XIXth Congress of the Conference of European Constitutional Courts

National Report

Constitutional Court of Romania,

I. Non-justiciable questions and deference intensities

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1. In your jurisdictions, what is meant by "judicial deference"?

The Constitutional Court is the guarantor for the supremacy of the Constitution and the sole authority of constitutional jurisdiction in Romania. During its more than 30 years of institutional existence, it has developed a complex case-law both in terms of identifying, enshrining and developing the values, principles and requirements established in the Constitution, as well as in terms of establishing the limits of its competence. Considering that the question refers to the meaning of the concept of judicial deference, it is first necessary to recall the legal mechanism used to establish the competence of the Constitutional Court of Romania. Thus, according to Article 3 (2) of Law No 47/1992 on the organization and operation of the Constitutional Court, in the exercise of its powers, the Constitutional Court is the only authority entitled to decide upon its competence. Moreover, according to Article 3 (3) of the same law, the competence of the Constitutional Court thus established may not be challenged by any public authority. It follows that it pertains exclusively to the Constitutional Court to make the final assessment as to the concrete determination of the institutional implications of the principle of separation of State powers, as well as to the interpretation of the value content of fundamental rights and freedoms. It can be noted that, in this context, it is also for the Constitutional Court to assess the intensity of the review on the observance of fundamental rights and freedoms, depending on the field under review. Thus, it is found that, in the exercise of its powers, the Constitutional Court of Romania has shaped its competence according to the evolution of Romanian society, the tendency being that of combining Bickelian virtues with that of capitalizing on a coherent alternation of living law and interpretative originalism, which has led, organically, to a jurisprudential development connected to the evolution of the core values underlying the Constitution (Decision No 766/2011[1]).

Although the case-law of the Constitutional Court rarely uses the term "deference", it can be noted instead that it attaches great importance to concepts that are closely related to judicial deference. Thus, the use of phrases such as "the legislator's margin of appreciation", "the legislator's option" or "legislative expediency" leads to the idea of a certain degree of judicial deference intervening in certain fields or questions of law. In this regard, we mention that, when examining a legal provision regarding the granting of material rights to the heroes-martyrs and fighters who contributed to the victory of the Romanian Revolution of December 1989, as well as to those who sacrificed their lives or suffered following the anti-communist workers' revolt in Brasov in November 1987, the constitutional court pointed out that:

[1] Published in the Official Gazette of Romania, Part I, No 549 of 3 August 2011.

"While the obligation of gratitude or respect due to certain persons for their particular contribution to the development of society is of a moral nature and rests with society as a whole, the legislator, whether original or delegated, enjoys, as regards the specific content of the regulation, including that of the norm impugned in this case, a relatively wide margin of appreciation, and, correlatively, the Constitutional Court shall analyse the constitutionality of the impugned regulation in a deferential manner. Consequently, the criteria that the authors of the exception of unconstitutionality consider to be discriminatory may be deemed contrary to Article 16 of the Constitution, insofar as they manifestly lack objectivity and rationality." (Decision No 430/2018[2], para. 27)

As such, judicial deference is directly proportional to the margin of appreciation granted to the legislator. Thus, whenever this margin is wider, the Constitutional Court's analysis is more deferential, the Court proving a self-restraint attitude and giving priority to the appreciation of the legislative authority. Therefore, judicial deference is related to the approach that the Constitutional Court has depending on the legislative fields subject to review; thus, it is competent to rule on them, but chooses to diminish the intensity of the review, considering that the authority best placed for assessing the measure is the legislative authority itself.

However, it should be noted that the legislator's margin of appreciation cannot be absolute, but is benchmarked/limited by the assessment of the objective and rational nature of the legislative measures examined.

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government, etc.)?

The Constitutional Court of Romania is willing to intervene most energetically in the "hard core" of constitutional jurisdictions' powers, namely the observance of fundamental rights. It should be noted that the intensity of the review varies according to the fundamental right under consideration or to certain of its components. Thus, with regard to economic rights, the Constitutional Court is more permissive, often referring to the fact that these are exercised under the law, and, as such, it tends to grant a wide margin of appreciation to the legislator, while, regarding civil and political rights, the legislator's margin of appreciation is lower, so the intensity of the review is much higher.

The following decisions of the Constitutional Court of Romania are examples in which the legislator's wide margin of appreciation was called into question, grouped according to the fields in which they were delivered:

a) The Constitutional Court of Romania does not examine purely political aspects.

"The fact that the presentation of the Government Program did not meet the expectations of the authors of the referral or that the hearings of the candidates for the position of minister and the parliamentary procedure in general suffered from the perspective of the same expectations are subjective statements, of a political nature, whose regime, including with regard to the effects that they produce, pertains exclusively to the political register. The Constitutional Court is not competent to rule on the value of the content of the Government Program or on the appropriateness of the measures that it contains. Moreover, the

[2] Published in the Official Gazette of Romania, Part I, No 818 of 24 September 2018.

Constitutional Court is not competent to assess the time allocated for hearing the candidates for the position of minister either. Consequently, the pleas thus formulated are irrelevant from the perspective of a constitutional review, exceeding the competence of the Constitutional Court." (Decision No 57/2021[3], para. 40)

"No minister can be held responsible for the political opinions or actions exercised when drafting or adopting a normative act that has the regime of law. [...] the exemption from liability for the law-making activity guarantees the exercise of the mandate against any potential pressure or abuse that might be committed against the persons holding the offices of MP or minister; such an immunity ensures their independence, freedom and security in exercising their rights and obligations under the Constitution and laws." (Decision No 68/2017[4], para. 81, Decision No 26/2020[5], para. 99*) "The statements of the Minister of Justice were of a political nature, falling within the limits of her freedom of expression. They did not produce any legal effects capable of leading to an institutional deadlock or hindering the exercise of the constitutional prerogatives of any public authority (requiring the intervention of the Constitutional Court of Romania – a/n)."* (Decision No 26/2020, para. 100)

"The review conducted by the Constitutional Court may concern only the constitutionality of Parliament's decisions, not the content of any political agreement that led to their adoption." (Decision No 12/2014[6], para. 53)

"The establishment of parliamentary procedures is a matter of parliamentary regulation, representing a regulatory option, which cannot be censured by the Court as long as it does not contravene in itself to any express or implicit constitutional provision." (Decision No 137/2018[7], para. 56)

b) Furthermore, the Constitutional Court does not examine matters of economic appreciation with major financial implications on the banking system. Thus, with regard to the acceptance in lieu of payment of the buildings purchased by bank loan in CHF, the Court was called upon to rule on whether or not a certain value of the exchange rate fluctuation and its maintenance over a certain period of time, predetermined by the legislator, could result in the termination of the credit agreement at the debtor's initiative, leading to the acceptance of the immovable property in lieu of payment and to the debtor's remaining balance being written off.

"It is not the role of the Constitutional Court to classify loan agreements into short, medium or long-term agreements depending on which to establish a certain legal regime in terms of retention of hardship and, thus, to impose, by itself, certain thresholds for the value consistency of the difference in the exchange rate [necessary to be met for hardship to intervene – a/n].

With regard to the temporal consistency of the difference in the exchange rate, the Court notes that the fact of maintaining, over a period of 6 months, a difference of 52.6% between the current exchange rate and the one existing at the time when the loan agreement was signed reveals the constant, permanent, irreversible nature of the fluctuation, which, therefore, is not

[3] Published in the Official Gazette of Romania, Part I, No 254 of 12 March 2021.
[4] Published in the Official Gazette of Romania, Part I, No 181 of 14 March 2017.
[5] Published in the Official Gazette of Romania, Part I, No 168 of 2 March 2020.
[6] Published in the Official Gazette of Romania, Part I, No 144 of 27 February 2014.
[7] Published in the Official Gazette of Romania, Part I, No 404 of 11 May 2018.

temporary/circumstantial/particular. It is not the Court's role to determine whether or not this period should have been longer, but only to ensure that it is a rational period that prevents arbitrariness." (Decision No 431/2021[8], para. 57 and 58)

c) The Constitutional Court does not examine matters of social appreciation, such as raising the retirement age for women.

"In ruling on the constitutionality of the legislative solution enshrining a different treatment between the sexes [in matters of retirement – a/n], the Court, by Decision No 107/1995, referred to the social conditions existing in 1995, considering that the impugned legal texts reflect these conditions, thus being constitutional. Furthermore, the Court, however, noted the changing trend in social conditions at European level and did not rule out a possible reconsideration of its views in the future.

This solution has been consistently maintained until 2008, when the Court, by Decision No 191/2008, noted that European institutions and the case-law of the European Court of Human Rights, through its judgment of 22 August 2006 in the case of Walker v. the United Kingdom, emphasised the possibility and even the need to equalise the legal treatment between men and women. However, it was left to the States to assess when and for how long it was necessary to make such changes. In this context, noting the change in the social conditions, at least at the level of the other European countries, which called for an equal treatment, the Court considered that the legislator was the only authority in a position to concretely assess when such a change shall take place.

By adopting the [new – a/n] Law on the unitary public pension system, the legislator considered that it was time to initiate a regulation that would gradually lead to the establishment of an equal treatment between men and women in terms of retirement age.

