hand, examining the provisions of criticised law, namely the information contained in Chapter II of the law - ***"Reorganisation measures of public authorities and institutions***'"", in conjunction with those contained in Chapter I - "***General provisions***", the Court noted that they provide the explanation of the option to adopt a law by assuming of the responsibility by the Government, indicating that it was "clearly determined by a national and international context which has imposed such reaction by the Government: ***economic crisis and honouring of obligations arising from international agreements"***[50]**.** Therefore, "by their content and motivation, the measures covered by Chapter II of this criticised Law (on reorganisation measures of public authorities and institutions) shall not constitute acts for the establishment of specialised bodies responsible to the Government or to its ministries, as it is groundless shown in the complaint, but acts of the reorganisation of public authorities and institutions, in order to reduce budgetary expenditure and to ensure more efficient overall management of public administration".

The Court also noticed that the measures introduced by this law concerned 74 institutions and public

[49] Decision no. 298 of 29 March 2006, published in the Official Gazette of Romania, Part I, no. 372 of 28 April 2006.

[50] Decision no. 1414 of 4 November 2009 referring to the objection of unconstitutionality of the Law on the reorganisation of some public authorities and institutions, the rationalisation of public expenditure, the development of the business environment and compliance with the framework agreements with the European Commission and the International Monetary Fund.

authorities established by law, Government Emergency Ordinance and Government Ordinance, as well as a number of 50 institutions and public authorities established by Government decision - whether they are subordinated to the Government or to its ministries. In this context, the Court, examining the concrete way of reorganisation, has found that in the case of 65 of the 124 authorities subject to reorganisation, the measure concerns the reduction of posts. The law which formed the object matter of the referral was, therefore, a framework law designed to give a unitary character to institutional reform initiated by the Government. There is no constitutional rule prohibiting the Parliament to legislate in this area, as there is no constitutional rule which would require the opinion of the Court of Auditors in this situation. Thus, the Court has held that ***"the setting of a short term - 7 days from the date of entry into force of this law - for the submission to the Government for approval of decisions on entities resulting from the reorganisation of public authorities and institutions, is among the measures designed to ensure the speed of institutional reform, in order to reduce the economic crisis effects and to fulfil the obligations resulting from international agreements***".

Other provisions of the law subject to review have established measures with regard to **the cumulation of pensions with wages**, in order to reduce budgetary expenditure. The Court found, first of all, that such measures may not concern the persons for whom the term of office shall be expressly established in the Constitution, since "the Basic Law expressly lays down **the term of office of persons occupying certain functions of public authority,** and the termination of this mandate as a result of the non-fulfilment of the obligation to express the option on the suspension of the pension payments in the performance of the duties, under the contested law, is incompatible with the constitutional provisions". As a result, only in so far as the law does not refer to those categories of persons, the legal solution adopted by the legislator to regulate the cumulation of the pension with the wages or, as the case may be, assimilated to wages, is in line with constitutional provisions.

With regard to the determination of the net pension until which the cumulation can operate at the level of the gross average salary used to support the State social insurance budget and approved by the law on the State social insurance budget, the Court found that it is in conformity with the conditions of objectivity (it is expressly laid down by law, predictable and determinable) and affordability (the average gross salary in the economy is a fair and balanced option) imposed by the principle of non-discrimination. **In terms of proportionality between the objective pursued by unequal treatment and used measures, it is noted that, according to the statement of reasons** which led to the adoption of this regulatory act, its purpose is fight against "***the economic crisis, global***

phenomenon structurally affecting the Romanian economy", the financial data and the forecasts made by the competent authorities in this field by outlining the "***image of a deep economic crisis, which may endanger the economic stability of Romania and, thereby, public order and national security***". This situation called "the ***adoption of certain exceptional measures which, by the efficiency and prompt application, leads to reducing its effects and to bring about the re-launch of national economy***". One of the measures covered by the legislator is restricting the right to cumulate wages to pensions, provided that two conditions are met: the employer is an authority or public central or local institution, regardless of the method of financing and subordination, or an autonomous, national or trade company in which share capital is held wholly or majority State owned or by an administrative-territorial unit, on the one hand, and the net pension exceeds the average gross salary in the economy, on the other. The justification for such a restriction lies in the State budget reduction, respectively of the State social insurance budget, as that it does not affect the incomes of persons under the average gross salary in the economy. It follows that the measure taken is proportionate to the situation which has determined it, being the result of a balance between the stated aim of the law and the means employed to achieve it, and shall be applied in a non-discriminatory manner to all the persons covered by this provision. Indeed, as the Constitutional Court has stated on a number of occasions[51], the legal solution establishing a certain threshold amount, judged as being reasonable, corresponds to an exclusive choice of the legislator, and therefore not being an issue of concern of constitutional nature. For the reasons outlined above, the Court found that these provisions are constitutional in so far as they do not relate to persons for whom the **term of office is expressly established by the Constitution**.

Another problem under the review of constitutionality had in view the criticised legal provisions which set out the obligation of public authorities and institutions' leaders, regardless of the method of financing, to reduce staff costs by an average of 15.5 % on a monthly basis, through a range of measures including measures whose way of application "***is agreed with the employee, after consultation with trade unions or, where appropriate, of employees' representatives***". Thus, by examining the criticised provisions by reference to the provisions of Article 53 of the Basic Law, which lay down the conditions restricting the exercise of certain rights or freedoms, the Court found that "***the restriction of the exercise of the right to work of the staff of public authorities and institutions which they cover satisfies the conditions of the constitutional text***. ***Thus, the restriction measure is provided for by law, aims at the practice of law and not at its substance, is determined by a global financial crisis situation which could affect, in the absence of appropriate measures, the economic stability of the country and thus,***

[51] For example, by Decision no. 358 of 30 September 2003 or Decision no. 4 of 18 January 2000).

national security."

Moreover, the Court held that ***"the imposed restrictive measure is applied on a non- discriminatory manner to its addressees - employees of the public authorities or institutions, is temporary, reasonable and proportional to the situation that has caused it, joining other legislative measures, some of them under the same law, determined by the same cause and having the same purpose: inclusion in the budgetary constraints caused by a phenomenon of economic crisis. The reasonable and temporary reduction of salary of budget units' staff, with a number of measures for the management of the financial problems faced by the State budget in this period constitutes a restriction of the right to work of this category of employees, compatible with the Basic Law."***

In that context, the Court made a statement, which is extremely important, related to the respect of the rule of law, namely that "***however, it is important to emphasise that the essence of the constitutional legitimacy of restricting a right or a freedom is the exceptional and temporary character thereof. In a democratic society, the rule is that of unrestricted exercise of fundamental rights and freedoms, the restriction being provided only as an exception, when there is no other solution for protecting the State values that are under threat. The State has the duty to find solutions for overcoming economic crisis effects, through an appropriate economic and social policy. Reducing the incomes of the staff working for public authorities or institutions cannot in the long term be a measure that is proportional to the situation indicated by the author of the bill. On the contrary, a legislative intervention aimed at extending this measure may cause effects contrary to its objectives, by disrupting the functioning of the public institutions and authorities."***

Another issue subject to constitutional review was the **Law concerning certain measures relative to pensions that was also adopted in the context of the global economic crisis (see to that effect Decision no. 873 of 25 June 2010 on the objection of unconstitutionality of the provisions of the Law concerning certain measures relative to pensions).**

The claim of unconstitutionality concerned the alleged infringement of the provisions of Article 15 (2) of the Constitution, whereas the High Court of Cassation and Justice (as subject of referral to the Constitutional Court within the ***a priori*** constitutional review) took the view that the provisions of the Law concerning certain measures relative to pensions which establish the recalculation of service pensions by determining the average annual score and the amount of each pension using the calculation algorithm laid down in Law no. 19/2000, violate the constitutional principle of non-retroactivity of the

law, according to which ***"the law shall only take effect for the future, except the more favourable law which lays down penal or administrative sanctions"***.

The Court, having examined the exception of unconstitutionality, noted that "**in principle, a professional category's service pension, governed by a special law, has two components, namely the contributory pension and supplement from the State**. The contributory part of the service pension is granted from the State social security's budget, whereas the part exceeding this amount is granted from the State budget. The granting of this supplement depends on the State policy in the field of social security and is not subsumed to the constitutional right to the pension, as governed by Article 47 (2) of the Constitution. Since **they do not constitute a privilege, being established by the legislator in the light of a given special status of the professional category** concerned, special pensions can be **eliminated only if there is a sufficiently strong reason to ultimately reduce the State social benefits in the** form of pension. However, in the present case, such a reason consists, as is apparent from the grounds of the contested law, **both of the serious economic and financial crisis** faced by the State (the State budget and the State social security's budget) and the of need to reform the pension system, by eliminating the **inequalities in this system**".

As regards the **elimination of magistrates' service pension**, the Court noted that ***"both the institutional independence of the judiciary (whereas the concept of judicial independence does not refer exclusively to judges, but covers the judiciary as a whole) and the independence of individual judges involve many aspects, such as: the absence of involvement of the other powers in the courts' activity, the fact that no other body than the courts can rule on their specific competencies prescribed by law, the existence of a procedure laid down by law relating to avenues of appeal against court rulings, the existence of sufficient monetary funds for conducting and managing courts' activity, the procedure for appointment and promotion of magistrates and, possibly, the period for which they are appointed, adequate working conditions, a sufficient number of judges of the respective in order to avoid an excessive workload and allow the settlement of cases within a reasonable period, a remuneration proportional to the nature of the activity, fair distribution of cases, possibility to form associations which have as their principal purpose to protect the magistrates' independence and interests, etc."***

Thus, it was emphasized that it is ***"obvious that the principle of judicial independence cannot be limited only to the amount of magistrates' remuneration (including both salary and pension), this principle involves a set of safeguards, such as: the status of magistrates (conditions of access,***

appointment procedure, robust safeguards to ensure transparency of the procedure under which magistrates are appointed, their promotion and transfer, suspension and termination of office or their removal), their stability and irremovability, the financial guarantees, the administrative independence of magistrates, as well as the independence of the judiciary from the other powers of the State. On the other hand, the judicial independence includes the judges' financial security, which also involves providing social safeguards, such as a service pension for magistrates." **In conclusion, the Court found that the principle of judicial independence protects the magistrates' service pension, as an integral part of their financial stability. It has been held, both in the case-law of the Constitutional Court of Romania and in the case-law of other constitutional courts, that the financial stability of magistrates is one of the safeguards of judicial independence.**

In another case[52], the Court found that the main reasons justifying the extraordinary situation are the increasing arrears recorded by the administrative-territorial units, the lack of correlation of legislation in the field of obtaining the advisory opinion of the local loans authorisation committee, and surplus staff in the local authorities.

Since the invoked reasons, considered separately, did not justify the existence of exceptional circumstances, the Court proceeded to analyse the effects of those circumstances if cumulatively met, namely, on the one hand, the financial blockage in local budgets of administrative-territorial units which adversely affect the State budget by increasing budget deficit, and, on the other hand, the impossibility of attaining the macroeconomic indicators agreed with the International Monetary Fund, the European Commission and the World Bank, which may jeopardise the subsequent tranches of the stand-by arrangement concluded by Romania. However, given the need for a policy to restrict budgetary expenditure and strengthen financial discipline in order to reduce deficits between revenues and legal commitments of local public expenditure and departing from the premises established by the Court by Decision no. 1414 of 4 November 2009, the Constitutional Court came to the conclusion that in the case at issue there was an objective state of fact, quantifiable and independent of the will of the Government, which threatens a public interest, namely the economic stability of the Romanian State.

The Court also found that the emergency ordinance was adopted in order to mitigate the effects of a general economic **crisis**. Such economic purpose necessarily and unequivocally involves a primary,

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[52] Decision no. 1105 of 21 September 2010 on the exception of unconstitutionality of Government Emergency Ordinance no. 63/2010 amending and supplementing Law no. 273/2006 on local public finances and setting some financial measures.

timely, holistic and energetic legal regulation. Consequently, the adoption of the contested measure had unquestionably requested emergency; the urgent regulation of the situation resulting from economic **crisis** conditions could not have been rapidly and reasonably realized by Government's assumption of responsibility before the Chamber of Deputies and the Senate on a draft law or by adoption of a draft law under the urgency procedure. In those circumstances, as to preserve economic stability, the only instrument remained in the hands of the Government was the adoption of an emergency ordinance (see also Constitutional Court Decision no. 713 of 25 May 2010, published in the Official Gazette of Romania, Part I, no. 430 of 28 June 2010). The Court found that the legislation at issue did not come against Article 115 (4) of the Constitution, whereas it complied with requirements of urgency and exceptional situation.

8. International events and developments have had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

The international events and developments with possible consequences for the interpretation of the rule of law could be, for example, the global economic crisis, migration, terrorism, and organised crime.

With regard to the global economic crisis, as mentioned above, international developments have also had an impact on the domestic legal, economic and social order, and the Constitutional Court has penalised all legislative solutions subjected to its constitutional review which departed from the constitutional principles and values or, on the contrary, it found that they were in line with the Basic Law.

As regards, for example, migration, terrorism and organised crime, in Romania, there are infraconstitutional measures relating to the prevention and combating organised crime, the State borders of Romania, the establishment, organisation and functioning within the Public Prosecutor's Office of the Directorate for Investigating Organised Crime and Terrorism[53] measures relating to the prevention and penalising of money laundering and establishing measures for preventing and combating the financing of terrorism.[54] Thus, some of these regulations have, over time, been subject to constitutional review and

[53] Law no. 508 of 17 November 2004 on the establishment, organisation and functioning within the Public Prosecutor's Office of the Directorate for Investigating Organised Crime and Terrorism, published in Official Gazette of Romania no. 1089 of 23 November 2004, as subsequently amended

[54] Law no. 656/2002 on preventing and sanctioning money laundering and establishing measures for preventing and combating the financing of terrorism, republished in the Official Gazette of Romania, Part I, no. 702 of 12 October 2012. See, for example, also Law no. 623/2002 for the ratification of the International Convention for the Suppression of the Financing of Terrorism, adopted in New York on 9 December 1999, published in the Official

we will now present some relevant examples with regard to the Constitutional Court's findings.