Indeed, the Court finds that the cultural traditions and social realities are still evolving towards ensuring a real factual equality between the sexes and, so, it cannot be concluded that, at present, the social conditions in Romania can be considered as supporting an absolute equality between men and women. [...]

Beyond the natural changes that occur in society in terms of mentalities, culture, education and traditions, the provision of an equal treatment between the sexes appears increasingly necessary in the context of the European trend that requires States to align to the standards of equal, non-discriminatory treatment between men and women.

The Court considers that it is necessary to change its views on the issue of equalising the retirement age between men and women. However, without being able to sharply rule on its expediency, opposition to this solution would equal, at present, to an actual opposition to a social trend of an international scale, to whose standards Romania is called to rise. Indeed, the discrepancies still existing between the current social conditions in Romania and these standards cannot be denied. Therefore, the Court considers that the solution adopted by the legislator through the Law on the unitary public pension system in the sense of a gradual increase of the retirement age of women over a period of 15 years is the only one able to ensure the adequacy of this measure to the social reality and to give a constitutional nature to this legal provision. For these reasons, the Court considers that the provisions of the Law on the

[8] Published in the Official Gazette of Romania, Part I, No 1027 of 27 October 2021.

unitary public pension system establishing an equal treatment in terms of retirement age between men and women are not contrary to the provisions of the Constitution." (Decision No 1237/2010[9])

d) The Constitutional Court does not examine the expediency of measures related to the wage policy of the legislator.

"It is up to the legislator to take charge of the wage policy regarding the personnel paid from public funds, meaning both the establishment of the salary system and of the additional salary rights. The Court has neither the role nor the competence to establish, by itself, the elements of this policy, but only to verify compliance with the constitutional requirements inherent in the normative acts adopted by the legislator in this field, and not the expediency of a wage policy measure." (Decision No 667/2016[10], para. 23, Decision No 139/2020[11], para. 15, Decision No 756/2021[12], para. 20, Decision No 294/2022[13], para. 67, Decision No 429/2022[14], para. 63, Decision No 223/2022[15], para. 31, Decision No 581/2022[16], para. 33, Decision No 102/2023[17], para. 17, Decision No 316/2023[18], para. 50 or Decision No 482/2023[19], para. 44)

"It is the right of the legislative authority to develop legislative policy measures in the field of wages in accordance with the economic and social conditions existing at a given moment. At the same time, the national legislator enjoys a wide margin of appreciation to determine the appropriateness and intensity of its policies in this field." (Decision No 575/2011[20])

e) The Constitutional Court does not examine the sufficiency of the financial resources to commit budgetary expenditure or generate an excessive deficit.

"The assessment of the sufficiency of financial resources is a matter of exclusive political expediency, which essentially concerns the relations between Parliament and the Government. If the Government does not have sufficient financial resources, it may propose the necessary amendments to ensure them, by virtue of its right of legislative initiative. [...] The Court cannot determine whether or not the budget allocation is exceeded because it is not competent to do so; instead, the Court is competent to ensure the observance of the constitutional requirements regarding budgetary certainty and predictability, so that both the Government and Parliament have a real representation of the budgetary impact of the measures that they promote and adopt, as the case may be." (Decision No 22/2016[21], para. 56 and 60)

[9] Published in the Official Gazette of Romania, Part I, No 785 of 24 November 2010.
[10] Published in the Official Gazette of Romania, Part I, No 57 of 19 January 2017.
[11] Published in the Official Gazette of Romania, Part I, No 468 of 3 June 2020.
[12] Published in the Official Gazette of Romania, Part I, No 164 of 18 February 2022.
[13] Published in the Official Gazette of Romania, Part I, No 616 of 23 June 2022.
[14] Published in the Official Gazette of Romania, Part I, No 169 of 28 February 2022.
[15] Published in the Official Gazette of Romania, Part I, No 851 of 30 August 2022.
[16] Published in the Official Gazette of Romania, Part I, No 181 of 3 March 2022.
[17] Published in the Official Gazette of Romania, Part I, No 758 of 22 August 2023.
[18] Published in the Official Gazette of Romania, Part I, No 707 of 2 August 2023.
[19] Published in the Official Gazette of Romania, Part I, No 1161 of 21 December 2022.
[20] Published in the Official Gazette of Romania, Part I, No 368 of 26 May 2011.
[21] Published in the Official Gazette of Romania, Part I, No 160 of 2 March 2016.

"It is not a matter related to the role and powers of the Constitutional Court, by way of constitutional review [...], to consider that one or several laws brought before it is/are capable of leading to an excessive budget deficit within the meaning of Article 126 of the Treaty on the Functioning of the European Union and Protocol No 12 on the excessive deficit procedure to this Treaty. The latter regulations establish their own specific procedure under European law in order to establish the existence of an excessive budget deficit and to remedy such a potential situation." (Decision No 593/2020[22], para. 58)

f) The Constitutional Court does not rule on the economic and social policy of the State.

"When implementing its policies, especially social and economic policies, the legislator must enjoy a margin of appreciation when ruling both on the existence of a problem of public interest, which requires a normative act, and on the choice of methods for its application." (Decision No 488/2023[23], para. 34)

g) The Constitutional Court does not rule on the monetary policy of the State.

"The State, through its representative bodies, safeguards the national interests implied by the economic, financial and foreign exchange activity, context in which the National Bank of Romania is responsible for carrying out the policy related to the management of the foreign exchange reserves, including with regard to the international reserves but, as concerns the conditions of actual storage of the gold reserves, respectively custody costs or transport costs for relocation or insurance of the gold held in the treasure reserve and stored either in the country or abroad, these are matters of expediency that fall within the competence of the legislator, by virtue of its capacity as [...] owner, being the expression of national sovereignty, according to Article 1 (2) and Article 2 of the Basic Law, aspects which, in fact, do not, in principle, fall within the scope of constitutional review.

Or, taking into account the institutional dialogue between the National Bank of Romania, Parliament and the Government, [...]by virtue of its role granted by the Constitution, the legislator may, at any time, legislate in the sense of storing abroad the gold held in the treasure reserve, if this is required, including in the event of Romania's accession to the euro area, or, on the contrary, as it is the case with the law submitted for constitutional review, to relocate the gold already stored abroad in the country." (Decision No 414/2019[24], para. 142 and 143)

h) The Constitutional Court does not rule on matters related to the fiscal policy of the legislator.

"The difference in legal treatment [between the State and the citizen, as subjects of the fiscal law relation – a/n] resides precisely in the specificity of the fiscal relations, in which the State enjoys a wide margin of appreciation, in the aim pursued by the legal suspension of forced execution (namely, the staggering of the payments resulting from court decisions) and in the urgent need for instant balancing of the State budget." (Decision No 1533/2011[25])

[22] Published in the Official Gazette of Romania, Part I, No 645 of 22 July 2020.
[23] Published in the Official Gazette of Romania, Part I, No 101 of 2 February 2024.
[24] Published in the Official Gazette of Romania, Part I, No 922 of 15 November 2019.
[25] Published in the Official Gazette of Romania, Part I, No 905 of 20 December 2011.

"Following the assessment of the context in which this normative act was adopted and of the purpose pursued by the legislator, the Court finds that the impugned text of law establishes the beneficiaries of this 'leniency act' [of a fiscal nature – a/n], the legislator being the only one able to establish both the possibility of exemption from payment of tax obligations by certain categories of taxpayers, as well as the conditions under which this fiscal measure is carried out." (Decision No 5/2018[26], para. 20)

i) The Constitutional Court does not rule on the criminal policy of the legislator.

"In the field of criminal policy, the legislator enjoys a rather wide margin of appreciation, given that it is in a position that allows it to assess, according to a series of criteria, the need for a certain criminal policy." (Decision No 101/2021[27], para. 79)

3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

3.1. The jurisprudential hypotheses set out in point 2 refer to the fields in which the constitutional court grants a wide margin of appreciation to the legislator in terms of dosing and grading its intervention. Admittedly, there are objectively quantifiable situations in which the Court retains a wider margin of appreciation in favour of the legislator, but when these situations are overcome, the Court restricts the margin of appreciation of the legislator.

Thus, Article 53 of the Constitution refers to the restriction of the exercise of certain rights or freedoms for the protection of national security, public order, health or morals, citizens' rights and freedoms; when conducting criminal investigations; for preventing the consequences of a natural calamity, disaster or particularly severe catastrophe. This constitutional text allows for a fairly wide margin of appreciation on the part of the legislator when deciding to limit or restrict the exercise of a fundamental right/freedom in the situations mentioned above. It can be noted that the enforcement of this constitutional text is determined by a factual and legal situation that deviates from the usual course of State life, so that the reaction of the legislator must be consistent with the exceptional situation that has arisen. As such, in times of social, economic or sanitary unrest, the Constitutional Court grants a wide margin of appreciation to the legislator, which is not, however, absolute. As an example, we note two decisions of the Constitutional Court of Romania, in which it stated that:

"[...] this threat to economic stability persists [the global economic crisis of 2009 – a/n], so the Government is entitled to adopt appropriate measures to fight it. One of these measures is to reduce budget expenditures, a measure materialized, among others, in the reduction of the amounts of salaries/allowances/payments by 25%. [...] Article 53, in its component on national security, is applicable and, at the same time, represents the basis for justifying the measures envisaged." (Decision No 872/2010[28])

[26] Published in the Official Gazette of Romania, Part I, No 401 of 10 May 2018.
[27] Published in the Official Gazette of Romania, Part I, No 295 of 24 March 2021.
[28] Published in the Official Gazette of Romania, Part I, No 433 of 28 June 2010.

or

"The measure of wearing a protective mask is one of the measures regulated by Law No 55/2020 aimed at preventing and combating the effects of the COVID-19 pandemic. As stated in the explanatory memorandum to the above-mentioned law, given the situation of exceptional gravity generated by the spread of the SARS-CoV-2 coronavirus and its negative consequences on public health, the national legislator considered that its legislative intervention was necessary, in compliance with the constitutional provisions of Article 53, in order to regulate measures aimed at combating the effects of the COVID-19 pandemic." (Decision No 381/2021[29], para. 57)

3.2. On the other hand, with regard to legal rights, the Court noted that their structuring was carried out in accordance with the legislator's option in that field and so, the assessment of its margin of appreciation is greatly diminished:

"What is specific to all these citizens' rights and correlative obligations of the State is the fact that, to the extent that they are not expressly listed by the Constitution, the legislator is free to choose, depending on the State policy, financial resources, priority of the objectives pursued and need to fulfil other obligations of the State, enshrined at constitutional level, what measures shall ensure citizens a decent standard of living, and to establish the conditions and limits for granting them. It may also order the modification or even termination of the social protection measures taken, without having to comply with the conditions of Article 53 of the Constitution, since this constitutional text refers only to the rights enshrined in the Basic Law, and not to those established by laws." (Decision No 1576/2011[30])

3.3. Another situation that calls into question the granting of a wide margin of appreciation in favour of the legislator also arises when its reaction is determined by the questionable way in which litigants use the procedural means regulated by law. Thus, the Court ruled that, since litigants raise exceptions of unconstitutionality and request the referral of the Constitutional Court only in order to obtain the staying of the proceedings before the courts of law, the legislator has a wide margin of appreciation in identifying the solutions necessary to cease such a practice. Hence:

"The legislator's option to repeal the measure of the de jure staying is based on the fact that the parties often lodge exceptions of unconstitutionality as a way to delay the adjudication of the cases. The extremely high number of cases pending before the Constitutional Court as a result of the frequent filing of exceptions of unconstitutionality makes their settlement extremely lengthy, to the detriment of the rapid adjudication of the cases. However, given that the purpose of this measure, i.e., the de jure staying of the settlement of cases before the courts of first instance, was to provide the parties with a procedural guarantee in exercising the right to a fair trial and the right to defence, by removing the possibility of settling a case based on a legal provision deemed unconstitutional, reality showed a transformation of this measure, in most cases, into an instrument designed to delay the settlement of the cases pending before the courts of law. The regulation encouraged abusive

[29] Published in the Official Gazette of Romania, Part I, No 836 of 1 September 2021.
[30] Published in the Official Gazette of Romania, Part I, No 32 of 16 January 2022.

use of procedural rights and arbitrariness in a form that cannot be sanctioned, as long as the staying of the proceedings is regarded as an immediate and necessary consequence of exercising free access to justice. Thus, the primary purpose of the constitutional review – the general interest of society to remove from the legislation in force those provisions affected by flaws of unconstitutionality – was perverted into a prominently personal purpose of certain litigants, who used the exceptions of unconstitutionality as a pretext for postponing the delivery of the solution by the court of law before which the dispute was brought. However, the Court finds that, by adopting the [impugned – a/n] law, the will of the legislator is to eliminate exceptions of unconstitutionality from being raised for purposes other than that provided for by the Constitution and the law, thus preventing, for the future, the abusive exercise by the parties of this procedural right." (Decision No 1106/2010[31])

3.4. The legislator also has a wide margin of appreciation in choosing the means to implement pilot judgments issued by the European Court of Human Rights.

Thus, in order to implement the ECtHR judgment of 12 October 2010 in the case of *Maria Atanasiu and Others v. Romania*, the legislator opted not to update with the inflation index the compensation owed by the State for the immovable property seized during the communist regime (1945-1989), given that such compensation was calculated according to a scale of real estate price indices from 2013, while the payment was made at a later date. On this point, the Constitutional Court ruled:

"The legislator implemented a measure equivalent to a capping of the amount of the compensation established under Law No 165/2013. This is an application consistent with the considerations of principle resulting [...] from the judgment of the European Court of Human Rights of 12 October 2010, delivered in the case of Maria Atanasiu and Others v. Romania, which granted a wide margin of appreciation as to the configuration and enforcement of State claims related to the restitution of buildings. In this respect, by the same judgment, it was held that the State 'must have a considerable margin of appreciation in selecting the measures to secure respect for property rights or to regulate ownership relations within the country and in their implementation' (para. 233), and that 'Setting a cap on compensation awards and paying them in instalments over a longer period might also help to strike a fair balance between the interests of former owners and the general interest of the community' (para. 235). [...]

Therefore, by taking into account, on the one hand, the particularly complex and burdensome patrimonial obligations on the State, with an encumbering effect on the actual State budget over a long period of time, correlated with the existing economic context, and, on the other hand, the fact that the above-mentioned obligations, related to present time, have a reparative nature with a prominent historical component, the Court finds that, by the impugned measure, the Romanian legislator clearly placed itself within that margin, thus fulfilling the requirements established by the judgment of the European Court of Human Rights." (Decision No 686/2014[32], para. 31 and 32)

In another case which also concerned the enforcement of several ECtHR judgments on prison conditions [*Iacov Stanciu v. Romania* and *Rezmiveș v. Romania*], the Constitutional Court of Romania granted a wide margin of appreciation to the legislator in choosing the

[31] Published in the Official Gazette of Romania, Part I, No 672 of 4 October 2010.
[32] Published in the Official Gazette of Romania, Part I, No 68 of 27 January 2015.

optimal solutions and measures to meet the requirements of the Strasbourg court judgments. The Constitutional Court of Romania noted that:

"By the judgment of 24 July 2012, delivered in the case of Iacov Stanciu v. Romania, although having found a violation of the provisions of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the ECtHR held that 'it is not for the Court to determine what measures of redress may be appropriate for a respondent State to take in accordance with its obligations under Article 46 of the Convention. However, the Court's concern is to facilitate the rapid and effective suppression of a shortcoming found in the national system of protection of human rights' (para. 194)." (Decision No 243/2023[33], para. 55)

"[Initially, the Romanian legislator had passed a law] establishing a compensation procedure for persons serving prison sentences in inappropriate conditions (compensatory appeal). Thus, when calculating the sentence actually served, regardless of the regime of execution of the sentence, as a compensatory measure, the execution of the sentence in inappropriate conditions was also taken into account, meaning that, for each period of 30 days of imprisonment served in inappropriate conditions, even if these were not consecutive, 6 additional days were considered served of the punishment applied [compensation in days considered served]." (Decision No 243/2023, para. 49)

"The determination of the number of days considered actually served, as a compensatory measure for each period of 30 days of imprisonment served in inappropriate conditions, is an element to be decided exclusively by the legislator, which is free to regulate in this regard based on considerations of expediency, assessed depending on the purpose of the law and the period in which this purpose is estimated to be achieved. The same arguments also support the option referring to the period for which days considered served are granted in compensation for accommodation in inappropriate conditions, which are calculated as of 24 July 2012, the date of delivery, by the European Court of Human Rights, of the judgment in the case of Iacov Stanciu v. Romania." (Decision No 181/2022[34], para. 17)

"[Subsequently], the legislator indicated its intention to amend the law [on the compensatory appeal] and to adopt the legislative solution of compensation [in cash] in case of accommodation in inappropriate conditions in a certain legal and social context. Thus, the Court considered that the solution to repeal [compensation in days considered served] fell within the exclusive competence of Parliament, as the sole legislative authority, to identify and edict normative solutions, in compliance with the constitutional requirements, in accordance with the present realities of society. Full competence to establish such solutions lies with the legislator." (Decision No 243/2023, para. 56)

3.5. According to the Romanian Constitution, under certain conditions, the Government is the delegated legislator, meaning that it can issue emergency and simple ordinances (primary regulatory acts having the force of law) under the conditions provided for by Article 115 of the Constitution. The Government may adopt emergency ordinances only in extraordinary situations whose regulation cannot be postponed, having the obligation to motivate the urgency therein. Under the specific conditions of the national constitutional regime, the constitutional court has the power to verify whether or not the Government has issued emergency ordinances

[33] Published in the Official Gazette of Romania, Part I, No 987 of 31 October 2023.
[34] Published in the Official Gazette of Romania, Part I, No 785 of 8 August 2022.

in extraordinary situations. The existence of an extraordinary situation is a condition for the constitutionality of emergency ordinances, and its assessment by the Constitutional Court, most of the times, confirms the existence of such a situation having led to the issuance of an emergency ordinance, which justifies the conclusion that the Government enjoys a margin of appreciation in assessing the conditions for issuing emergency ordinances, especially in the economic and social fields:

"Having regard to the role of the Government in ensuring the balanced functioning of the economic and social system, the Government's assessment of the extraordinary nature of the situation having led it to adopt Government Emergency Ordinance No 8/2021, in order to reconcile the legislative policy aimed at protecting students with the existing budgetary resources, shall be taken into consideration, as well as that of the urgency to regulate this situation, as follows from the preamble of this normative act and its substantiation note." (Decision No 500/2023[35], para. 36)

3.6. The legislator's option to grant a wide margin of appreciation to the authorities called upon to apply the law is accepted in the case-law of the Constitutional Court of Romania with regard to the field in which it intervenes.