The Court, by Decision no. 148 of 16 April 2003 on the constitutionality of the legislative proposal for the revision of the Constitution of Romania, published in Official Gazette of Romania, Part I, no. 317 of May 2003, held that "in ***order to give expression to some requirements of the acquis communautaire relating to the fight against terrorism, transnational crime, organised crime, trafficking in drugs and human beings, it is necessary to circumstantiate the constitutional interdiction relating to the extradition of Romanian citizens".***

It had been proposed the amendment of Article 19 (1) of the Constitution of Romania, as follows: "(1) ***Romanian citizens cannot be extradited or deported from Romania. Romanian citizens may be extradited on the basis of international treaties to which Romania is a party, in accordance with the law and on a reciprocal basis"***. With regard to this amendment, the Constitutional Court noted that this new wording of the provisions of Article 19 (1) of the Constitution is antinomical at first glance: ***the first sentence stated that Romanian citizens cannot be extradited or deported. By contrast, the second sentence stated the opposite, i.e. that Romanian citizens may be extradited on the basis of international treaties to which Romania is a party, on a reciprocal basis, which reflects a defective wording.***[55]

Apart from that, ruling on certain provisions of Law no. 508 of 17 November 2004 on the establishment, organisation and functioning within the Public Prosecutor's Office of the Directorate for Investigating Organised Crime and Terrorism, published in Official Gazette of Romania no. 1089 of 23 November 2004, as subsequently amended, the Court held that ***"in view of the need to step up the fight against organised crime and terrorism, as well as to adapt the means and methods of action to the structural developments in the manifestation of the main vectors operating within the organised crime and terrorism, it was necessary to adopt immediate measures to enhance the capacity of the Directorate for Investigating Organised Crime and Terrorism"***. In this respect, the competences of the Directorate for Investigating Organised Crime and Terrorism had been reconfigured and the total number of position had been increased. These were therefore sound arguments justifying the issue of the emergency ordinance. Furthermore, the Court pointed out that ***"as it can be seen, the measures ordered include changes that are not meant to be converted into structural issues which could substantiate the complaint relating to Article 73 (3) (l), in the sense that such measures concerned the organisation***

Gazette of Romania, Part I, no. 852 of 26 November 2002.

[55] By Decision no. 148 of 16 April 2003 on the constitutionality of the legislative proposal for the revision of the Constitution of Romanian published in Official Gazette of Romania, Part I, no. 317 of May 2003

and functioning of the Public Ministry. On the contrary, the Directorate for Investigating Organised Crime and Terrorism has been set up by Law no. 508/2004, which is an organic law adopted in accordance with Article 76 (1) of the Constitution".

On another occasion, for example, by Decision no. 1258 of 8 October 2009 on the exception of unconstitutionality of the provisions of Law no. 298/2008 on the retention of data generated or processed by providers of publicly available electronic communications services or of public communications networks, and amending Law no. 506/2004 on the personal data processing and the protection of privacy in the electronic communications sector, the Constitutional Court noted that "Law ***no.298/2008 as a whole, establishes a rule regarding the processing of personal data, namely that of their retention continuously for a period of 6 months as from the time of their interception. The obligation of providers of publicly available electronic communications or public communications network has a continuous character. However, in the matter of personal rights such as the right to personal life and the freedom of expression, as well as of processing of personal data, the widely recognized rule is to ensure and guarantee their observance, respectively of confidentiality, the State having, in this respect, mostly negative obligations, of abstention, by which should be avoided, insofar possible, its interference in the exercise of such right or freedom***." To this end, Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, Law no. 677/2001 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, as well as Law no. 506/2004 on the personal data processing and the protection of privacy in the electronic communications sector, were enacted. Exceptions are permitted only under the conditions expressly laid down by the Constitution and the applicable international legal instruments. Law no. 298/2008 represents such an exception, as its very title indicates.

The obligation to retain data covered by the Law no.298/2008 as an exception or derogation from the principle of protecting personal data and confidentiality thereof, by its nature, extent and scope, deprives of content that principle, as it was guaranteed by Law no. 677/2001 and Law no. 506/2004. However, it is widely recognized in the case-law of the European Court of Human Rights, for example in the Case Prince Hans-Adam II of Liechtenstein v. Germany, 2001, that the Contracting States under the Convention on Human Rights and Fundamental Freedoms have assumed such obligations to ensure that the rights guaranteed by the Convention are practical and effective not theoretical and illusory, the legislative measures adopted following the effective protection of rights. But the legal obligation that requires the continuous retention of personal data makes the exception to the principle of effective

protection of the right to personal life and freedom of expression, absolute as a rule. The right appears to be regulated in a negative fashion, its positive side losing its predominant character.

At the same time, the Court noted that "***another issue leading to unduly restriction of a person's right to privacy is that the Law no.298/2008 leads to the identification not only of the person who sends a message, an information through any means of communication, but as results from the text of Article 4, also of the recipient of that information. The person called is thus exposed in terms of retention of data related to his personal life, regardless of one's own act or a manifestation of will, but only according to the behaviour of another person - the caller - whose actions he cannot censor in order to protect himself against the other's bad faith or intention to blackmail, harassment, etc. Although he is a passive subject in the inter-communication relationship, the person called can become beyond his will, suspect in terms of the rigors under which the State authorities carry out their activity of criminal investigation. However, in this regard, interference in the personal life of individuals, governed by Law no.298/2008, appears to be excessive***."

In this context, the Constitutional Court has emphasised that ***"not the justified use, under the terms covered by the Law no. 298/2008, is the one that in itself is in an unacceptable manner prejudicial to the exercise of the right to a private life or freedom of expression, but the continuous, generally applicable legal obligation of data storage. This operation equally concerns all recipients of the law, whether or not they have committed criminal acts or whether or not they are subject of criminal investigation, which is likely to overturn the presumption of innocence and a priori transform all users of electronic communications services or of public communications networks in persons likely to commit crimes of terrorism or serious crimes. However, Law no. 298/2008, although it uses specific concepts and procedures of criminal law has a broad scope - essentially, on all natural and legal users of publicly available electronic communications services or of public communications networks, and so cannot be regarded as in conformity with the provisions of the Constitution and the Convention on Human Rights and Fundamental Freedoms concerning the guarantees of the rights to private life, secrecy of correspondence and the freedom of expression***."

Therefore, the Constitutional Court did not **deny the purpose** itself envisaged by the legislature in adopting Law no. 298/2008, in the sense that it was imperative to ensure adequate and effective legal means compatible with the ongoing process of modernisation and technologization of media so that ***crime can be prevented and controlled. It is precisely for this reason that individual rights cannot be exercised in absurdum but may be subject to restrictions which are justified in the light of the***

objective pursued. Limiting the exercise of certain personal rights in consideration of collective rights and public interest, aimed at national security, public order or prevention of crime, was always a sensitive operation in terms of regulation, so as to maintain a fair balance between the interests and rights of the individual, on the one hand, and those of the society, on the other. It isn't less true, as noted by the European Court of Human Rights in the case of Klass and others v. Germany, 1978, that taking surveillance measures, without adequate and sufficient safeguards, can lead to "destruction of democracy on the ground of defending it".

In conclusion, in view, in essence, of the broad coverage of the Law no. 298/2008 on the continuous nature of the obligation to retain traffic and location data of legal and natural persons as users of publicly available electronic communications services or of public communications networks, and other "related data", necessary to identify them, the Constitutional Court found that the law at issue was unconstitutional as a whole.

Furthermore, as regards, for example, "migration", in Romania, there is a legislative framework governing certain measures on asylum in Romania[56] and the social integration of aliens who have acquired a form of protection or a right of residence in Romania, as well as of citizens of the Member States of the European Union and the European Economic Area[57], a framework continuously adapted to developments at international level on the "migration phenomenon ", as, for example, Law no. 376/2013 amending and supplementing certain legislative acts in the area of migration and asylum[58], Law no. 331/2015 amending and supplementing certain legislative acts with regard to aliens[59].

Over time, some of the legislative acts **in matters of migration and asylum** have been subject to constitutional review. Thus, for example, adjudicating by Decision no. 679 of 26 June 2012, published in Official Gazette of Romania, Part I, no 681 of 2 October 2012, on some provisions of the Government Emergency Ordinance no. 194 of 12 December 2002 on the regime for aliens in Romania, which state that ***"detention is a temporary measure which restricts freedom of movement on***

[56] Law no. 122/2006 on asylum in Romania, published in the Official Gazette of Romania, Part I
[57] Government Ordinance no. 44/2004 on the social integration of aliens who have acquired a form of protection or a right of residence in Romania, and of citizens of the Member States of the European Union and the European Economic Area. In this regard, we may recall, for example, the Agreement of 24 June 2004 between the Government of Romania and the Federal Government of Austria on mutual data exchange in the field of migration control and asylum or the Agreement of 8 May 2008 between the Government of Romania and the United Nations High Commissioner for Refugees and the International Organisation for Migration on the temporary evacuation to Romania of persons in urgent need of international protection and their onward resettlement
[58] Published in the Official Gazette of Romania, Part I, no. 826 of 23 December 2013
[59] Published in the Official Gazette of Romania, Part I, no. 944 of 21 December 2015.

Romanian territory, ordered by the magistrate against aliens who could not be removed under escort within the period laid down by law, in one of the following situations: a) there is a risk of absconding of the removal process; b) the alien has not complied with the deadline for voluntary return set forth in the return decision; c) the alien has been declared undesirable person on the territory of Romania; d) the alien avoids or hampers the preparation of return or the removal process". The Court stated that ***"they define and describe clearly and unambiguously the measure of detention of certain categories of aliens (...) and it is clear from those provisions that the detention is not a sanction involving deprivation of liberty within the meaning of Romanian criminal law, but a temporary restriction of the freedom of movement on Romanian territory***." In addition, the Constitutional Court noted that in a landmark case of the European Court of Human Rights - judgment of 27 November 2003 in Case Shamsa v. Poland — the European Court concluded that in order to detain an individual in a particular area reserved for undesirable persons on the (Polish) territory for an indefinite and unpredictable period without that detention to be based on a specific legal provision or a valid court decision is in itself contrary to the principle of legal certainty, which is an implicit principle of the Convention and constitutes one of the basic pillars of the rule of law (paragraph 58).

9. Your Court has dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional/international courts (e.g. the Inter-American, African or European courts) or international bodies (notably, the Human Rights Committee)? Is there related difficulties in implementing decisions of such courts/bodies? What is the essence of these difficulties? Please provide examples.

As outlined above, Romania, on the one hand, has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms by Law no. 30/1994, and the additional protocols thereto, and, on the other hand, in 2007 it joined the European Union. The Constitution of Romania establishes also the order of precedence of international legal rules in relation the national rules; the provisions of Articles 11, 20 and 148 of the Constitution establish the principle of priority of international human rights treaties and of European Union law.

As regards the relationship between the Constitutional Court and other courts, for example, European courts, on points of law, in the light of the aforementioned constitutional provisions, it is established a "judicial dialogue". This dialogue takes place, firstly, through the case-law to which the Constitutional Court refers when a matter of national law is brought into question, and such falls under the ambit of

international law. Secondly, the case-law of the Constitutional Court can be directly mentioned, for example, in the case-law of the European Court of Human Rights, or indirectly when the same points of law are interpreted in a different way by the Constitutional Court, the European Court of Human Rights or, as the case may be, by the Court of Justice of the European Union.

A. As concerns the case-law of the European Court of Human Rights being invoked within the constitutional review, this matter has gradually evolved, as the constitutional court has started including more and more the case-law of the Court of Strasbourg in the rationale of its documents (decisions, rulings, opinions). Thus, for example, through Decision no. 96 of 24 September 1996[60], the Court held that, with regard to ***"the reason concerning the violation of the requirement referred to by Article 6 § 1 of the European Convention on Human Rights, to have a case settled within a reasonable time, it should be noted that both the European Commission and Court have constantly underlined in their practice that this requirement must not be examined in abstracto, but on a case-by-case basis, by taking into account the duration of the proceedings, the nature of the claims, the complexity of the trial, the behaviour of the authorities and parties, the difficulty of the debates, the caseload of the court, the legal remedies used etc.",*** without, however, invoking a concrete case-law of the European Court of Human Rights.

Later on, the Constitutional Court has included concrete references to the case-law of the European Court of Human Rights, for example through Decision no. 81 of 15 July 1994[61], partially upholding the exception of unconstitutionality raised before it.

Thus, the Court stated that ***"in many countries, there is currently the idea that same-sex relationships between adults having consented to this represent a dimension of individuals' private life and, therefore, they cannot be criminally sanctioned. Intense research has led to this idea. Thus, the European Court of Human Rights itself, in 1976, has dismissed the idea of general European morals, as the concept of good morals must be understood from the perspective of national legislations. However, later on, the Court turned back to this viewpoint (Case of Dudgeon - 1981, Case of Norris - 1987, Case of Modinas - 1993), considering that private same-sex relationships between consenting adults are not contrary to good morals and, therefore, they are not likely to violate Article 8 of the European Convention on Human Rights, which states that: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a***

[60] Published in the Official Gazette of Romania, Part I, no. 251 of 17 October 1996.
[61] Published in the Official Gazette of Romania, Part I, no. 14 of 25 January 1995.

public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". Through these decisions, the European Court has suggested the amendment of the legislation of the Member States of the Council of Europe, in accordance with the new interpretation given to Article 8 of the Convention. The same idea can also be found in Amendment no. 8 of the Parliamentary Assembly of the Council of Europe to the Report on Romania's Application for Membership of the Council of Europe, which states the hope that Romania would not take long to amend its legislation so that Article 200 of the Criminal Code should no longer consider as criminal offences same-sex relationships between consenting adults.