"The requirements of the rule of law do not imply the absence of any margin of appreciation of public authorities. Moreover, not every area of social life must or can be standardized down to the smallest details, so that, depending on the field concerned, the margin of appreciation of public authorities may be greater or narrower. As to awarding and withdrawing decorations/medals, given the nature of the field, this margin is wider, which does not imply any prejudice to the principle of the rule of law." (Decision No 479/2021[36], para. 39)

In certain specific situations faced by society, the Court grants the legislator a margin of appreciation in managing the respective field concerned, but the intensity of the review may vary, by introducing constitutional requirements, which limit the margin of appreciation.

"The adoption of concrete measures to control the phenomenon of stray dogs falls within the State's margin of appreciation; thus, the legislator is called to establish the concrete normative conditions under which the phenomenon of stray dogs must be managed. In this respect, the legislator is bound, as a constitutional requirement, to involve and make responsible the local public authorities, including through summary or criminal sanctions, in order to avoid resorting to euthanasia." (Decision No 1/2012[37])

"The Constitutional Court is not competent to assess the expediency of the solution adopted by the Romanian legislator [for controlling the phenomenon of stray dogs – a/n] nor that of the legislative solution promoted by the authors of the referral." (Decision No 383/2013[38])

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

[35] Published in the Official Gazette of Romania, Part I, No 7 of 4 January 2024.
[36] Published in the Official Gazette of Romania, Part I, No 1023 of 27 October 2021.
[37] Published in the Official Gazette of Romania, Part I, No 53 of 23 January 2014.
[38] Published in the Official Gazette of Romania, Part I, No 644 of 21 October 2013.

Usually, granting a fairly wide margin of appreciation in relation to "institutional competence or expertise" occurs if the Constitutional Court is put in a position to assess compliance with the conditions provided for by Article 115 (4) of the Constitution for issuing emergency ordinances in a field with economic and financial implications. The issuance of such ordinances shall be carried out by the Government only in extraordinary situations whose regulation cannot be postponed, it having the obligation to motivate the urgency therein. As such, it is up to the Constitutional Court to assess whether or not the situation invoked by the Government is an extraordinary one so as to justify the issuance of the respective emergency ordinance.

"From the corroborated analysis of the substantiation note and the preamble to Government Emergency Ordinance No 174/2022, the Court notes that [...] the economic benchmarks, invoked by the Government in the preamble to the ordinance – among which some indicate the current state of the economy and others confirm its previous evolution, while some anticipate the future evolution of the economy –, are particularly important in assessing the extraordinary nature of the situation, but also the urgency of the regulation. Such extremely volatile events, with significant impact on the economy, such as those invoked by the Government in the preamble to the ordinance, require a prompt reaction from the delegated legislator in adopting legislative measures. Therefore, the Court notes that, in such circumstances, the Government's margin of appreciation regarding the extraordinary nature of a situation, which led it to adopt an emergency ordinance, may be wider" (Decision No 187/2023[39], para. 56)

"The Constitutional Court must take into account the specific matter in which the Government has adopted the emergency ordinance under review as regards compliance with this article of the Basic Law and, in particular situations, such as those related to fiscal-budgetary matters, grant the Government a wider margin of appreciation. The extraordinary situation and urgency of the regulation are not invariable notions, especially in a context characterized by a very strong dynamics, such as the fiscal-budgetary one, in which a multitude of constantly evolving factors must be taken into account, but notions that, from case to case, shall acquire different valences." (Decision No 200/2021[40], para. 36)

"The analysis of the preamble to Government Emergency Ordinance No 93/2012 and of its substantiation note led the Court to infer the factual/objective elements of the extraordinary situation. This situation is the result of a series of dysfunctions of the financial system, which, amid the tensions generated by the economic crisis, would lead to a loss of public confidence in the services provided by the entire financial system. Even if the dysfunctions of the financial system, viewed alone, are not of such a gravity as to damage public interest, combined with the tensions generated by the economic crisis, they may damage public interest; moreover, in assessing the latter situations, the Government enjoys a certain margin of appreciation." (Decision No 175/2014[41], para. I.4, and Decision No 309/2018[42], para. 20)

[39] Published in the Official Gazette of Romania, Part I, No 318 of 13 April 2023.
[40] Published in the Official Gazette of Romania, Part I, No 653 of 1 July 2021.
[41] Published in the Official Gazette of Romania, Part I, No 361 of 16 May 2014.
[42] Published in the Official Gazette of Romania, Part I, No 1064 of 17 December 2018.

5. Are there cases where your Court deferred because there was a risk of judicial error?
No.

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

The institutional and democratic legitimacy of the original or delegated legislator, as the case may be, confers on it, in certain situations, a margin of appreciation in adopting normative acts. By way of example, the following recitals from the Constitutional Court of Romania's case-law can be noted:

"Taking into account [...] the fact that, through its constitutional powers and all the institutional characteristics that it possesses, [...] the Government is best placed to guide and define the budgetary policy of the State and, as such, it shall give weight to the Government's assessment of the extraordinary nature of the situation having led it to adopt Government Emergency Ordinance No 99/2016 and, in particular, to maintain, in 2017, the measure of staggering salary payments due under court decisions" (Decision No 769/2020[43], para. 19)

"The distinct criticism formulated in relation to Article 101 (5) of the law ['If the number of students enrolled in the admission exam, for each specialization, is lower than the number of places available, the respective unit shall not have the right to organize an admission exam for the specialization in question for the following school year'] cannot be examined by the Constitutional Court in the light of the reasons invoked. Thus, Parliament is the public authority best placed to determine the conditions under which a school unit can organize an admission contest in the ninth grade, as well as the situations in which this right is withdrawn." (Decision No 340/2023[44], para. 155)

"The democratic legitimacy enjoyed by Parliament represents the exclusive constitutional basis that gives it the prerogative to configure the system of rights granted to its members so that they can fulfil the representative mandate acquired. It is therefore up to Parliament to assess the establishment of these rights, the criteria for granting them, their content, amount, method of calculation. Therefore, by opting for the old-age allowance, Parliament exercised its margin of appreciation in determining the rights attached to the status of Deputies and Senators. The repeal of the legal provisions establishing this right was done under the same margin of appreciation, considering that the other standardised rights represented a sufficient protection granted to the parliamentary mandate. The Court is not competent to substitute itself for this margin of appreciation and cannot establish that the removal of one or the other of the legal protection measures affects the constitutional level of protection of the representative mandate." (Decision No 678/2023[45], para. 40 and 42)

However, in its case-law, the Court noted that:

"The different political legitimacy of a public authority in relation to another cannot justify a breach of the duties/powers of the other public authority by such duties/powers being

[43] Published in the Official Gazette of Romania, Part I, No 145 of 12 February 2020.
[44] Published in the Official Gazette of Romania, Part I, No 595 of 29 June 2023.
[45] Published in the Official Gazette of Romania, Part I, No 1119 of 12 December 2023.

shifted and taken over by another public authority elected by vote." (Decision No 358/2018[46], para. 100)

The democratic legitimacy of Parliament, although not specifically stated, is transposed in the recitals of the decisions by reference to the fact that the measure adopted/criticised is based and forms part of the legislator's policy in that area.

"The legislator used precisely that discretion [in deciding whether and to what extent the differences between different similar situations justify different legal treatment] and laid down special conditions for obtaining compensatory payments in the defence industry system. [...] Such a stance has been supported by the legislative policy on economic and social issues. The choice of one criterion or another for the grant of social benefits pertains to the legislator's free assessment, provided that that criterion is not random and does not infringe the constitutional rights and principles." (Decision No 1648/2010[47])

"As regards the economic, financial and foreign currency policy of the State, [...] the State must ensure that national interests are protected in economic, financial and foreign currency activities. It is therefore the State that is developing a general economic policy, and it is the economic, financial and foreign/monetary policy that must facilitate social and economic development, and it is the obligation of the State, through its representative bodies, to carry out this constitutional task. Thus, pursuant to Article 61 (1) of the Constitution, according to which the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country, the legislative authority may and must adopt any solution it deems necessary and appropriate, of course, within the limits of the Basic Law, by which legal provisions circumscribed to the constitutional provisions on economic, financial and foreign exchange activity are transposed at infra-constitutional level in the aforementioned areas." (Decision No 414/2019[48], para. 139)

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

As indicated in point 2, criminal, economic, social, financial, monetary or budgetary policy issues call into question a wide margin of discretion on the part of the legislator. The Constitutional Court of Romania carries out a constitutional review of the concrete measures taken, without interfering with the policies pursued in these areas.

"The Court emphasised that it is not competent to assume itself the criminal policy of the State, and thus it is the legislator that has a wide margin of discretion in this area." (Decision No 101/2021, para. 82)

[46] Published in the Official Gazette of Romania, Part I, No 473 of 7 June 2018.
[47] Published in the Official Gazette of Romania, Part I, No 44 of 18 January 2011.
[48] Published in the Official Gazette of Romania, Part I, No 922 of 15 November 2019.

"It is the right of the legislator to develop legislative policy measures in the area of salaries in accordance with the economic and social conditions prevailing at some point in time." (Decision No 575/2011)

"It is for the legislator to assess not only the appropriateness of the remedies but also their scope." (Decision No 504/2011[49])

In the context of social policies to encourage family relationships based on marriage, the Constitutional Court grants the legislator a wide margin of discretion to adopt specific measures in this regard:

"As regards the grant of the pension only to the surviving spouse and not to the persons who have actually lived with the deceased, the legislator intended to protect and encourage stable and continuous relationships based on marriage. In that regard, the Court notes that the legislator has made the grant of a survivor's pension subject to a period of at least 10 years of marriage, which reflects not only an objective determination, which falls within the financial resources of the State which influence the determination of the criteria and limitations for the grant of social security rights, but also the intention to protect family life based on marriage. However, [...] the national legislator is free to lay down rules to support family relationships based on marriage and conferring rights specific to spouses. The Court considers that, in so far as it would encourage the assimilation of cohabitation relationships to relationships between spouses for the purposes of determining entitlement to a survivor's pension, the legislator would render relative the importance of the requirement relating to the duration of the marriage, weakening the protection afforded to that institution. [...]. The Court considers that, if it acknowledges that the number of years of marriage provided for by law in order to obtain a survivor's pension can be complemented by adding the period spent together out of wedlock, the Constitutional Court would replace, in breach of the principle of separation of powers in the State, the legislator, which […] enjoys exclusive competence to regulate the conditions governing the grant of social security rights taking into account both the protected social values and the available financial resources." (Decision No 699/2020[50], para. 33-35)

The legal transposition of constitutional concepts expressing a certain orientation of the State's social policy also falls within the legislator's wide discretion:

"The social State requires a certain degree of State intervention in addressing the various areas of social character existing in the social policy of the State. Establishing the degree of State intervention in the sphere of social rights and the concrete forms of intervention suitable for each stage of its development is an exclusive prerogative of Parliament, which can opt either for a massive unconditional State intervention in the social field (social democratic model) or for subsidiary intervention thereof, with the primary place resting with family, community, churches or trade unions (conservative-corporate model), or for minimal intervention where economic development is encouraged to address social problems (liberal model). By choosing one of the three models set out above, the State has a duty to create the conditions necessary to achieve optimal social security for its citizens, but it does not mean that it must create and maintain the whole system alone. The resources of the State alone are not enough in order to cope with these tasks, especially in situations of deep economic crisis,

[49] Published in the Official Gazette of Romania, Part I, No 506 of 18 July 2011.
[50] Published in the Official Gazette of Romania, Part I, No 49 of 15 January 2021.

so awareness must be raised on the fact that not only the State but also the community and individuals have mutual responsibilities, which are related obligations in this area.

[...] the State, in the course of its existence, may opt for different social security models, ranging from minimal intervention to maximum intervention; what's important is that the State does not give up its social function. The constitutional obligation imposed by Article 1 (3) is to intervene in favour of the citizen, so this constitutional text requires a positive attitude and action by the State. However, the degree of intensity of these interventionist measures may differ depending on the political vision and economic conditions of the State at a given time. Denying the possibility for the State or its legislative body to change its conception in that regard would amount to denying the evolution or denying the adaptation of the society to the existing factual situation.

Imposing the conservative-corporate model under the criticised law amounts to enshrining the principle of subsidiarity in the field of social security, namely, the State doubles the action of the community, the family and, ultimately, the citizen. But State intervention is still strong since it provides social assistance benefits to prevent and combat poverty and the risk of social exclusion, to support the child and the family, to support people with special needs or for special situations (Article 9 (1) of the Law), as well as services of a social nature (e.g. support and support services to ensure the basic needs of the person, personal care, rehabilitation, social integration/reintegration services – see in this regard Article 30 (1) of the contested law). Moreover, the existence of an institutional construction of the national social assistance system at both central and local level, coupled with precise and detailed procedures for obtaining social assistance benefits or services, demonstrates the interest of the State in the field of social assistance. Social welfare as an integral part of the social policy of the State is therefore an integral part of the concept of social welfare, and the State in this area can vary the intensity of its intervention without affecting Article 1 (3) of the Constitution. Only the very sharp reduction or abandonment of that intervention would lead to a breach of that constitutional concept, which, as has been pointed out, is not the case of the impugned law." (Decision No 1594/2011[51])

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

The Constitutional Court, in criminal matters, held that:

"Parliament is free to decide on the criminal policy of the State, in accordance with Article 61 (1) of the Constitution, as the sole legislative authority of the country. The Court also held that it did not have the power to engage in the legislative and criminal policy of the State, any contrary attitude constituting an interference with the competence of that constitutional authority." (Decision No 629/2014[52], para. 23)

"The Court has acknowledged that, in this area, the legislature enjoys a fairly wide margin of discretion, given that it is in a position which enables it to assess, on the basis of a number of criteria, the need for a particular criminal policy. However, although, in principle, Parliament enjoys exclusive competence to regulate measures relating to the criminal policy

[51] Published in the Official Gazette of Romania, Part I, No 909 of 21 December 2011.
[52] Published in the Official Gazette of Romania, Part I, No 932 of 21 December 2014.

of the State, that power is not absolute in the sense of excluding the exercise of constitutional review over the measures adopted. The criminalisation/decriminalisation of acts or the reconfiguration of the constituent elements of an offence falls within the legislator's discretion, which is not absolute and is limited by constitutional principles, values and requirements." (Decision No 405/2016[53], para. 66)

"The legislator must weigh the use of criminal law according to the protected social value, since the Constitutional Court may censure that the legislator's choice only if it is contrary to constitutional principles and requirements." (Decision No 824/2015[54], para. 25)

"Parliament may only exercise its power to criminalise and decriminalise antisocial acts in compliance with the rules and principles enshrined in the Constitution." (Decision No 2/2014)

"In the exercise of its constitutional power to legislate in the context of criminal policy, the legislator has the right, but also the obligation to defend certain social values, some of which identify themselves with the values protected by the Constitution (right to life and physical and psychological integrity – Article 22; right to protection of health – Article 34, right to vote – Article 36, etc.), by criminalising the acts adversely affecting them." (Decision No 62/2007[55], Decision No 2/2014, Decision No 405/2016, para. 67, Decision No 221/2023[56], para. 35 or Decision No 364/2023[57], para. 45)

"In so far as a criminal rule is contrary to the criminal policy of the State, it is possible to find an infringement of those fundamental rights and freedoms in respect of which the constitutional standard of protection has been disregarded. However, in so far as a legislative solution, which conflicts with the criminal policy of the State, affects all those fundamental rights or freedoms, in that it undermines the system of their protection as a whole, Article 1 (3) of the Constitution should be laid down as a reference provision, in its component relating to the rule of law. Such a measure not only affects certain social relations, but has the capacity/capability to undermine the entire system of guarantees associated with fundamental rights and freedoms. The Court will carry out a two-fold analysis, namely it will establish the clear relationship of conflict between the criminal rule adopted and the criminal policy of the State and then it will determine whether that relationship of conflict is such as to infringe specific fundamental rights/freedoms [of the defendant or other persons], or even the entire spectrum thereof." (Decision No 650/2018[58], para. 297 and 298)

"The criminal policy of the State, which is reflected primarily and mainly in the Criminal Code, has focused on the idea of reducing the special penalty limits and punishing more severely the plurality of offences [imposition of the highest penalty, to which an increase by one third of all the other penalties fixed is added]. However, the new legislative wording is an obvious relaxation of the system of penalties for concurrent offences, as compared with that in force; if the legislator has, in principle, the constitutional power to establish such an orientation of criminal policy, it must link the two axes which it took into account when drawing

[53] Published in the Official Gazette of Romania, Part I, No 517 of 8 July 2016.
[54] Published in the Official Gazette of Romania, Part I, No 122 of 17 February 2016.
[55] Published in the Official Gazette of Romania, Part I, No 104 of 12 February 2007.
[56] Published in the Official Gazette of Romania, Part I, No 505 of 9 June 2023.
[57] Published in the Official Gazette of Romania, Part I, No 661of 19 July 2023.
[58] Published in the Official Gazette of Romania, Part I, No 97 of 7 February 2019.

up the Criminal Code. Thus, if concurrent offences are to be punished more leniently, the legislator is under a constitutional obligation to increase the special penalty limits in order to make a correlation between them. Otherwise, the offender would be encouraged to commit several offences, because he knows that he is mainly punished for a single offence committed and the increase applied in these circumstances becomes insignificant. In those circumstances, the criminal policy of the State becomes contradictory: if this Criminal Code was initially given a preventive function, the envisaged form has the effect of encouraging the commission of as many concurrent offences as possible, because most of them would remain unpunished. Such a conception affects the basis of the rule of law as it is undeniable that criminal perseverance must be discouraged and punished harsher. This measure alters the State's criminal policy, as promoted and regulated by the Criminal Code in force. There is nothing to prevent the legislator from amending/changing the State's criminal policy, but this must be linked to the overall conception of the Criminal Code and in line with the requirements of the Constitution; this means that the State must strike a fair balance between the protection of the individual liberty of the offender and the fundamental rights and freedoms of other persons." (Decision No 650/2018, para. 303-306)

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The case-law of the Constitutional Court of Romania does not provide examples of the legislature's broad discretion in matters of national security. On the contrary, the Constitutional Court of Romania found that certain legal provisions concerning the use of classified information in criminal proceedings were unconstitutional.