The Court held that "the expression good morals can acquire different meanings, depending on religions and ideologies. The law, as a social phenomenon, cannot ignore the trends in the evolution of the contemporary society, including of human relations, even if, at a certain point, the legislative and case-law solutions might seem contrary to the traditional moral precepts".

Or,[62] it has been noticed that ***there is such an inconsistency between Article 8 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights in Strasbourg and Article 200 (1) of the Romanian Criminal Code,*** which forces the Constitutional Court of Romania to issue the appropriate decision. Removing the conflict between the national criminal law and the text of the European Convention on Human Rights, as interpreted by the European Court of Human Rights leads to a partial upholding of the exception of unconstitutionality concerning Article 200 (1) of the Criminal Code.

But, the upholding of the exception, in order to make the Romanian criminal law compliant with the international standard, is possible only by establishing a correlation between the interpretation of Article 8 of the European Convention on Human Rights and that of Article 26 of the Romanian Constitution, as, based on ***the principle of subsidiarity,*** the interpretation of the European court being binding for the national constitutional court as well. Based on these general guidelines, it must be accepted that ***the national constitutional court has not only the right, but also the obligation to interpret the Constitution,*** thus removing, through its solution, any inconsistency between the domestic text and the

[62] Idem.

European one, so that the national law be applicable, by using legal terms as defined by the legislator.

It should also be noted that the interpretation of Article 8 of the European Convention on Human Rights given by the European Court of Human Rights in Strasbourg does not concern, ***tale quale,*** all same-sex relationships, just as stated in Amendment no. 8 of the Parliamentary Assembly of the Council of Europe as well, but only those relationships between adults that take place in private, not in public places, and therefore without causing public scandal and, obviously, if the respective persons have consented to such relationships. ***Per a contrario,*** all relationships with minors or between adults, but by force, or in public places or in private places but having led to public scandals, are no longer covered by Article 8 of the European Convention on Human Rights and, consequently by Article 26 of the Romanian Constitution either, as relations that should continue being subject to criminal sanctions.

Consequently, the exception of unconstitutionality concerning Article 200 (1) of the Criminal Code has been partially upheld, only for the consented sexual relations between same-sex adults taking place in private, provided that they should not lead to a public scandal.

Moreover, the current case-law of the Constitutional Court includes frequent references to the case-law of the European Court of Human Rights, for example, from the recently given decisions we could mention Decision no. 363 of 7 May 2015, published in the Official Gazette no. 495 of 6 July 2015, in which the Court held that, "according to the first sentence of Article 7 - ***No punishment without law*** - of the Convention for the Protection of Human Rights and
Fundamental Freedoms, no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. To this effect, through its Judgment of 22 June 2000, delivered in the case of ***Coeme and Others v. Belgium*** (paragraph 145), restating its previous case-law, the European Court of Human Rights shows that Article 7 of the Convention enshrines, among others, the principle that only the law can define a crime and prescribe a punishment ***(nullum crimen, nulla poena sine lege)*** and, moreover, the principle that criminal law must not be interpreted extensively and impair the accused. Consequently, all crimes and relevant punishments must be clearly defined by law, requirement met only if an individual can understand, from the content of the legal provision, which are the acts or omissions entailing his/her criminal liability."

B. There have also been matters of law upon which both the Constitutional Court and the European Court of Human Rights have ruled.

For example, through Decision no. 1414 of 4 November 2009, published in the Official Gazette of Romania, Part I, no. 796 of 23 November 2009, the Constitutional Court found that the entire Chapter IV of Law no. 329/2009 was constitutional insofar as it did not apply to the persons for which the duration of the mandate was expressly set in the Constitution. Moreover, it stated that no constitutional provision prevented the legislator from discarding the combination of pensions with salaries, provided that such a measure be applied equally to all citizens, and that potential differences of treatment have a lawful reason.

Later on, through the Decision of 20 March 2012, rendered by the European Court of Human Rights in the Case of ***Ionel Panfile v. Romania,*** it was shown that such a measure was referred to by law, that it pursued a legitimate aim, it observed the fair balance between the general interests of the community and the protection of the fundamental rights of individuals, as well as the fact that, in social matters, the State enjoyed a wide margin of appreciation, which led to the conclusion that the impugned measure was not contrary to Article 1 of the Additional Protocol to the Convention (paragraphs 17-25).

Furthermore, the European Court of Human Rights, in paragraph 21, states that ***"In its assessment of the public interest of the impugned measures, the Court takes account of the Constitutional Court's reasoning, which confirmed that the Romanian legislature had imposed new rules in the field of public-sector salaries for the purpose of rationalising public expenditure, as dictated by the exceptional context of a global crisis on a financial and economic level (see paragraph 11 above). Having also regard to the fact that this is a matter that falls to be decided by the national authorities, who have direct democratic legitimation and are better placed than an international court to evaluate local needs and conditions, the Court sees no reason to depart from the Constitutional Court's finding that the contested measures pursued a legitimate aim in the public interest***'. Next, the European Court of Human Rights considered that ***"the criticised legal instrument did institute a difference in treatment between retired persons who were still active in the private sector and those who worked in the public sector, like the applicant; however, the two categories of persons can hardly be regarded as being in an analogous or relevantly similar situation within the meaning of Article 14, since the essential distinction, relevant to the context in which the impugned measures were taken, is that they draw their incomes from different sources, namely a private budget and the State budget respectively ".*** Or "***concerning the difference in treatment based on the personal monthly income level, the Court considers, in line also with the Romanian Constitutional Court's decision, that the level referred to was foreseeable and reasonable, and was established in relation to objective factors***

by the legislature, which acted within its discretionary power in the field of budgetary decisions, without transgressing the principle of proportionality" (see paragraph 28 to this effect).

C. In what concerns the case-law of the Court of Justice of the European Union and the case-law of the Constitutional Court, we would like to show, first, that, through Decision no. 668 of 18 May 2011, published in the Official Gazette of Romania, Part I, no. 487 of 8 July 2011, the Constitutional Court stated that ***"it is up to the Constitutional Court to apply, within the constitutional review, the judgments of the Court of Justice of the European Union or to address preliminary questions for establishing the content of the European norm. Such an attitude is a matter of cooperation between the national constitutional court and the European court, as well as of judicial dialogue between them, without referring to aspects related to the setting of <u>a hierarchy between these courts</u>***".

Moreover, within the constitutional review, for example Decision no. 887 of 15 December 2015, published in the Official Gazette no. 191 of 15 March 2016, the Constitutional Court made a reference to the case-law of the Court of Justice of the European Union noting that "In what concerns the field of competition, this is one where the Romanian State, just like any other Member State, has relinquished its powers, as this field falls under the category of the exclusive competences of the European Union, according to Article 3 (1) (b) of the Treaty on the Functioning of the European Union (the establishing of the competition rules necessary for the functioning of the internal market). Of course, the matter of State aids is subordinated to the field of competition. Therefore, the Court notes that the provisions of Article 2 (1) of the Treaty become applicable in this field, according to which, - **When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts***." Or,* **"ascertaining the compatibility of State aids is the exclusive competence of the European Commission, and the verification of the compliance of the Commission's act with the primary and secondary legislation of the European Union is carried out by the latter's courts (the General Court and the Court of Justice of the European Union). To this purpose, according to Article 108 (2) of the Treaty on the Functioning of the European Union, the Commission 'shall decide that the State concerned shall abolish or alter such aid'. Consequently, national courts do not have the competence to declare the compliance or non-compliance of a State aid with the European legislation (see the Judgment of 12 February 2008, issued in the cases C-199/06 CELF and Ministre de la Culture et de la Communication, paragraph 38, or the Judgment of 21 November 1991, issued in the case C-354/90 Federation Nationale du Commerce Exterieur des Produits Alimentaires and Others v.**

France, paragraph 14). In exchange, national courts have the competence to safeguard the rights of the persons impaired by an implementation, contrary to the fundamental treaties, of the State aid prior to the decision of the Commission and to enforce the decision of the Commission. Thus, in order to protect the interests of third parties, national courts have the competence to take ad interim measures (Federation Nationale du Commerce Exterieur des Produits Alimentaires and Others v. France, paragraphe 12, or Case C-39/94 — SFEI and Others, paragraph 52) and, consequently, can transfer the amounts of the State aid to a blocked account.*"*

D. Moreover, there have been matters of law upon which both the Constitutional Court and the Court of Justice of the European Union have ruled, for example, Article XV of Government Emergency Ordinance no. 8/2014 amending and supplementing certain legislative acts and other fiscal and budgetary measures, published in the Official Gazette of Romania, Part I, no. 151 of 28 February 2014, stating, mainly, that " ***The payment of the sums determined by judicial decision relating to the restitution of the tax on pollution for motor vehicles and the tax on polluting emissions from motor vehicles, the interest calculated until the date of full payment and legal costs, and all other sums as may be determined by the court, which became enforceable by 31 December 2015, shall be paid over a period of five calendar years by means of an annual payment of 20% of the amount payable".*** Thus, in relation to these legal provisions, through **Decision no. 676 of 13 November 2014**, published in the Official Gazette of Romania, Part I, no. 93 of 4 February 2015, the Constitutional Court held that ***"the enforcement of a court ruling cannot be hindered, annulled or postponed for a long period of time. As concerns the modality of enforcement, the Court has stated that uno ictu enforcement is just another modality of enforcement, without this meaning that this is the one and only modality of enforcement possible that can be applied".*** Thus, the legislator can establish certain measures, i.e. "the payment in instalments of certain amounts included in writs of execution, as also referred to in the provisions of Article XV of Government Emergency Ordinance no. 8/2014, by which the delegated legislator has introduced a measure intended to strengthen the purpose of the judiciary proceedings, in the sense that it represents a first important step taken by the debtor for the payment of the debt." In this context, restating its reasoning in Decision no. 190 of 2 March 2010, published in the Official Gazette of Romania, Part I, no. 224 of 9 April 2010, the Constitutional Court noted that "the mechanism of staggered payments, as a means of enforcement of a court ruling, can be deemed compliant to the principles enshrined by the case- law of the Constitutional Court and of the European Court of Human Rights, if certain conditions are met: clearly determined intermediary payments, reasonable time for a full payment, compensation of a potential depreciation of the amount due". Or, ***the provisions of Article XV of Government Emergency Ordinance no. 8/2014 establishing the instalments, adjusts this five-***

year payment on the basis of the consumer price index, thus meeting the requirements established in the case-law of the Constitutional Court. Moreover, the Court noted that ***"the Government does not refuse to implement court rulings but, on the contrary, it acknowledges them and firmly undertakes to enforce them according to the reasonable and objective criteria established in the impugned legislative act. Therefore, it is found that the emergency ordinance is not a measure prohibiting, not even temporarily, the enforcement of a court ruling and, consequently, it does not represent an interference of the legislative power in the achievement of justice."***

Also, the Constitutional Court has restated the fact that, as it ***"is not a positive legislator or a court of law competent to interpret and apply European law in disputes involving subjective rights of citizens, the use of a European norm within the constitutional review as a norm interposed with the norm of reference implies, under Article 148 (2) and (4) of the Romanian Constitution, aggregated conditions: on the one hand, that this norm should be sufficiently clear, precise and unequivocal in itself or that its meaning should have been established in a clear, precise and unequivocal manner by the Court of Justice of the European Union and, on the other hand, that the norm must imply a certain level of constitutional relevance, so that its normative content should support the potential violation, by the national law, of the Constitution - the sole direct norm of reference for the constitutional review. In such a hypothesis, the approach of the Constitutional Court differs from the simple implementation and interpretation of the law, competence belonging to courts of law and administrative authorities, or from possible matters related to the legislative policy promoted by the Parliament or the Government, where appropriate".*** Or, in what concerns the tax on pollution for motor vehicles and the tax on polluting emissions from motor vehicles, and the interest calculated until the date of adoption of Government Emergency Ordinance no. 8/2014, the Court of Justice of the European Union has stated as follows:

- In Case C-402/09 Ioan Tatu v. Statul roman prin Ministerul Finantelor si Economiei, Direcţia Generală a Finantelor Publice Sibiu, Administratia Finanțelor Publice Sibiu, Administrația Finanțelor Publice Sibiu, Administrația Fondului pentru Mediu, Ministerul Mediului, following the reference for a preliminary ruling lodged by the Tribunalul Sibiu on 18 June 2009, the European court stated that "Article 110 TFEU must be interpreted as precluding a Member State from introducing a pollution tax levied on motor vehicles on their first registration in that Member State if that tax is arranged in such a way that it discourages the placing in circulation in that Member State of second-hand vehicles purchased in other Member States without discouraging the purchase of second-hand vehicles of the same age and condition on the domestic market".

- In Case C-565/11 - Mariana Irimie v. Administratia Finantelor Publice Sibiu, Administratia Fondului pentru Mediu [preliminary question lodged by the Tribunalul Sibiu - Romania] it was held that "European Union law must be interpreted in the sense that, if a Member State collects a tax incompatible with the European Union law, i.e. Article 110 TFEU, the respective State must reimburse the amount of the tax concerned and pay the interest on that sum from the date of payment of that tax".