"The impugned legislative solution breaks the fair balance between the public interests and individual interests, in that it attributes the decision to refuse access to classified information of probative value in criminal proceedings to an administrative authority, which amounts to an obstacle to the defendant's right to information, with direct consequences for his right to a fair trial, an obstacle which is not subject to any form of judicial review. In such a situation, access to classified information is subject not only to the procedural steps necessary in order to obtain an authorisation provided for by law, but, once the legal procedure has been completed and the necessary authorisations have been obtained, the defendant's defence counsel may be faced with a refusal by the issuing authority, which has the effect of effectively and absolutely blocking access to classified information. The legal consequences are all the more serious because the request for access to that information is not a matter for the defendant/defence counsel, but for the court hearing the case, which has previously found that that information is essential for the resolution of the criminal proceedings, by attributing probative value to it. However, in so far as evidence unknown to the defendant and his lawyer is used in criminal proceedings, even if, ultimately, it cannot be used to rule on a conviction, to waive the imposition of the sentence or to postpone the imposition of the sentence in question, but was taken into account in the document instituting the proceedings, on which the criminal

charge is based, it is clear that equality of arms and, therefore, a fair trial, can no longer be guaranteed." (Decision No 21/2018[59], para. 63)

"The Court cannot overlook the situation of a category of officials, who perform their duties almost exclusively in relation to classified documents/information (as is the case of the defendants in the case in which the present exception of unconstitutionality was raised, who are employed by an intelligence service). In such a situation, by excluding the classified evidence solely as a result of the will of the employing institution (since Article 352 (12) of the Code of Criminal Procedure provides that 'if the issuing authority does not allow the defendant's defence counsel to have access to the classified information, that information cannot be used to rule on a conviction, to waive the imposition of the sentence or to postpone the imposition of the sentence in question' - a/n), which is not subject to judicial review, may result in a genuine 'immunity' before the criminal law for that professional category, as regards offences committed in connection with the service, a conclusion which the Court holds to be inadmissible in a democratic society governed by the principles of the rule of law. The distinct, privileged legal status from the point of view of criminal liability contravenes the principle of equal rights of citizens." (Decision No 21/2018, para. 69)

"It is necessary for the defendant's lawyer, in order to ensure the effectiveness of his rights of defence, to initiate and follow the procedure in order to obtain the authorisations provided for by law, that is to say, be subject to the verification and control measures required by law in order to ensure the protection of classified information, in accordance with the constitutional provisions aimed at safeguarding national security. Therefore, the strict regulation of access to information classified as State secrets, including with regard to the establishment of conditions to be met by the persons who will have access to such information, does not have the effect of effectively and absolutely blocking access to information essential to the outcome of the case, but creates precisely the legislative framework within which two conflicting interests – the individual interest of the defendant, based on the fundamental right of defence, and the general interest of society, based on the need to safeguard national security – coexist in a fair balance, which gives satisfaction to both legitimate interests, with the result that none of them is affected in its substance.

[Acceptance of access to] classified information constituting, respectively, State secrets and professional secrecy for [all] lawyers would create a gap in the national system for the protection of classified information, that is to say, a professional category who would have access to such information in excess of the needs arising from each criminal case in which lawyers carry out assistance and representation activities. [...] for reasons of expediency, not all the employees of an institution have to obtain clearance certificates and that, otherwise, there is a risk of creating a gap in the national system for the protection of classified information which, unlike the activity inherent in the act of justice, cannot be covered by reliance on grounds of incompatibility or recusal. Consequently, [...] restrictions on access to classified information are a procedural remedy for situations in which the presumption of honesty or professionalism of the individual dealing with classified information is questioned." (Decision No 199/2021[60], para. 24 and 25)

[59] Published in the Official Gazette of Romania, Part I, No 175 of 23 February 2018.
[60] Published in the Official Gazette of Romania, Part I, No 640 of 30 June 2021.

"The Parliament cannot subrogate itself to the original competence of the executive power to declassify secret State information, as it has only the constitutional power to create the legislative framework necessary for declassification, and not the power to decide, by law, on that legal operation. The application of the law, its implementation in this matter, is a matter for the executive." (Decision No 74/2019[61], para. 136)

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

As has been pointed out, the Parliament has no absolute discretion in any field. The margin of discretion is narrower or broader, so that exceeding it may be penalised by the Constitutional Court. The variability of the margin of discretion requires the intervention of the Constitutional Court in order to protect both the constitutive and the attributive dimensions of the Constitution and the fundamental rights and freedoms. The intensity of the review of constitutionality is directly proportional to the nature of the area concerned and to the margin of discretion enjoyed by the legislator. In other words, in areas where the legislator's discretion is wide, the intensity of the Constitutional Court's assessment of the legislative policy in that area is lower and may even take the form of observations.

"The Court wishes to point out that, although the legislator has the right, under the Basic Law, to regulate the remuneration of teaching and auxiliary teaching staff, the fact remains that, in the relevant legislative activity, the legislator must take account of the fact that education is a national priority and that the remuneration of teaching and auxiliary teaching staff must be consistent with the role and importance of the activity carried out." (Decision No 212/2015[62], para. 35)

"The intensity of the review (level of scrutiny) which it carries out in the context of that power [resolution of legal disputes of a constitutional nature – a/n] in order to ensure the supremacy of the Constitution is lower in terms of attainment of the purpose of the law, but it is high in terms of the result/purpose laid down by law to be achieved." (Decision No 417/2019[63], para. 160)

II. The decision-maker

Laura-Iuliana Scântei, judge
Benke Károly, first-assistant-magistrate

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

[61] Published in the Official Gazette of Romania, Part I, No 200 of 13 March 2019.
[62] Published in the Official Gazette of Romania, Part I, No 323 of 13 May 2015.
[63] Published in the Official Gazette of Romania, Part I, No 825 of 10 October 2019.

According to Article 146 of the Constitution, the Constitutional Court carries out the constitutional review of laws and ordinances or emergency ordinances adopted by the Government. The latter acts adopted by the Government are delegated legislative acts which have the legal force of laws but are subject to approval by Parliament.

In carrying out the review of constitutionality, the Court does not draw any distinction based on any different level of democratic accountability of the Parliament or the Government. The Court examines the act subject to review on the basis of its legislative nature, without the level of its review varying according to the author of the act, that is to say, an aspect which is external to its normative content.

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

In its decisions, the Court rarely observes how, in the legislative procedure, the parliamentary committees referred to the fundamental rights and freedoms in question. Even though the Court mentions reports of parliamentary committees in its decision, in the context of the legislative procedure conducted, their conclusions are not analysed and, as such, are not decisive in the assessment of the constitutionality of the law. Where appropriate, the opinions of the stakeholders (Legislative Council – specialised body of the Parliament) are relied on in support of the possible constitutionality or unconstitutionality of the law, after the primary analysis was carried out by the Constitutional Court of Romania, practically to legitimise the solution reached by the Constitutional Court (Decision No 198/2021[64], para. 59).

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

In the Romanian constitutional system, the draft law or legislative proposal must be accompanied by an explanatory memorandum. That explanatory memorandum is taken into account in the process of assessing the constitutionality of the law only as part of the methods for interpreting the provisions subject to review (Decision No 238/2020[65]). The justification for the decision to legislate usually takes into account the element of legislative expediency and cannot be subject to constitutional review. The only case in which the justification for the decision to legislate is analysed arises where the legal provisions found to be unconstitutional are brought into line with the decisions of the Constitutional Court of Romania (Decision No 466/2019[66], Decision No 467/2019[67]). However, there have been situations where the Court analysed how the Parliament justified the substance of the legislative solution promoted and the lack of such justification led to a declaration of unconstitutionality of that law (Decision No 153/2020[68]).

[64] Published in the Official Gazette of Romania, Part I, No 421 of 21 April 2021.
[65] Published in the Official Gazette of Romania, Part I, No 666 of 28 July 2020.
[66] Published in the Official Gazette of Romania, Part I, No 862 of 25 October 2019.
[67] Published in the Official Gazette of Romania, Part I, No 765 of 20 September 2019.
[68] Published in the Official Gazette of Romania, Part I, No 489 of 10 June 2020.

On the other hand, with regard to the legislative acts of the Government, which must be accompanied by a substantiation note, the Court examines whether the Government has justified its decision to legislate, since those legislative acts are adopted under the strict conditions laid down in Article 115 of the Constitution.

As to the merits of the legislation, the Court assesses the legislative solution from its own primary perspective, without substituting itself to the political decision-maker. In the case of interim decisions delivered by the Constitutional Court, it can be observed that the Constitutional Court attaches meanings or interpretations or additive/complement solutions to the law which indicate quite clearly that, had it been the decision-maker, that legislation, in terms of its constitutionality, should have included other requirements/assumptions and that the Court would thus have reached another decision. In this regard, an illustrative decision is Decision No 136/2021[69], in which the Court, in essence, held that compensation for deprivation of liberty in the course of criminal proceedings cannot be limited solely to the situation in which that measure was taken unlawfully, but must also include the situation in which such a measure was unfair in view of the purpose of the judicial proceedings (the person was ultimately acquitted).

It is precisely those interim decisions which show that the paradigm in which the Constitutional Court operates is that of carrying out a separate assessment, as in the case of a primary decision-maker.

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

As stated in the reply to question 12, the Court does not show deference on the manner in which the assessment of the conformity of the law with fundamental rights and freedoms was carried out during the parliamentary procedure. The Court carries out its own assessment of the constitutionality of the law, regardless of the depth of the parliamentary debate on the compatibility of the law with fundamental rights.

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

In the case-law of the Constitutional Court, it was held that "*regulatory autonomy confers on the Chambers of Parliament the right to decide on their own organisation and on the procedures for the conduct of parliamentary activity, but that right may not be exercised in a discretionary, abusive manner, in breach of Parliament's constitutional powers or of the mandatory rules relating to parliamentary procedure; the regulatory rules are the legal instruments enabling parliamentary activities to be carried out for the performance of the*

[69] Published in the Official Gazette of Romania, Part I, No 494 of 12 May 2021.

constitutional functions of the legislative forum and must be interpreted and applied in good faith and in a spirit of loyalty to the Basic Law." (Decision No 209/2012[70])

"The Constitutional Court does not also have jurisdiction to rule on the arrangements for the application of parliamentary regulations." (Decision No 44/1993[71], Decision No 68/1993[72], Decision No 22/1995[73], Decision No 98/1995[74], Decision No 710/2009[75], Decision No 786/2009[76], Decision No 1466/2009[77], Decision No 209/2012, Decision No 738/2012[78], No 260/2015[79], para. 18, or Decision No 223/2016[80], para. 33 and 34)

"Regulatory autonomy cannot be exercised in a discretionary manner, in breach of Parliament's constitutional powers." (Decision No 209/2012)

"[With regard to the complaint that – a/n] the report of the Joint Special Committee drawn up in the course of the proceedings before the Chamber of Deputies was circulated to Deputies on the very day of the vote, that is to say, in breach of the deadline of at least 5 days before the date set for the discussion of the draft law or the legislative proposal in the plenary session of the Chamber of Deputies, [the Court found that - a/n] failure to comply with the deadline for submitting the report constitutes an issue of application of the regulations of the two Chambers. In other words, the subject-matter of the complaint of unconstitutionality is, in fact, the manner in which, subsequent to the submission of the report by the Joint Special Committee of the Chamber of Deputies and the Senate for systematisation, unification and guarantee of legislative stability in the field of justice, the parliamentary rules and procedures for the adoption of the law were complied with. However, in so far as the regulatory provisions relied on in support of the complaints are of no constitutional relevance, since they are not expressly or implicitly enshrined in a constitutional provision, the questions raised by the authors of the referral do not constitute questions of constitutionality, but of the application of the regulatory rules." (Decision No 650/2018, para. 214 and 216)

"In all constitutional rules, the provisions containing incidental procedural rules relating to law-making are linked and subsumed to the principle of legality enshrined in Article 1 (5) of the Constitution, a principle which in turn underpins the rule of law, expressly enshrined in the provisions of Article 1 (3) of the Constitution. Moreover, the Venice Commission, in its report entitled Rule of Law Checklist, adopted at its 106th Plenary Session (Venice, 11-12 March 2016), also states that the procedure for the adoption of laws is a criterion for assessing legality, which is the first of the reference values of the rule of law (Section IIA5). In that regard, according to the same document, the following, inter alia, are also relevant: the existence of clear constitutional rules concerning the legislative procedure, public debates on draft laws, their adequate justification and the existence of impact assessments before the laws are adopted. As regards the role of these procedures, the

[70] Published in the Official Gazette of Romania, Part I, No 188 of 22 March 2012.
[71] Published in the Official Gazette of Romania, Part I, No 190 of 10 August 1993.
[72] Published in the Official Gazette of Romania, Part I, No 12 of 19 January 1993.
[73] Published in the Official Gazette of Romania, Part I, No 64 of 7 April 1995.
[74] Published in the Official Gazette of Romania, Part I, No 248 of 31 October 1995.
[75] Published in the Official Gazette of Romania, Part I, No 358 of 28 May 2009.
[76] Published in the Official Gazette of Romania, Part I, No 400 of 12 June 2009.
[77] Published in the Official Gazette of Romania, Part I, No 893 of 21 December 2009.
[78] Published in the Official Gazette of Romania, Part I, No 690 of 8 October 2012.
[79] Published in the Official Gazette of Romania, Part I, No 318 of 11 May 2015.
[80] Published in the Official Gazette of Romania, Part I, No 349 of 6 May 2016.

Commission notes that the rule of law is linked to democracy in that it promotes accountability and access to rights that limit the powers of the majority.

The establishment of clear rules concerning the legislative procedure, including at the level of the Basic Law, and compliance with the rules thus established are a safeguard against the misuse of powers by parliamentary majority, thus a guarantee of democracy. In so far as the rules on legislative procedure are enshrined at constitutional level, the Constitutional Court has jurisdiction to rule on the way in which the laws adopted by Parliament comply with them and to adequately sanction their infringement." (Decision No 128/2019[81], para. 32 and 33)

"This means that accelerated legislation, without the urgency procedure having been approved beforehand, cannot be carried out as part of the general procedure for the adoption of laws, since it goes beyond the constitutional reference framework and is contrary to Articles 75 and 76 (3) of the Constitution, which are the basis for democratic debates in Parliament and which, by virtue of their value, presuppose an exchange of ideas between those exercising national sovereignty. The avoidance or limitation of parliamentary debates by unduly shortening time limits, without complying with the express constitutional provisions to that effect, denotes an infringement of a fundamental value of the State, namely its democratic nature. From an axiological point of view, parliamentary debates in their common/general form are intrinsically linked to democracy, so that any deviation from it must be carried out only under the conditions and limits laid down by the Constitution. Disregarding that highest value places the addressee of the legal rule in a situation of perpetuating legal uncertainty. Thus, although, prima facie, it appears that the Parliament has failed to comply with just one procedural aspect, in fact, the consequences that that irregularity entails might be serious from a formal point of view, affecting the idea of democracy and legal certainty in their substance." (Decision No 261/2022[82], para. 75)

It may therefore be stated that, in some cases, few in number, the Court reviews the conduct of the parliamentary procedure, as a question of formal/extrinsic constitutionality, observance of which is the prerequisite for the representation of all opinions in parliamentary debate. In other words, for the Court, the guarantee of compliance with the procedure also represents, by default, respect for the essential content of parliamentary debate.

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

Article 2 of the Romanian Constitution provides that national sovereignty belongs to the Romanian people, who shall exercise it through their representative bodies, resulting from free, periodic and fair elections, as well as by means of a referendum.

Article 90 of the Constitution provides that the President of Romania may, after consultation with Parliament, ask the people of Romania to express, by referendum, their will on matters of national interest.

[81] Published in the Official Gazette of Romania, Part I, No 189 of 8 March 2019.
[82] Published in the Official Gazette of Romania, Part I, No 570 of 10 June 2022.

At the same time, Article 74 (1) of the Romanian Constitution provides that the legislative initiative shall lie, as the case may be, with the Government, Deputies, Senators, or a number of at least 100,000 citizens entitled to vote. The citizens who exercise their right to legislative initiative must belong to at least one quarter of the country's counties, while, in each of those counties or the Municipality of Bucharest, at least 5,000 signatures should be registered in support of such initiative. In accordance with Article 150 (1) of the Constitution, revision of the Constitution may be initiated by the President of Romania at the proposal of the Government, by at least one quarter of the number of Deputies or Senators, as well as by at least 500,000 citizens with the right to vote.

Whether a law is adopted following a governmental, parliamentary or citizens' initiative, or the results of an advisory referendum, it will enjoy the same democratic legitimacy. Consultations and public debates define the shape of the legislative initiative and attach a certain content thereto, without, however, the assessment of the constitutionality of the law being deferent in relation to the ideas, thesis or conceptions debated and promoted.