Consequently, the Constitutional Court concluded that ***"in this case, although the meaning of the European norm has been clarified by the Court of Justice of the European Union, the requirements resulting from this judgment have no constitutional relevance, being rather related to the legislator's obligation to issue norms compliant with the judgments of the Court of Justice of the European Union; otherwise, Article 148 (2) of the Romanian Constitution might be applicable. Therefore, the legislator has observed the judgment of the Court of Justice of the European Union precisely by issuing the legislative act, which the Constitutional Court deems compliant with the provisions of the Constitution".***

Ruling on the same matters, through the judgment issued in Case C-200/14, ["Reference for a preliminary ruling — Principle of sincere cooperation — Principles of equivalence and effectiveness — National legislation laying down the detailed rules for the repayment of taxes improperly levied with interest — Enforcement of judicial decisions relating to such rights to repayment stemming from the legal order of the Union — Refund payable over a period of five years — Repayment contingent on the existence of funds received from a tax — No possibility of enforcement"], the Luxembourg Court of Justice stated that ***"The principle of sincere cooperation must be interpreted as meaning that it precludes a Member State from adopting provisions making repayment of a tax held to be contrary to EU law by a judgment of the Court, or whose incompatibility with EU law results from such a judgment, subject to conditions relating specifically to that tax which are less favourable than those that would have applied, in their absence, to such a repayment; it is for the referring court to determine whether that principle has been complied with in the present case".*** Also, concerning the principle of equivalence, it held that it ***"must be interpreted as precluding a Member State from providing procedural rules which are less favourable for applications for the repayment of a tax based on an infringement of EU law than those applicable to similar actions based on an infringement of domestic law. It is for the referring court to make the necessary checks to ensure compliance with that principle so far as concerns the legislation applicable to the dispute pending before it***'. It also considered that "the ***principle of effectiveness must be interpreted as precluding a system of repayment with interest of taxes levied in breach of EU law, the amount of which was***

established by enforceable judicial decisions, such as the system at issue in the main proceedings, which provides for the repayment of such taxes by instalments over five years and which makes the execution of such decisions contingent on the availability of funds received in respect of another tax, without the individual having the right to compel public authorities to fulfil their obligations if they do not do so voluntarily. It is for the referring court to ascertain whether legislation such as that which would be applicable in the case at issue in the main proceedings in the absence of such a system of repayment meets the requirements of the principle of effectiveness."

E. Distinctly from all the above, it is also worth mentioning the fact that, for example, within the constitutional review, the European Commission, as ***amicus curiae,*** has filed written notes. As concerns the intervention of the European Commission, the Court noted that ***"under Article 23a (2) of Council Regulation (EC) no. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, it filed, as amicus curiae, written observations concerning the exception of unconstitutionality raised, by which, it mainly requests the dismissal, as groundless, of the exception of unconstitutionality and, secondly, to the extent to which there are doubts concerning any aspects related to the interpretation of the European Union law in the field of State aids, it urges the Court to stay the proceedings in the case and address the Court of Justice of the European Union the preliminary questions that it deems necessary for settling the exception of unconstitutionality, under Article 267 of the Treaty on the Functioning of the European Union, and it does not lodge an explicit request to intervene as party in the proceedings"***. Thus, the Court held that "the ***procedure for intervening as amicus curiae in the proceedings before the Constitutional Court does not represent an extension of the existing procedural framework, because the parties in the constitutional dispute are those holding this capacity in the a quo proceedings. Filing written notes, under these circumstances, does not amount to granting the European Commission a procedural capacity, as referred to in the Civil Procedure Code, combined with Article 14 of Law no. 47/1992 on the organisation and operation of the Constitutional Court, but represents the expression of an opinion/a position by a third party in relation to the constitutional dispute settling the matter referred to the a quo court, in order to support the constitutional court in settling the case***".

III. THE LAW AND THE STATE

10. What is the impact of the case-law of your Court on guaranteeing that State powers act within the constitutional limits of their authority?

As we will further develop in the answers in this questionnaire, considering the general binding nature

of the decisions issued by the Constitutional Court, its role in defining the limits of the constitutional remit of State powers is a fundamental one. The way in which the Constitutional Court's powers have been regulated has configured effective legal instruments for fulfilling this role. We would like to highlight, in this context, an important power granted to the Constitutional Court following the revision of the Constitution, i.e. the settlement of legal conflicts of a constitutional nature between public authorities, where the Court is called to state on concrete actions or inactions by which an authority or more undertakes powers or competences that, according to the Constitution, belong to other public authorities or failure thereof consisting of declining competence or refusing to accomplish certain actions that are incumbent upon them. According to Article 146 (e) of the Romanian Constitution, the Court has the power to adjudicate on the merits of any legal conflict of a constitutional nature between public authorities, and not only on conflicts of competence arising between them. Therefore, according to the Court's case-law, legal conflicts of a constitutional nature are not limited only to conflicts of competence, positive or negative, which could lead to institutional deadlocks, but also cover any legal conflicts arising directly from the text of the Constitution[63]. But all the powers granted to the Constitutional Court lead, mainly, to ensuring that instating, maintaining, exercising State power are done within the limits of the Constitution, as the Constitutional Court is the guarantor of its supremacy.

11. Do the decisions of your Court have binding force on other courts? Do other /ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

The Romanian Constitution enshrines, in Article 147 (4), the ***erga omnes*** binding nature of the Constitutional Court's decisions, which means that they should be imposed on all legal subjects, therefore on courts of law as well, just like a normative act. The ***erga omnes*** binding nature concerns both the rationale and the operative part of the decisions. In its constant case-law, starting with the Plenum's Decision no. 1/1995, the Court stated that the ***res iudicata*** accompanying jurisdictional acts, therefore also the decisions of the Constitutional Court, is attached not only to the operative part, but also to the rationale on which it relies. Therefore - the Court retained - both the Parliament and the Government, respectively public authorities and institutions must fully observe the rationale, as well as the operative part of the decisions rendered by the Constitutional Court. The ***"res iudicata***" referred to by the Constitutional Court, attached to the rationale, as well as to the operative part of its decisions, is the expression of the ***erga omnes*** binding nature of the Court's interpretation of the Constitution,

[63] Decision no. 901/2009, Official Gazette no. 503 of 21 July 2009.

binding nature based on the constitutional provisions of Article 1 (3) and (5), enshrining the principle of the rule of law and the supremacy of the Constitution, of Article 142 (1) enshrining the role of the Constitutional Court as guarantor for the supremacy of the Constitution and of Article 147 (4) enshrining the generally binding nature of the Constitutional Court's decisions.

Non-observance, by the courts of law, of the case-law of the Constitutional Court, is also a disciplinary misconduct under the law. Thus, according to Article 99 (ş) of Law no. 303/2004 on the status of judges and prosecutors[64] ***"Are disciplinary misconducts:[...] ş) non-observance of the decisions of the Constitutional Court or of the decisions issued by the High Court of Cassation and Justice when settling the appeals in the interest of the law ".***

There have been rare discrepancies in terms of case-law between the Constitutional Court and the High Court of Cassation and Justice. In such cases, in the referrals settled, the Constitutional Court has stated the binding nature of its decisions, including in relation to the supreme court in the hierarchy of courts of law, i.e. the High Court of Cassation and Justice. Thus, for example, when, through the settlement of an exception of unconstitutionality concerning the provisions of Article 414^5 (4) of the Criminal Procedure Code, the situation determined by the rendering, by the High Court of Cassation and Justice, in an appeal in the interest of the law, of a solution binding for the courts of law, according to the impugned text of law, but contrary to a decision previously issued by the Constitutional Court[65] (decision generally binding, according to Article 147 (4) of the Constitution, therefore for the High Court of Cassation and Justice as well) was brought before the Constitutional Court, the latter has stated on the limits of the powers of courts of law, as well as on their obligation to observe its decisions.

Thus, the Court retained that ***"Where there are conflicting decisions - however, equally binding on the courts - delivered by the Constitutional Court, on the one hand, and by the High Court of Cassation and Justice, on the other hand, the question concerns the distinction between the legal effects of the decisions of the two courts, as well as the legal ground substantiating the primacy of one or the other. The issue is particularly sensitive as both types of decisions are binding on the courts, i.e. the decision of the Constitutional Court under Article 147 (4) of the Constitution, and the decision of the High Court of Cassation and Justice under Article 414^5 (4) of the Code of Criminal Procedure ".*** The Court

[64] Republished in the Official Gazette of Romania, Part I.
[65] Decision no. 62/2007, published in the Official Gazette of Romania, Part I no. 104 of 12 February 2007, in which the Court found that the provisions of Article I (56) of Law no. 278/2006 amending and supplementing the Criminal Code, as well as amending and supplementing other laws, the part referring to the repealing of Articles 205, 206 and 207 of the Criminal Code, were unconstitutional (ascertaining the unconstitutionality of a repealing norm regulating insult and slander).

found that '***both types of decisions [...] give expression to a specific competence, strictly provided by law. Therefore, [...] their compliance does not prevent the exercise of legal powers of the courts.****'* In other words, the different competence of those two courts, established by the framers and developed in infraconstitutional law eliminates the possibility of conflicting solutions and ensures compliance with both the decisions of the Constitutional Court in the exercise of constitutional review and the decisions of the High Court of Cassation and Justice when settling appeals in the interest of the law. According to the Constitutional Court, ***'in the exercise of the power envisaged by Article 126 (3) of the Constitution, the High Court of Cassation and Justice has an obligation to ensure consistent interpretation and application of the law by all courts of law, in compliance with the basic principle of separation and balance of powers enshrined in Article 1 (4) of the Romanian Constitution. The High Court of Cassation and Justice has no constitutional power to establish, alter or abolish legal rules laid down by law or to carry out the constitutional review thereof.' Thus, the power of the High Court of Cassation and Justice concerning the settlement of appeals in the interest of the law has double limitation - only concerning the 'interpretation and application of the law ' and only with respect to 'all other courts of law '. The Constitutional Court decides on the constitutionality of laws, while the High Court of Cassation and Justice, by means of the appeal in the interest of the law, decides on the interpretation and application of legal norms. On the other hand, through their effects, the decisions of the Constitutional Court are generally binding according to Article 147 (4) of the Constitution, including for the legislator, while decisions delivered by means of an appeal in the interest of the law are directed at the common judge. Therefore, in relation to the constitutional text of reference of Article 126 (3), the phrase 'interpretation of the points of law adjudicated upon', set forth in Article 414[5] (4) of the Criminal Procedure Code, on the one hand, can only concern the uniform interpretation and application of the content of the legal rules, in the sense of normative acts, and not of the decisions of the Constitutional Court and of the effects they produce, and, on the other hand, it can only concern the uniform interpretation and application of the law by the courts of law and not by the Constitutional Court, which is a distinct authority in relation to the judicial system. In other words, only in these circumstances 'the interpretation of the points of law adjudicated upon' can be binding, because only in these circumstances there can be a compatibility with constitutional rules. Any other interpretation is inconsistent with the provisions of Article 147 (1) and (4) of the Constitution, because it deprives of effects the decisions of the Constitutional Court, and the appeal in the interest of the law is thus transformed, in violation of the Constitution, in a form of control of the Constitutional Court's acts."*** The Court also held that, ***"Because, in relation to the constitutional text of Article 126 (3), the phrase 'the interpretation of the points of law adjudicated upon, included in Article 414[5] (4) of the Code of Criminal Procedure can only regard the uniform interpretation and***

application of legal provisions by the courts of law, the interpretation given to this phrase by the High Court of Cassation and Justice through Decision no. 8/2010 is unconstitutional, being contrary to the constitutional provisions of Article 1 (3) and (5) that enshrine the principle of legal certainty, those of Article 1 (4) on the principle of separation and balance of powers - legislative, executive and judicial - in the framework of constitutional democracy, those of Article 126 (3) on the role of the High Court of Cassation of Justice, those of Article 142 (1) stating that 'The Constitutional Court shall be the guarantor for the supremacy of the Constitution' and those of Article 147 (1) and (4) on the effects of the decisions of the Constitutional Court. Proceeding to such interpretation, the High Court of Cassation and Justice posed in a court of judicial review for the Decision no. 62/2007 delivered by the Constitutional Court. Since this legal precedent seriously affects legal certainty and the role of the Constitutional Court, the Court found it necessary to penalise any interpretation of the provisions of Article 414[5] (4) of the Code of Criminal Procedure, governing the mandatory nature of the interpretations of the points of law adjudicated upon by the High Court of Cassation and Justice by means of the appeal in the interest of the law, in that it would give this court the possibility, in this way, under an infraconstitutional rule, to give mandatory interpretations contrary to the Constitution and to the decisions of the Constitutional Court." Therefore, the Court upheld the exception of unconstitutionality covering the provisions of Article 414[5] (4) of the Code of Criminal Procedure and found that 'the interpretation of the points of law adjudicated upon' by the Decision of the High Court of Cassation and Justice - United Sections no. 8 dated 18 October 2010, published in the Official Gazette of Romania, Part I, no. 416 of 14 June 2011, was unconstitutional, contrary to the provisions of Article 1 (3), (4) and (5), Article 126 (3), Article 142 (1) and Article 147 (1) and (4) of the Constitution, as well as to the Constitutional Court Decision no. 62 of 18 January 2007, published in the Official Gazette of Romania, Part I, no. 104 of 12 February 2007. The Court has also stated that the decision thus rendered "***causes - from the date of its publication in the Official Gazette of Romania, Part I - the restoration, for the future, of the generally binding effect of the Constitutional Court Decision no. 62/2007 and the application of the rules of criminalisation of insult and slander contained in Articles 205 and 206 of the Criminal Code, as well as of the provisions of Article 207 of the Criminal Code on truth-in-evidence*, *in compliance with the provisions of Article 15 (2) of the Constitution***", text enshrining the principle of non- retrospectively of laws, except for the more favourable criminal and administrative law[66].

12. Has your Court developed / contributed to standards for law-making and for the

[66] Decision no. 206/2013, published in the Official Gazette no. 350 of 13 June 2013.

application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, non bis in idem, nulla poena sine lege, etc.).

The Constitutional Court is the guarantor for the supremacy of the Constitution. Therefore, it has the exclusive power to carry out the constitutional review and, within this framework, to interpret the provisions and principles of the Constitution, respectively the standards that it establishes.

A significant development in the context of the review of constitutionality regards ***the principle of legality***[67]***,*** also in terms of incorporating the rules of legislative technique for drafting normative acts. The constitutional basis for relying on the rules of legislative technique within the review of constitutionality has been identified in Article 1 (3) ***"Romania is a*** [...] ***State governed by the rule of law***", and in Article 1 (5), "***Observance of the Constitution, of its supremacy, and the laws shall be obligatory in Romania***". The Constitutional Court made the following correlation between the two rules contained in Article 1 of the Constitution: ***"the principle of legality is a principle of constitutional rank"***[68] so that "law ***breaking has as immediate consequence the overriding of Article 1 (5) of the Constitution of Romania, which provides that observance of the law shall be mandatory. The breach of this constitutional duty would implicitly result in the infringement of the principle of the rule of law enshrined in Article 1 (3) of the Constitution".***[69] The Court also stated that "***although the rules of legislative technique do not have a constitutional value, [...] by their regulation, the legislator has imposed a number of binding criteria for the adoption of any normative act, and the compliance therewith is necessary in order to ensure the systematisation, harmonisation and coordination of legislation, as well as the content and legalform appropriate for each legislative act".***[70] Thus the Court has referred expressly to the provisions of Law no. 24/2000, bearing in mind that: ***"in accordance with Article 1 (2) of Law no. 24/2000 on the legislative technique rules for drafting normative acts, [...] 'Normative acts shall be initiated, drawn up, adopted and implemented in accordance with the provisions of the Constitution of Romania, republished, with the provisions of this law, as well as with the principles of the legal order', and, according to Article 3 (1) of the same Law, 'The legislative***

[67] Topic developed in the Report of the Constitutional Court of Romania for the XVII[th] Congress of the Conference of European Constitutional Courts, Part I, rapporteurs: Judge Simona-Maya Teodoroiu, First Assistant-Magistrate Marieta Safta, http://constcourt.ge/congress2015-2017/downloads/landesberichte/romania_SEN.pdf; see also M. Safta, *The evaluation of the legislative technique rules within the constitutional review***,** in *Buletin de informare legislativa* no. 2/2016, ISSN 1583-3178, pp.3-23.

[68] Decision no. 901 of 17 June 2009, published in the Official Gazette of Romania, Part I, no. 503 of 21 July 2009.

[69] Decision no. 783 of 26 September 2012, published in the Official Gazette of Romania, Part I, no. 684 of 3 October 2012.

[70] Decision no. 26 of 18 January 2012, Decision no. 681 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 477 of 12 July 2012, Decision no. 447 of 29 November 2013, cited above, Decision no. 448 of 29 October 2013, published in the Official Gazette of Romania, Part I, no. 5 of 7 January 2014.

technique rules shall be mandatory upon drawing up the draft law by the Government and the legislative proposals made by Deputies, Senators, or citizens upon exercising the right of legislative initiative [...] '. The obligation to comply with these legal provisions also follows from the provisions of Article 1 (5) of the Constitution, according to which, 'In Romania, observance of the Constitution, of its supremacy, and the laws shall be obligatory'."[71] Developing further the aforementioned reasoning, the Court also found that "***in its case-law, it has held that 'The essential feature of the rule of law is the supremacy of the Constitution and the obligation to respect the law '***[72] ***[...] and that 'the rule of law ensures the supremacy of the Constitution, correlating all laws and normative acts with the Constitution'***[73] ***[...] which means that it 'entails, as a matter of priority, observance of the law, whilst the democratic State is essentially a State governed by the rule of law'***[74] ***[...] and therefore, compliance with the provisions of Law no. 24/2000 on the legislative technique rules for drafting normative acts is a genuine criterion of constitutionality through the application of Article 1 (5) of Constitution (ad similis, see Decision no. 1 of 10 January 2014, cited above, and Decision no. 17 of 21 January 2015, published in Official Gazette of Romania, Part I, no. 79 of 30 January 2015, paragraphs 95 and*** 96)."[75]

Supporting this interpretation of the principle of legality, highlighting, in particular, ***the quality of the law***, the Court has stated that it is a "***fundamental State institution acting as guarantor for the supremacy of the Constitution, the rule of law and the principle of separation and balance of powers"***[76]**.** All these "***include, inter alia, the Court's competence, certainly within the limits of the Constitution, to ensure compliance of the entire legislation with the fundamental rules and principles***".[77]

This special development of the principle of legality in the case-law of the Constitutional Court was carried out by including the case-law of the European Court of Human Rights whereby the latter has

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[71] Decision no. 666 of 16 July 2007, published in the Official Gazette of Romania, Part I, no. 514 of 31 July 2007.
[72] See, to this effect, Decision no. 232 of 5 July 2001, published in the Official Gazette of Romania, Part I, no. 727 of 15 November 2001, Decision no. 234 of 5 July 2001, published in the Official Gazette of Romania, Part I, no. 558 of 7 September 2001, Decision no. 53 of 25 January 2011, published in the Official Gazette of Romania, Part I, no. 90 of 3 February 2011, or Decision no. 1 of 10 January 2014, published in the Official Gazette of Romania, Part I, no. 123 of 19 February 2014.
[73] Decision no. 22 of 27 January 2004, published in the Official Gazette of Romania, Part I, no. 233 of 17 March 2004.
[74] Decision no. 13 of 9 February 1999, published in the Official Gazette of Romania, Part I, no. 178 of 26 April 1999
[75] Decision no. 22/2016 cited above.
[76] Decision no. 738 of 19 September 2012, published in the Official Gazette of Romania, Part I, no. 690 of 8 October 2012.
[77] Decision no. 728 of 9 July 2012, published in the Official Gazette of Romania, Part I, no. 478 of 12 July 2012.

ruled on **the concept of "law", which appears in a number of articles of the Convention, in the sense that it encompasses both law of legislative origin and that deriving from case-law, and that it implies some qualitative conditions, *inter alia*, those of accessibility and foreseeability** (see, ***inter alia,*** Judgment of 15 November 1996 in the case of ***Cantoni v. France,*** paragraph 29, Judgment of 22 June 2000 in the case of ***Coeme and Others v. Belgium,*** paragraph 145, Judgment of 7 February 2002 in the case of ***E.K. v. Turkey,*** paragraph 51). According to its settled case-law, the term "prescribed by law" requires firstly that the adopted measure should have a basis in national law, but it also refers to the quality of that law: it must be **accessible to the persons concerned and formulated with sufficient precision to enable the applicants looking for appropriate legal advice, if need be, to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail** (see, ***inter alia,*** Judgment of 8 June 2006 in the case of ***Lupşa v. Romania,*** paragraph 32). In other words, **only a rule formulated with sufficient precision to enable an individual to regulate his or her conduct could can be considered a "law"**. The individual must be able to foresee the consequences which a given action may entail (see, ***inter alia,*** Judgment of 26 April 1979 in the case of ***Sunday Times v. the United Kingdom).*** The significance of the notion of foreseeability depends to a large extent on the context of the text at issue, the field it is designed to cover and the number and status of those to whom it is addressed (see, ***inter alia,*** Judgment of 28 March 1990 in the case of ***Groppera Radio AG and Others v. Switzerland,*** paragraph 68, Judgment of 8 June 2006 in the case of ***Lupşa v. Romania,*** paragraph 37). The foreseeability of the law does not preclude the concerned person to request proper advice in order to assess, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail (see, ***inter alia,*** Judgment of 13 July 1996 in the case of ***Tolstoy Miloslavsky v. the United Kingdom,*** paragraph 37). This is usually the case with professionals, who are used to having to proceed with a high degree of caution when pursuing their occupation. It may also be expected from them to pay particular attention to the assessment of the risks involved ***(Cantoni,*** cited above, paragraph 35). According to the same court, precisely because of the principle of generality of laws, their content cannot provide absolute precision. One type of regulatory technique is to use broad categories rather than exhaustive lists. Likewise, many laws use the effectiveness of more or less vague formulas, to avoid excessive rigidity and to adapt to changing situations. Interpretation and application of such texts depends on practice (see, ***inter alia,*** Judgment of 25 May 1993 in case ***Kokkinakis v. Greece,*** paragraph 40, Judgement Cantoni, cited above, paragraph 31, Judgement ***Dragotoniu and Militaru — Pidhorni v. Romania,*** and Judgment of 24 May 2007, paragraph 36). The decisional function entrusted to courts serves precisely to remove the doubts that might exist in relation to the interpretation of rules, taking into account the evolution of the daily practice, provided that the result be consistent with the substance

of the offence and clearly foreseeable" (see, ***inter alia,*** Judgment of 22 November 1995 in the case of ***S.W. v. the United Kingdom,*** paragraph 36, and ***Dragotoniu and Militaru — Pidhorni v. Romania,*** cited above, paragraph 37).

On the grounds of Article 20 of the Constitution, in many cases the Constitutional Court has applied the case-law of the European Court of Human Rights relating to the requirements of accessibility and foreseeability of the law, noting the unconstitutionality of the regulations that did not meet these requirements.[7881] The Court has held that ***"in order to be compatible with the principle of the rule of law, the law must meet the requirements of accessibility (the rules governing the matter of interception of communications must be regulated by law), clarity (the rules must have a fluent and comprehensible wording, without syntactic difficulties or obscure or ambiguous phrases, being formulated in a specific legal normative language and style, concise, understandable, with strict compliance with the rules of grammar and spelling), precision and foreseeability (lex certa, the rule should be clearly and precisely drafted so as to enable any individual – if need be, with appropriate advice – to regulate his or her conduct and to be able to foresee, to a reasonable extent, the consequences which a certain act may entail***)"[79].

Thus, for example, ascertaining the unconstitutionality of the provisions of Article II (1) and (3) of Law no. 249/2006 amending and supplementing Law no. 393/2004 on the status of local elected officials, the Court stated that "***the legal provisions under review, due to their improper wording, do not comply with the requirements of legislative technique specific to legal norms. [...]";*** in that case, the conclusion of the Court was that ***"the legal texts under review do not comply with the four criteria of clarity, precision, foreseeability and predictability so as to enable an individual to regulate his or her conduct and, therefore, avoid the consequences of the breach thereof."***[80]

Developing its case-law in the same vein, in a case[81] in which it found the unconstitutionality of the

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[78] See, *inter alia,* Decision no. 61 of 18 January 2007, published in the Official Gazette of Romania, Part I, no. 116 of 15 February 2007, Decision no. 604 of 20 May 2008, published in the Official Gazette of Romania, Part I, no. 469 of 25 June 2008, Decision no. 26 of 18 January 2012, published in the Official Gazette of Romania, Part I, no. 116 of 15 February 2012, Decision no. 1.258/2009, published in the Official Gazette of Romania, Part I, no. 798 of 23 November 2009, Decision no. 440 of 8 July 2014, published in the Official Gazette of Romania, Part I, no. 653 of 4 September 2014, or Decision no. 17 of 21 January 2015, published in the Official Gazette of Romania, Part I, no. 79 of 30 January 2015.

[79] Decision no. 51 of 16 February 2016, published in the Official Gazette of Romania, Part I, no. 190 of 14 March 2016.

[80] For example, through Decision no. 61 of 18 January 2007, published in the Official Gazette of Romania, Part I, no. 116 of 15 February 2007.

[81] Decision no. 1258 of 8 October 2009, published in the Official Gazette of Romania, Part I, no. 798 of 23

provisions of Law no. 298/2008 on the retention of data generated or processed by providers of publicly available electronic communications services or of public communications networks, and amending Law no. 506/2004 concerning the processing of personal data and the protection of privacy in the electronic communications sector, transposing into national law a European Directive, the Court held that ***"the lack of a precise legal regulation, which would determine with accuracy the scope of the data necessary to identify the users - natural or legal persons, opens the door to abuses in the activity of retention, processing and use of data stored by providers of publicly available electronic communications services or of public communications networks. The restriction on the exercise of the right to private life, secrecy of correspondence and freedom of expression, [...] must occur in a clear, foreseeable and unequivocal manner so as to remove, if possible, the authorities' arbitrariness or abuse in this area. The addressees of the legal norm [...] must have a clear understanding of the applicable legal rules in order to adapt their conduct and to foresee the consequences arising from the breach thereof.***" The Court sanctioned "the ambiguous wording" non- compliant with the rules of legislative technique, the lack of a definition of certain terms of the law, the use of unclear phrases. In its analysis, the Court found that ***"compliance with the rules of legislative technique, within the set of rules specific to the law-making activity, is a key factor in the implementation of all drafting requirements deriving from the obligation to respect the fundamental human rights. [...] an accurate regulation of the scope of Law no. 298/2008 is all the more necessary given, in particular, the complex nature of the rights subject to limitation, and the consequences that a potential abuse of the public authorities would have on the private life of the persons to whom the law is addressed [...]***." The follow-up case-law, having as object rules by which the legislator sought to transpose the same Directive was found unconstitutional due to the breach, ***inter alia,*** of Article 1 (5) of the Constitution, in terms of lack of precision of the legislation[82].

In another case, the Court found that, "***as it is the most intrusive of all the preventive measures, the measure of pre-trial detention must be ordered in a clear, precise and foreseeable regulatory framework both for persons subject to this measure and for the prosecution and the courts of law. Otherwise, one of the essential rights in a State governed by the rule of law, i.e. individual freedom, could be randomly/subjectively restricted. Therefore, in this regulatory context, the requirements on quality, precision and foreseeability directly and immediately influence the individual right to a fair trial, regarded, in this case, as a guarantee of individual freedom (...). In conclusion, the Court holds***

November 2009.

[82] See, for example, Decision no. 440 of 8 July 2014, published in the Official Gazette of Romania, Part I, no. 653 of 4 September 2014.

that the lack of clarity, precision and foreseeability of the provision complained of is likely to infringe the provisions of Article 21 (3) of the Constitution, given that the person subject to the pre-trial detention measure may not benefit of a fair trial, since the rule in question can be interpreted by the courts of law with a wide margin of discretion in terms of the scope of the offences for which this measure can be ordered. However, purely subjective statements should be excluded from the legislative hypothesis under examination."[83]

Similarly, in another case, the Court found that, "***given the intrusive nature of the technical supervision measures, it is essential that this be carried out in a clear, precise and foreseeable regulatory framework, both for the person subject to this measure and for the prosecution and the courts of law. Otherwise, this would result in the possibility of random/abusive violation of some basic fundamental rights in a State governed by the rule of law: personal, family and private life and the secrecy of correspondence. It is generally accepted that the rights referred to in Articles 26 and 28 of the Constitution are not absolute, but the restriction thereof must be carried out in compliance with the provisions of Article 1 (5) of the Basic Law, and the degree of precision of the terms and concepts used should be high, given the nature of the fundamental right restricted. Therefore, the constitutional standard of protection of personal, family and private life and of the secrecy of correspondence requires that limitation thereof take place within a legislative framework setting out, in a clear, precise and foreseeable manner, the bodies authorised to carry out operations which constitute interference in the protected scope of the rights. Therefore, the Court deems justified the legislator's choice that the technical supervision warrant be enforced by the public prosecutor and the criminal investigation authorities, which are judicial bodies according to Article 30 of the Code of Criminal Procedure, as well by specialised police officers, to the extent they may receive the assent to act as judicial police officers, under the terms of Article 55 (5) of the Code of Criminal Procedure. This option is not justified, however, as concerns the inclusion, in Article 142 (1) of the Code of Criminal Procedure, of the phrase 'other specialised State bodies', which are not specified in the Code of Criminal Procedure or in other special laws.***" [84] For all of those reasons, the Court found that the provisions subject to criticism violated the constitutional provisions contained in Article 1 (3) on the rule of law in its component relating to guaranteeing citizens' rights and in Article 1 (5) which enshrines the principle of legality.[85]

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[83] Decision no. 553 of 16 July 2015 concerning the exception of unconstitutionality of the provisions of Article 223 (2) of the Code of Criminal Procedure.

[84] Decision no. 51 of 16 February 2016, published in the Official Gazette no. 190 of 14 March 2016.

[85] For a selection of case-law, see T. Toader, M. Safta, CONSTITUŢIA ROMÂNIEI – decizii CCR, hotărâri

As regards law enforcement, distinguishing in relation to the powers of courts of law in this field, according to the principles of the rule of law, the Court has stated, for example, that the provisions granting the courts of law the power to remove legal norms set out through laws and to create other norms instead or to replace them with norms included in other normative acts were unconstitutional, as they violated the principle of separation of powers enshrined in Article 1 (4) of the Constitution, as well as the provisions of Article 61 (1), according to which the Parliament is the sole legislative authority of the country[86].

13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

If we refer here to the liberal professions exercising a public function, we would like to mention the case-law of the Constitutional Court concerning notaries, mediators, judicial officers, where it stated on the need to observe the rule of law in what concerns the regulation and exercise of their activity.

Thus, while examining, within the ***a priori*** constitutional review, the objection of unconstitutionality of the provisions of Article II (1), (5) and (15) of the Law supplementing Government Emergency Ordinance no. 119/2006 on certain measures necessary for enforcing certain community regulations from the date of Romania's accession to the European Union, as well as amending and supplementing the Law of notaries public and notarial activity no. 36/1995[87], the Court held, ***inter alia,*** that "according to the provisions of Articles 2 and 3 of Law no. 36/1995, the notarial activity is carried out by the notaries public through notarial deeds and notarial legal counselling, under the law, as the notary public is vested to provide a service of public interest. The office of notary public shall be carried out only by the notaries public members of the National Union of Notaries Public from Romania and it has the status of an autonomous office, in the exercise of the profession and in relation thereto, the notary public being protected by law. In other words, the status of notaries is protected by law, including through means pertaining to criminal law, and they are professionals vested by the State with the exercise of the public authority and for whose loyalty towards the fulfilment of the public office the State is held responsible. The fact that the notary exercises this public authority results from the nature and content of the activity provided, as State proxy, beyond any qualification of the law. The exercise of the public

CEDO, hotărâri CJUE, legislaţie conexă, Hamangiu Publishing House, Bucharest, 2016.

[86] Decision no. 1325 of 4 December 2008, published in the Official Gazette of Romania no. 872 of 23 December 2008.

[87] Decision no. 582 of 20 July 2016, published in the Official Gazette of Romania, Part I, no. 731 of 21 September 2016.

authority by the notary public, especially through document authentication, sets out requirements related to professional quality and standards of moral integrity identical to those of all other public servants, as the State entrusts this professional category with the review of legality and the presumption of truthfulness of the documents signed before the notary public. Moreover, Article 7 of Law no. 36/1995 states that "the act fulfilled by the notary public, bearing the latter's seal and signature, entails public authority and has probative force and, where appropriate, the binding nature referred to by law". Under the public authority that the notary public is vested with, his/her deeds are applied in the civil circuit, with the presumption of truthfulness, until their forgery, thus fulfilling the State's need to provide this public service for the proper administration of the legal relations between citizens, public authorities and the State. Consequently, there must be a direct link between the nature of the notarial activity and the forms of liability applicable to the notary public, the latter's legal status relying upon a series of obligations, whose non-observance might entail even criminal liability for acts of corruption or offenses committed while in office, offences with a qualified active subject and which, through their nature, are serious facts precisely because their author uses the trust granted to him together with the public authority, thus overturning the presumption of loyalty in the exercise of his/her function. Although these people are not public servants within the meaning of civil law, they exercise powers of public authority, delegated through an act of the competent State authority and are subject to its review, which justifies their assimilation with public servants within the meaning of the criminal law "[...] Consequently, the exclusion of notaries public from the category of civil servants 'for the decisions and organisational and administrative activity conducted at the notarial office and within the other structures of the notarial organisation' does not rely on objective and rational criteria, the distinction made by the legislator lacking a logical justification, as it leads to the setting up of two different legal systems concerning the activity of notaries public, these being on the one hand public servants and on the other hand natural persons, within the same legal entity - the notarial office or any other structure of the notarial organisation - and while fulfilling the powers specific to their capacity as notaries public. The decisions and the organisational and administrative activity are closely related to the activity of public authority conducted by the notary and they cannot be separated, in terms of responsibilities, from it. Moreover, the profession of notary and the entire legal status associated thereto, including the forms of exercise of this function in a notarial office - individual office or professional corporation -, are regulated in a unitary and unequivocal manner, so that any amendment of the legal framework as intended by the legislator would not only entail a privileged regime for notaries public, but also a violation of the provisions of Article 54 (2) of the Constitution, according to which "Citizens entrusted with a public

office […] are answerable on account of failure to loyally fulfil the obligations assigned to them […]"[88].

Through the same decision, the Court also held that, concerning the cessation of the capacity as notary public in case of a criminal conviction, "the protected social value is the integrity/probity of the person holding this capacity and providing a public service, exercising the public authority with which (s)he was vested by the State. Finding criminal unlawfulness through a final court ruling discards the presumption of innocence of the accused and places it, through itself, outside the legal framework for exercising this office. Therefore, conviction in itself leads to the loss of integrity/probity, the basic element of the exercise of public authority without which the person holding the respective public office no longer has the legitimacy to continue his/her activity. The method to carry out the sentence applied by the court of law is only a means to individualise the carrying out of the sentence which, although has a direct, negative impact on the activity of the notary public, should the sentence be imprisonment, as it is just a consequence of the conviction, indirectly concerns the protected value, i.e. the integrity/probity of the person holding the capacity as notary public. Therefore, the amendment of the Law of notaries public and notarial activity no. 36/1995 establishes a different legal treatment for persons in the same legal situation, and the distinction criterion, although it can be qualified as objective, it is not a reasonable one, because, as shown before, it cannot justify, in itself, the loss of integrity, as the value protected by the norms concerned. Conviction alone leads to a change in the legal situation of the person exercising public authority thus disqualifying him/her, from a legal and moral point of view, from holding the position to which (s)he has been vested. The presumption of innocence, of good will and loyalty of the this person have been discarded as an effect of the final ruling of conviction so that, regardless of how the sentence has been carried out, the State can no longer entrust such a person with the exercise of public authority because, through the criminal conviction, the respective person loses legitimacy and stops being in line with the general interests that (s)he is called upon to protect, according to the law. The concept of "rule of law", enshrined by Article 1 (3) of the Constitution states, on the one hand, the State's power to endure high-quality services to its citizens and to create the means to enhance their trust in the public institutions and authorities. This entails the State's obligation to set ethical and professional standards especially for those called upon to fulfil activities or provide services of public interest and even more so for those carrying out acts of public authority, i.e. for those public or private agents vested and authorised to invoke State's authority when fulfilling certain acts or tasks. The State must create all the prerequisites - and the legislative framework in one of them - for the exercise of its offices by professionals meeting professional criteria and the criteria of moral probity. From this

[88] Decision no. 582 of 20 July 2016, published in the Official Gazette of Romania, Part I, no. 731 of 21 September 2016.

perspective, if a State servant or another servant vested with the exercise of the public authority is convicted for an offense committed while in office, i.e. by resorting precisely to the confidence granted by the public office that (s)he must exercise with loyalty, the way of enforcing the sentence, as established through the court ruling, is completely void of relevance".

In the same vein, through Decision no. 2 of 15 January 2014[89], "liberal professions are organised and exercised only in accordance with the law, the statute of the profession and the code of ethics and have the status of an autonomous function, which is exercised in offices or cabinets, within professional associations set up in accordance with the law. For example, lawyers, public notaries, mediators, doctors, pharmacists, architects, independent experts or insolvency practitioners could fall under this category, without having a clear legislation on all professions qualified as liberal. It is worth noting that some of the persons above can have, under Article 147 (2) of the Criminal Code, the capacity as 'official' when they are employees of a legal person and may therefore be the active subjects of corruption offences or of offences committed while exercising their duties. Similarly, some of the persons exercising liberal professions are regarded as civil 'servants' under Article 175 (2) of the new Criminal Code, where, although operating under a special law and not financed from the State budget, they exercise a public-interest service and are subject to control or supervision by a public authority." The Court also held that "the exclusion of persons exercising a liberal profession from the scope of criminal liability for corruption offences and for offences committed while exercising their duties does not constitute an objective criterion which may justify intervention by the legislator" and it considered that "decisive for the inclusion or exclusion of persons from the scope of criminal liability are criteria such as the nature of the service provided, the legal basis under which that activity is carried out or the legal relationship between the person concerned and the public authorities, public institutions, institutions or other legal persons of public interest".

14. Public officials are accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?

The Constitution of Romania enshrines in Article 72 parliamentary immunity, as follows: ***"No Deputy or Senator shall be held legally responsible for any vote cast or political opinion expressed in the***

[89] Official Gazette no. 71 of 29 January 2014.

exercise of his office. (2) Deputies and Senators may be object to criminal prosecution or sent to trial for actions which are not related with votes or political opinions expressed in the exercise of their office, but they shall not be searched, detained or arrested without consent from the Chamber whose members they are, after being duly heard. Prosecution and indictment may only be carried out by the Prosecution Office attached to the High Court of Cassation and Justice. Jurisdiction shall rest in the High Court of Cassation and Justice. (3) In case of a crime committed in flagrante delicto, a Deputy or a Senator may be taken into temporary custody and searched. The Ministry of Justice shall forthwith inform the President of the Chamber on such custody and search. Where the Chamber concerned finds no reasons for detainment, it shall order that the measure be cancelled out at once."

Explaining the meaning of this provision of the Constitution, the Constitutional Court held, inter alia, that "parliamentary immunity — as «procedural immunity» — is a means of protection against abusive measures determined sometimes by political motives. Following the revision of the Constitution, parliamentary immunity has a narrower content, as inferred from Article 72 (2) of the Constitution. Thus, the Deputies and Senators may be subject to criminal investigation, or may be criminally prosecuted for acts that are not connected with their votes or their political opinions expressed in the exercise of their office, but they cannot be searched, detained or arrested without the consent of the Chamber they belong to, and only after being duly heard. When it comes to the Prosecutor's Office attached to the High Court of Cassation and Justice referral to one of the three authorities (the Chamber of Deputies, the Senate and the President of Romania) to demand the criminal prosecution of certain members of the Government who are also MPs, the provisions of Article 72 (2) of the Basic Law referring strictly to parliamentary immunity are not applicable".[90]

The Court has also found, whilst circumstantiating the scope of acts-facts covered by parliamentary immunity, that "according to Article 72 of the Constitution, Deputies and Senators cannot be legally held responsible for votes or political opinions expressed in the exercise of their office. This intrinsic office-related immunity defends the MP with regard to acts performed in the exercise of his office, such as vote, amendments, taking the floor, questions and interpellations, reports and opinions given on behalf of the Commission to which he belongs, etc. In other words, the parliamentary mandate is exercised in Parliament and within its working bodies, as well as upon carrying out tasks established by the Chambers in accordance with the law."[91]

[90] Decision no. 270 of 10 March 2008, Official Gazette no. 290 of 15 April 2008.
[91] Decision no. 279 of 22 March 2006, Official Gazette no. 323 of 11 April 2006

The Court has also held, with regard to the procedural rules imposed by the constitutional rules of reference, inter alia, that "Article 72 (2) second sentence of the Constitution does not require that the investigation and prosecution of Deputies and Senators be carried out by a public prosecutor's office attached to the High Court of Cassation and Justice, whereas the constitutional text identifies, by an own name, the sole public prosecutor's office competent to carry out investigation and prosecution, i.e. «the Prosecutor's Office attached to the High Court of Cassation and Justice», which excludes any assimilation thereof with another public prosecutor's office. Where the Constitution clearly indicates a subject of law — the Public Prosecutor's Office attached to the High Court of Cassation and Justice — it is not possible to draw the conclusion that we have in front of us a generic name, able to absorb within its content any prosecutor's office attached to the supreme court, which is unique itself. For that reason, the interpretation of the constitutional text cannot lead to the idea that the investigation and prosecution of Deputies and Senators, for committing acts of corruption, can also be carried out by other prosecutor's offices besides the Prosecutor's Office attached to the High Court of Cassation and Justice.[92] Similarly, settling a legal dispute of a constitutional nature between the Public Ministry — the Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Senate, upon request from the President of the Superior Council of Magistracy, dispute triggered by the Romanian Senate's disregard of overriding mandatory provisions of Article 76 (2) of the Constitution concerning the request for a declaration of the detention and arrest of a Senator, as well as by the Romanian Senate's disregard of the overriding mandatory provisions of Article 67 of the Constitution concerning the request for a declaration of detention and arrest Senator, by the fact that no resolution had been adopted, the Court found that the refusal of the Senate to draft and publish the resolution adopted in the plenary session of 25 March 2015 amounts to a failure to fulfil an obligation set forth in the Constitution, as well as in the pertinent piece of legislation and in the Regulations, engaging this public authority in a legal dispute of a constitutional nature with the authority that requested a declaration on the arrest of a Senator, i.e. the Prosecutor's Office attached to the High Court of Cassation and Justice, through the Minister of Justice. Once ascertained this dispute, the Constitutional Court, under the provisions of Article 142 (1) of the Constitution, according to which it "is the guarantor of the supremacy of the Constitution", is obliged to resolve the dispute, indicating the behaviour in line with the constitutional provisions. In this respect, the Court has expressly held that it concerns "the provisions of Article 1 (3) of the Constitution, in accordance with which «Romania is a democratic and social state governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the

[92] Decision no. 235 of 5 May 2005, Official Gazette no. 462 of 31 May 2005

spirit of the Romanian people's democratic traditions and the ideals embodied by the December 1989 Revolution, and shall be guaranteed)), considering that «one of the pre-requisites for achieving the fundamental objectives of the Romanian State, as defined in the afore-cited text, is the proper functioning of public authorities, while respecting the principles of separation and balance of powers, without institutional bottlenecks). As regards the Romanian Senate, the public authority which triggered the dispute ascertained by the Court, it "is required to draw up the resolution adopted at the plenary session of 25 March 2014 by which it has decided on the request for acceptance of the arrest of Senator [...], to communicate the resolution to the relevant public authorities and to publish it in the Official Gazette of Romania, Part I".[93]

As regards the **President of Romania**, the Court has held that "national laws of various States provide for dual protection, whereas immunity is expressed by two legal concepts: irresponsibility and inviolability. The non-accountability is the protection afforded to the President of Romania not to answer for his political opinions expressed in the exercise of his powers. Its scope includes protection against penalties for acts committed in the exercise of presidential term, defending the freedom of expression of the President. The President of Romania's non-accountability is governed expressly by the provisions of Article 84 (2) second sentence of the Constitution, as well as by reference to the provisions of Article 72 (1) of the Constitution, which enshrine the MPs non-accountability, provisions applicable to the President of Romania, accordingly. The inviolability presupposes a set of rules on prosecution, trial or a number of preventive measures, such as arrest, detention or search. The provisions of Article 84 (2) of the Constitution, which enshrine the immunity of the President of Romania, make no reference also to the provisions of Article 72 (2) and (3) of the Constitution providing for the MPs inviolability and the limitations thereof. According to these constitutional provisions, Deputies and Senators may be object to criminal prosecution or sent to trial for actions which are not related with votes or political opinions expressed in the exercise of their office, but they shall not be searched, detained or arrested without consent from the Chamber whose members they are, after being duly heard. Prosecution and indictment may only be carried out by the Prosecution Office attached to the High Court of Cassation and Justice. Jurisdiction shall rest in the High Court of Cassation and Justice. Similarly, in case of a crime committed in flagrante delicto, a Deputy or a Senator may be taken into temporary custody and searched. The Ministry of Justice shall forthwith inform the President of the Chamber on such custody and search. Where the Chamber concerned finds no reasons for detainment, it shall order that the measure be cancelled out at once. However, the constitutional provisions on the MPs inviolability are

[93] Decision no. 261 of 8 April 2015, Official Gazette no. 260 of 17 April 2015

not applicable also to the President of Romania, in respect of whom the inviolability may be removed only in the case referred to in Article 96 of the Constitution, which lays down the possibility for Parliament impeach him for high treason. The measure adopted by Parliament results in the removal of the President's immunity, and, therefore, throughout the exercise of his term, he can only answer for acts of high treason. Unlike inviolability, non-accountability present an absolute feature as regards the duration of its effects: the protection is maintained after the end of his or her term of office in respect of opinions expressed during such term. Having examined at the legal significance of immunity, the Court found that it is a constitutional guarantee, a measure of legal protection of the term of office, which is intended to ensure the independence of the term from any external pressure or abuse. The guarantee referred to in Article 72 (1) of the Constitution encourages the holder of the office to have an active role in the political life of society as it removes his/her legal responsibility for political opinions expressed in the exercise of the public office. But the holder of the office remains responsible under the law for all acts committed during the term, which are not connected with his/her votes or political opinions (Decision no. 284 of 21 May 2014, paragraph 44, published in Official Gazette no. 495 of 3 July 2014). Therefore, the President of Romania is not legally responsible for the political opinions expressed in the exercise of the public office, either during his/her term of office or after its expiry as a result of the concept of non-accountability of the President of Romania, although, as stated in the case-law of the Constitutional Court, the holder of the office remains responsible under the law for all acts and facts that have no connection with his/her political opinions and which were committed before or during the his/her term of office. With regard to those acts and facts, the President shall be liable, in accordance with the constitutional and legal provisions, subject to suspension throughout his/her term of all criminal investigations, as effect of the inviolability of the President of Romania. In conclusion, having examined the constitutional and legal provisions relating to the immunity of the President of Romania and the relevant case-law of the Constitutional Court, the Court finds that the President of Romania, in the exercise of his/her powers, shall enjoy immunity [Article 84 (2) of the Constitution], under two aspects: the non-accountability for the political opinions expressed in the exercise of his/her office, and the inviolability, except for case provided for in Article 96 of the Constitution — the impeachment for high treason. By virtue of the inviolability of the presidential term, throughout its exercise, the President cannot be subject to any criminal judicial proceeding, with the exception of the case provided for in Article 96 of the Constitution".[94]

With regard to the **liability of public officials** for their actions, we would mention the case-law of the

[94] Decision no. 678 of 13 November 2014, Official Gazette no. 886 of 5 December 2014

Constitutional Court whereby it declared unconstitutional Articles I (5) and II (3) of the Law amending and supplementing certain legislative acts and the sole article of the Law amending Article 253^1 of the Criminal Code, noting that the comparative analysis between the amending and the amended text shows that the new provisions removes the "public official" form the scope of active subjects of the criminal offence of conflict of interests and replaces him with the person who is an employee of a public authority, public institution or any other legal person of public interest, provided for in Article 145 of the current Criminal Code. Consequently, the Court held that "the amending rule under Article 253^1(1) of the Criminal Code restricts the scope of the provision criminalising the conflicts of interest to persons performing an act in the performance of their duties "set forth in an employment contract and in the job description signed with one of the institutions referred to in Article 145 of the Criminal Code", excluding from the scope of the criminalisation rule all office-holders, elected or appointed, offices which do not involve the conclusion of a contract of employment with one of the institutions listed in Article 145 of the Criminal Code or the performance of their duties on the basis of a job description. However, since, as explained previously, the purpose of the law is to create the premises so that the public office-holder can carry out his/her duties objectively and in accordance with the Constitution and other normative acts, and to exercise service activities in accordance with the principles of impartiality, integrity, transparency and primacy of public interest, and not for personal interest of a pecuniary nature, which would undermine the public interest and affect citizens' trust in State institutions, the restriction of the scope of criminalisation rule of conflict of interest raises serious issues of unconstitutionality." The Court found that "the new provision constitutes a genuine reason of impunity of elected or appointed office-holders" as regards the offence of conflict of interest, "being excluded, among others, the President of Romania, the Deputies and the Senators, the Ministers, the judges, the prosecutors, the public officials, the mayors, the presidents of county councils, the local councillors or the prefects." The Court further found that in "in paragraph (1) of the same Article 253^1 of the Criminal Code, the new provisions introduce the term «undue material gains». However, the provision relating to the undue nature of the material gains is unfounded, in the light of the particular legal object of that offence, i.e. the social relations concerning the effective exercise of service activity, an activity that cannot be carried out by adopting acts in breach of the principles of impartiality, integrity, transparency and primacy of the public interest in the exercise of public functions and dignities. Thus, the conflict of interests cannot only refer to undue material gains, but also to any type of benefit, whereas the criminalisation is not aimed at penalising breaches of the legal rules conferring legal basis and justification for obtaining certain material gains, but the situations in which the impartial exercise of civil servant's service duties might be affected". Noting the unconstitutionality of the above rules, the Court pointed out that "according to the Article 1 (5) of the Basic Law, respect for the Constitution is mandatory, which means

that Parliament cannot exercise the power of criminalisation and decriminalisation of antisocial acts unless in accordance with the rules and principles enshrined in the Constitution. Moreover, the Constitutional Court stated in its case- law (Constitutional Court Decision no. 62/2007, published in Official Gazette of Romania, Part I, no. 104 of 12 February 2007) that «Parliament could not define and declare as criminal offences, without thereby infringing the Constitution, acts in which content would be included any of the elements of discrimination laid down in Article 4 (2) of the Basic Law. Similarly, Parliament may not abolished the criminal legal protection of the values of constitutional level. The regulatory freedom of Parliament in these cases shall be exercised by regulating the conditions for prosecution for anti-social offences affecting the values laid down and guaranteed by the Constitution))".[95]

IV. THE LAW AND THE INDIVIDUAL

15. Is there an individual access to your Court (direct/indirect) against general acts/individual acts? Please briefly explain the modalities/procedures.

The Romanian legislation does not allow the direct individual access to the Constitutional Court against general/individual acts. This access is mediated by ordinary courts and courts of commercial arbitration before which any person may raise an exception of unconstitutionality against laws and ordinances applicable to their cases. Thus, pursuant to Article 29 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, for application of Article 146 (d) of the Constitution of Romania, ***"(1) The Constitutional Court shall decide upon the exceptions raised before the courts of law or courts of commercial arbitration referring to the unconstitutionality of laws and ordinances which are in force, or any provision thereof, where such is related to adjudication of the case, regardless in which stage of trial proceedings or subject matter thereof. (2) The exception can be raised at the request of either party or ex officio, by the court of law or of commercial arbitration hearing the case. Likewise, the prosecutor is entitled to raise this exception before the court in cases where he attends trial proceedings. (3) Legal provisions whose unconstitutionality has been found by prior decision of the Constitutional Court cannot form the object of an exception. (4) The case shall be referred to the Constitutional Court by the court before which the exception of unconstitutionality was raised, through an interlocutory order which shall include the parties' for and against viewpoints, and the instance's opinion on the exception, together with the evidence provided by the parties. If the exception has been raised ex officio, the interlocutory order shall be motivated,***

[95] Decision no. 2/2014 of 29 January 2014, Official Gazette no. 71

including the parties' arguments, as well as the necessary evidence. Alongside with the interlocutory order, the referring court must also send to the Constitutional Court the full name of the litigant parties and other details comprising necessary data for the accomplishment of the summons proceedings in respect thereof. [...]"

16. Your Court has developed case-law concerning access to ordinary/lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?

Considering how the concept of the rule of law is enshrined in various international instruments and in national laws, it is generally accepted that one of its essential elements is free access to justice. Moreover, the general concern for the protection of human rights has reinforced the idea that these rights need to be enshrined and guaranteed by law, by including the holders'possibility that, in case of disregard or breach of his/her rights and freedoms, have recourse to courts. The right of recourse to the courts is therefore a condition of the effectiveness of their rights and freedoms and concerns all these rights and freedoms. In this respect, Article 21 of the Constitution of Romania, included in Title II dedicated to the Fundamental rights, freedoms and duties, establishes that ***"Everyone shall have access to the courts in order to defend his rights, freedoms and legitimate interests. No law shall allow restrictions on the exercise of that right. Parties are entitled to a fair trial and to have their case resolved within a reasonable time. Special administrative jurisdictions are optional and free of charge***." In terms of related safeguards, the provisions of Article 21 of the Constitution must be read in conjunction with those of Article 1 (4) on the separation of powers, Article 24 on the right to defence, Article 52 on the right of a person aggrieved by a public authority, Articles 124-130 relating to the courts, as well as Articles 142-146 on the Constitutional Court.

With regard to the application of these constitutional texts, there is a rich case-law of the Constitutional Court concerning the conditions for the exercise of the free access to justice and the related safeguards, and, therefore, by way of example, we mention the following decisions:[96]

■ **Free access to justice presupposes any person's possibility to apply directly to a court in order to protect his/her rights and legitimate interests** (e.g.: Decision no. 953/2006[97], Decision no.

[96] See A. Cojocaru, M. SAFTA, "Free Access to Justice — Constitutional Principle and Fundamental Human Right protected by the Case-Law of the Constitutional Court of Romania" — Papers of the Conference in the Constitutional Court of Romania — 20 Years of Existence and 100 Years of Constitutional Review, Universul Juridic Publishing House, Bucharest, 2013, pp. 17-30

[97] Published in the Official Gazette of Romania, Part I, no. 53 of 23 January 2007

347/2007[98], Decision no. 467/2008[99], Decision no. 604/2008[100], Decision no. 631/2015[101]); that is why, for example, the mandatory preliminary procedure consisting of the information on the advantages of mediation is perceived as a barrier by the citizen in realizing and obtaining his/her rights in court. Furthermore, a procedure consisting of the information on the existence of a law is undoubtedly in breach of the right of access to justice, as it is an inappropriate burden on the individual, especially since the procedure is confined to a mere information obligation, and does not represent an effective attempt of conflict resolution through mediation, so that the participation to the information session before the mediator is merely formal. The obligation imposed on the parties, natural persons or legal persons, to attend the information session on the advantages of mediation, under penalty of inadmissibility of the writ of summons, is unconstitutional and contrary to the provisions of Article 21 of the Constitution.[102]

■ **Free access to justice is compatible with the regulation of certain administrative-jurisdictional procedures, provided that the decision of the administrative jurisdiction body is subject to the judicial review of the administrative court, or of other competent court, in accordance with the law** (e.g.: Decision no. 59/1994[103], Decision no. 66/1995[104], Decision 90/1995[105], Decision 3/1998[106], Decision 486/1997[107], Decision no. 220/2004[108], Decision no. 1614/2010);

■ **Free access to justice is compatible with the regulation of specific procedures for particular circumstances, provided that all those concerned enjoy full possibility to use these procedures, in the forms and procedures provided for by law, and that the effectiveness of that right is ensured**.

In this respect, through a decision of principle issued in the early years of the Constitutional Court (Plenary Decision no. 1/1994), having to answer at the question whether the free access to justice is compatible to the establishment of some special procedures, for special situations, or, on the contrary, it entails the existence of an unique procedure, regardless of such situations, inclusively as concerns the exercise of remedies, the Court decided that it is within the exclusive competence of the legislator to

[98] Published in the Official Journal of Romania, Part I, no. 307 of September 2007
[99] Published in the Official Gazette of Romania, Part I, no. 422 of 5 June 2008
[100] Published in the Official Gazette of Romania, Part I, no. 469 of 25 June 2008
[101] Published in the Official Gazette of Romania, Part I, no. 831 of 6 November 2015
[102] Decision no. 266 of 7 May 2014, published in Official Gazette of Romania no. 464 of 25 June 2014
[103] Published in Official Gazette of Romania no. 259 of 15 September 1994
[104] Published in Official Gazette of Romania no. 210 of 13 September 1995
[105] Published in Official Gazette of Romania no. 272 of 23 November 1995
[106] Published in Official Gazette of Romania no. 113 of 16 March 1998
[107] Published in the Official Gazette of Romania, Part I, no. 118 of 16 February 2011
[108] Published in Official Gazette of Romania no. 539 of 16 June 2004

establish the rules of conduct of court proceedings, as clearly inferred from the provisions of Article 126 (2) of the Constitution, according to which ***"Jurisdiction of the courts and the conduct of trial proceedings are determined only by the law "*** and of Article 129 according to which ***"Judicial decisions may be appealed against by the parties concerned and by the Public Ministry, subject to the law ".*** Thus, "the ***legislator can establish, considering some special situations, special procedure rules, as modalities to exercise the procedural rights, the principle of the free access to justice requiring the unlimited possibility of all those interested to use these procedures, in the forms and ways established by law, no law being able to exclude from the exercise of the procedural rights thus established any category or social group"***. These reasoning can be found in many decisions of the Constitutional Court in this field, when it had to pronounce on the constitutionality of the regulation of remedies, procedural time limits, formal requirements that must be observed when drawing up procedural documents, the imposition of some stamp duties or bails as condition for the access to justice.

a) As regards the rules governing the **exercise of judicial remedies**, the Constitutional Court has consistently held that free access to justice does not mean that it must be ensured at all levels and in terms all legal remedies, whereas jurisdiction and remedies are determined exclusively by the legislator, which may establish specific rules for particular cases (Decision no. 66/2001[109], Decision no. 99/2000[110]). However, the Court has ascertained the unconstitutionality of certain provisions removing some avenues of appeal, with the consequent violation of the parties' free access to justice for the protection of their rights and legitimate interests. (e.g.: Decision no. 783/2009[111], Decision no. 233/2011[112]);

b) As regards the **procedural time-limits**, the Court held as a matter of principle that it cannot claimed that by setting procedural deadlines — e.g. for the submission of grounds of appeal or of an application for review — the constitutional provisions of Article 21 on access to justice are infringed upon (e.g.: Decision no. 210/1999[113], Decision no. 114/2000[114], Decision no. 531/2007[115]). However, the Court found unconstitutional the legal provisions which, by establishing time limits for challenging some acts, restricted the free access to justice. This is because, as the Court held in one of the decisions[116] ***"according to Article 126 (2) of the Constitution, the legislator has the power to establish***

[109] Published in the Official Gazette of Romania no. 389 of 21 August 2000
[110] Published in Official Gazette of Romania no. 389 of 21 August 2000
[111] Published in the Official Gazette of Romania, Part I, no. 404 of 15 June 2009
[112] Published in the Official Gazette of Romania, Part I, no. 340 of 17 May 2011
[113] Published in Official Gazette of Romania no. 76 of 21 February 2000
[114] Published in Official Gazette of Romania no. 344 of 25 July 2000
[115] Published in the Official Gazette of Romania, Part I, no. 409 of 19 June 2007
[116] Decision nr.797/2007, published in the Official Gazette of Romania, Part I, no. 707 of 19 October 2007

the court procedure, and in the light of special circumstances, it may adopt special provisions, but such constitutional rule does not justify the regulation of legal provisions that result in the impairment of a right". The same reasoning can be found, for example, in Decision no. 797/2007[117], whereby the Court found unconstitutional the provisions of Article 7 (7) of Law no. 554/2004 on administrative litigation, relating to the time-limit for the introduction of a preliminary complaint with regard to unilateral administrative acts or in Decision no. 1037/2009[118], whereby the Court found unconstitutional Article 28 (2) of the Competition Law no. 21/1996[119] relating to the time-limit for challenging the legality of administrative acts of a legislative nature.

c) As **regards the procedural obligations and the formal requirements**, in its settled case-law, the Court has held that upon regulating the exercise of the right laid down in Article 21 of the Constitution, the legislator has the possibility to impose certain formal requirements, related to the nature and the requirements of the administration of justice; however, such requirements cannot affect the very substance of the right or deprive it of any effect. Thus, for example, by **Decision no. 176/2005[120]**, the Court found that the provisions of Article 302^1 (1) (a) of the Code of Civil Procedure, which penalise with absolute nullity the omission to specify in the content of the request for appeal ***"the name, domicile or residence of the parties or, in case of legal persons, their name and registered office, as well as, as applicable, the registration number in the trade register or in the legal persons registry, the unique registration code or, as applicable, the fiscal code and the bank account***", as well as - if the appellant lives abroad - ***"the chosen domicile in Romania, where all communications on the trial are to be made",*** appear as a formalism unacceptably rigid, able to seriously affect the effectiveness of the exercise of the remedy and to unduly restrict the free access to justice. Following the same legal reasoning, by Decision no. **737/2008[121]**, the Court has found unconstitutional the provision contained in **Article 302 of the Code of Civil Procedure**, which penalised with absolute nullity the lodging of an appeal before a court other than that whose decision is being appealed against. In line with the above, the Court noted that ***"the application of the constitutional principles on free access to justice and the use of remedies require that all the requests wrongly made be transmitted to the competent court for settlement"*** Subsequently, adjudicating upon **the provisions of Article 288 (2) of the Code of Civil Procedure**, and noting that its wording is identical, in terms of penalization of the failure to lodge the appeal before the court whose decision is being appealed against, with that of Article 302 of the Code of Civil Procedure, the Court, by **Decision no. 303/2009[122]**, declared unconstitutional

[117] Published in the Official Gazette of Romania, Part I, no. 707 of 19 October 2007
[118] Published in the Official Gazette of Romania, Part I, no. 501 of 21 July 2009
[119] Republished in Official Gazette of Romania, Part I, no. 742 of 16 August 2005
[120] Published in the Official Gazette of Romania, Part I, no 356 of 27 April 2005
[121] Published in the Official Gazette of Romania, Part I, no. 562 of 25 July 2008
[122] Published in the Official Gazette of Romania, Part I, no. 293 of 10 April 2009

the provisions of Article 288 (2) final sentence, ***"under the penalty of nullity",*** of the Code of Civil Procedure. For similar reasons, by **Decision no. 604/2008**[123], the Court found unconstitutional the provisions of Article 121 (1), (2) and (3) of Law no. 122/2006 on asylum in Romania as they were removing the possibility of concrete and effective use of the right of access to justice.

d) **With regard to the pecuniary nature of courts' services**, the Constitutional Court of Romania has consistently stated in its rich case-law on the matter that court proceedings must not and cannot be in all cases free of charge. As stated in numerous decisions (no. 198/1999[124], no. 65/2000[125], no. 7/1993[126], no. 8/1993[127], no. 18/1997[128], no. 211/1999[129], etc.), Article 21 of the Constitution does not institute any interdiction on judicial fees, whereas it is legal and normal that litigants who benefit directly from the work carried out by the judicial authorities contribute to the coverage of the related costs, where the stamp duty is a method used to partly cover the expenditure incurred in delivering this public service. Moreover, litigants' contribution can be recovered, on the grounds of Article 274 (1) of the Code of Civil Procedure, form the unsuccessful party. Therefore, the general rule is that of payment of stamp duties for court actions, and the exemptions are possible only insofar as they are laid down by the legislator.

■ **Free access to justice includes the right to a fair trial and the resolution of cases within a reasonable period of time;**

■ **Upon establishing the rules for access to justice, the legislator must respect the principles of accessibility and foreseeability of the rule (**i.e. the respect for the principle of **legality and of legal certainty** which has been significantly developed in case-law of the Constitutional Court of Romania, as highlighted in the other answers to this questionnaire);

■ **The guarantees that characterise free access to justice and the right to a fair trial concern both phases of civil proceedings: proceedings and enforcement**

17. Your Court has developed case-law on other individual rights related to the rule of law?

As regards the provisions of Article 1 (3), first sentence of the Constitution, which enshrine the principle of the rule of law, the Court held in its case-law[130] that its requirements concerned the major purposes of

[123] Published in the Official Gazette of Romania, Part I, no. 469 of 25 June 2008
[124] Published in Official Gazette of Romania No 179 of 27 July 1993
[125] Published in Official Gazette of Romania No 179 of 27 July 1993
[126] Published in Official Gazette of Romania No 148 of 10 July 1997
[127] Published in Official Gazette of Romania No 4 of 7 January 2000
[128] Published in Official Gazette of Romania No 99 of 6 March 2000
[129] Published in Official Gazette of Romania No 452 of 13 September 2000
[130] For example, Decision no. 70/2000, Official Gazette no. 334 of 19 July 2000

State activity, anticipated in what is usually called the rule of law, an expression involving the subordination of the State to the Law, enabling those means that would allow the right to censor political options and, in this context, to temper discretionary abusive possible trends of State structures. The rule of law ensures the supremacy of the Constitution, correlation of laws and of all normative acts with the Constitution, the existence of the system of separation of public powers, which must act within the limits of the law, i.e. within the limits of a law expressing the general will. The rule of law establishes a number of safeguards, including judicial safeguards, to ensure respect for the rights and freedoms of citizens through the self-limitation of the State, respectively that public authorities act within the law[131]. As already highlighted also in our answer to the previous question, there is such case-law, one example consisting in addressing the issue of free access to justice as an essential element of the rule of law.

18. The rule of law is used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

From the case-law of the Constitutional Court of Romania we can infer the following main dimensions of the rule of law: ***legality*** (including the requirements relating to the primacy of law, the respect for/compliance with the law, the relationship between national law and international law, the executive authorities law-making powers, the procedures for adoption of a law); ***legal certainty*** (including the accessibility, clarity, coherence and stability of law, the respect for the legitimate expectations, the non-retroactivity, the respect for the law, the legality of incrimination, the respect for the res judicata authority), ***prevention/sanctioning the abuse of power, equality before the law and non-discrimination, access to justice*** (including the independence of the judiciary, the independence of the judge, the impartiality of justice, the independence and impartiality in relation to other legal professions/lawyers, the access to the courts, the presumption of innocence, the other aspects of the right to a fair trial, the effectiveness of judgments, the review of constitutionality), other issues/challenges to the rule of law (we have in mind, in particular, the issue of corruption and conflict of interest).[132] They were shaped by the interpretation of the constitutional principle of the rule of law in conjunction with other principles and constitutional provisions, and there is a substantial body of case-law to that effect.

[131] Decision no. 17 of 21 January 2015, Official Gazette no. 79 of 30 January 2015

[132] In line with the criteria set forth in the Report on the rule of law, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf; Development