A valid advisory referendum or a citizens' initiative does not always have the expected effect, i.e. the adoption of a law in accordance with the outcome of the referendum or the citizens' initiative.

Thus, an advisory referendum was held on 22 November 2009, the validated outcome of which was the switching to a unicameral Parliament composed of 300 members, but the initiative to revise the Constitution in accordance with the outcome of the referendum was not adopted and was rejected by Parliament. (2012)

Also, on 26 May 2019, an advisory referendum was held, the validated result of which was to prohibit amnesty and pardon in respect of persons convicted of corruption offences, but, prior to any action of the Parliament on the initiative to revise the Constitution, in line with the outcome of the referendum, the initiative was declared unconstitutional. The Constitutional Court found that:

"The general prohibition on granting amnesty or pardon in respect of 'acts' of corruption has the effect of denying persons who have committed acts of corruption the right to benefit from the act of amnesty or pardon. Such legal treatment, regardless of its regulatory level, disregards the human existence of the individual, placing human beings who committed "acts" of corruption in a situation of inferiority, thus limiting their human dignity. The legislative proposal for the revision of the Romanian Constitution excessively restricts the State's power and discretion, which unjustifiably affects the exercise of public power in favour/benefit of citizens. Thus, as a result of the limitation of public power, a category of citizens is deprived of a right on grounds of a circumstantial nature, contrary to human dignity. The Court thus finds that the envisaged measure constitutes a disrespect of the subjective principles characterising the human being, which constitutes, in the light of Article 152 (2) of the Constitution, an infringement of human dignity." (Decision No 464/2019[83], para. 54)

Similarly, a citizens' initiative to revise the Constitution for the purposes of defining marriage as a freely consented union between a man and a woman – and not between spouses – was adopted in Parliament, but it could not be approved by the referendum held on 6-7

[83] Published in the Official Gazette of Romania, Part I, No 646 of 5 August 2019.

October 2018, due to the absence of a legal quorum for participation, for which reason the referendum was invalidated by the Constitutional Court. (Ruling No 2/2018[84])

III. Rights' scope, legality and proportionality

Gheorghe Stan, judge
Cristina Titirișcă, assistant-magistrate

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

The principle of separation and balance of powers presupposes the existence of reciprocal control between the powers of the State with regard to the exercise of their specific powers in accordance with the law, which is a mechanism specific to the rule of law and democracy in order to avoid abuse by one or other of the powers of the State[85]. To that effect, the Constitutional Court analysed the concept of constitutional loyalty and, therefore, the principle of sincere cooperation between State institutions, which is not constitutionally enshrined, but the importance of which in the context of the mechanisms inherent in the rule of law was revealed in the settled case-law of the Constitutional Court, which it attached to the normative content of Article 1 (5) of the Constitution[86]. Thus, the Court held[87] that a first component of the rule of law is the implementation of the explicit and formal provisions of the law and of the Constitution. In other words, in terms of sincere cooperation between State institutions/authorities, an initial meaning of the concept is compliance with the rules of positive law, in force for a given period of time, expressly or implicitly governing powers, prerogatives, tasks, obligations or duties of State institutions/authorities.

The Court found that respect for the rule of law is not limited to this component, but involves, on the part of the public authorities, constitutional behaviour and practices, which have their origin in the constitutional normative order, regarded as a set of principles that underpin the social, political and legal relations of a society. In other words, this constitutional normative order has a broader meaning than the positive norms enacted by the legislator, constituting the constitutional culture specific to a national community. Therefore, sincere cooperation implies, beyond respect for the law, mutual respect of state authorities/institutions, as an expression of constitutional values assimilated, assumed and promoted, in order to ensure balance between state powers. Constitutional loyalty can therefore be characterised as a value-principle intrinsic to the Basic Law, while sincere cooperation between state authorities/institutions plays a defining role in the implementation of the Constitution. As the

[84] Published in the Official Gazette of Romania, Part I, No 1012 of 29 November 2018.
[85] Decision No 1109 of 8 September 2011 of the Constitutional Court, published in the Official Gazette of Romania, Part I, No 773 of 2 November 2011.
[86] Article 1 of the Constitution – The Romanian State: "(1) Romania is a sovereign, independent, unitary and indivisible National State. (2) The form of government of the Romanian State is the Republic. (3) 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 democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed. (4) The State shall be organized based on the principle of the separation and balance of powers – legislative, executive, and judicial – within the framework of constitutional democracy. (5) In Romania, the observance of the Constitution, of its supremacy and that of the laws shall be mandatory".
[87] Decision No 611 of 3 October 2017 of the Constitutional Court, published in the Official Gazette of Romania, Part I, No 877 of 7 November 2017.

Venice Commission pointed out, "respect for the Constitution cannot be limited to the literal execution of its operational provisions. The Constitution by its very nature, in addition to guaranteeing human rights, provides a framework for state institutions, establishes their duties and obligations. The purpose of these provisions is to enable the proper functioning of the institutions on the basis of sincere cooperation between them. The head of state, the Parliament, the Government, the judiciary, all serve the common purpose of promoting the interests of the country as a whole, not the narrow interests of a single institution or of a political party that has appointed the holder of the office. Even if an institution is in a situation of power, when it is able to influence other state institutions, it must do so in view of the interest of the state as a whole, including, as a consequence, the interests of the other institutions and those of the parliamentary minority" (Venice Commission on the compatibility with constitutional principles and the rule of law of the actions of the Romanian Government on other state institutions and the Government Emergency Ordinance amending Law No 47/1992 on the organisation and functioning of the Constitutional Court and the Government Emergency Ordinance amending and supplementing Law No 3/2000 on the organisation and conduct of the referendum in Romania, opinion adopted at the 93rd Plenary Session/Venice, 14-15 December 2012, par. 87). The institutional conduct that falls within the scope of sincere cooperation has, therefore, an *extra legem* component, based on constitutional practices, which have as their primary purpose the proper functioning of the state authorities, the good administration of public interests and respect for the fundamental rights and freedoms of citizens. The secondary purpose is to avoid interinstitutional conflicts and remove blockages in the exercise of their legal prerogatives. The instruments that compete in achieving these goals and demonstrate loyal behaviour towards constitutional values are institutional dialogue and the establishment of mutually accepted practices. These instruments must form the basis for resolving "together", "by the parties' agreement", and not "against", "to the detriment" of one or another, of any disputes arising in the relations between authorities, caused by confusing, equivocal factual or legal situations. By virtue of the principle of sincere cooperation between authorities, it is therefore necessary for each of them to exercise reasonable and increased due diligence in the framework of the legal institutional dialogue in order to avoid as far as possible the generation of legal conflicts of a constitutional nature. Indisputably, sincere cooperation involves only solutions in accordance with the constitutional normative order, since their basis may be *extra legem*, not at all *contra legem*. Thus, the conduct of the parties who, in order to avoid a conflict, adopt a solution contrary to the legal or constitutional norms in force cannot be classified as sincere cooperation. It is obvious that a clear, rigorous, predictable and exhaustive legislative framework is such as to remove potential interinstitutional conflicts, but the legislator, even the constitutional one, cannot be criticised for the fact that the adopted legislative solutions do not include in their normative hypotheses all the possible situations which the reality (social, political, legal), mutable in its essence, can generate. In that light, the concept of sincere cooperation cannot have a stable, concrete, quantifiable content, but, on the contrary, it is a dynamic one, variable from one case to another, depending on the actors involved, but also from one era to another, depending on the evolution of the legislative framework governing inter-institutional relations or the existence of good practices/equities governing those relationships. However, what can be established on a permanent basis is that the loyalty of state institutions/authorities must always be manifested towards constitutional principles and values, while inter-institutional relations must be governed by dialogue, balance and mutual respect.

In the light of these considerations, the Court noted that the role of contributing to the shaping of the principle of sincere collaboration and mutual respect lies mainly with the institutions/authorities in a position to cooperate. It is for them to shape/structure the possible forms that a loyal conduct can adopt, in relation to the legal powers of each of the institutions/authorities in collaboration and in relation to the constitutional values and principles relevant to the respective cooperation. Cooperation must be done in the forms provided by the law, and where the law is silent, public authorities must identify and establish, in good faith, those forms of cooperation which value the constitutional normative order and do not prejudice the constitutional principles under which they operate and relate, nor the fundamental rights or freedoms of the citizens in whose service they carry out their activity. Good faith must therefore be manifested in order to find solutions that overcome the possible institutional blockages and that ensure the efficient functioning of each authority, in accordance with the powers conferred by law. In the event that the identification of these good practices is difficult to achieve and the resolution of inter-institutional disputes fails, public authorities have the possibility to appeal to constitutional instruments of mediation, namely to the procedure of resolving conflicts of a constitutional nature, provided for in Article 146 e) of the Constitution, which aims precisely to restore the constitutional normative order, by interpreting the norms of the relevant Basic Law and establishing concrete benchmarks of loyal conduct towards constitutional values and principles.

In the light of these jurisprudential references, it follows that the Romanian Constitutional Court acts as mediator between the powers of the State and does not give precedence to the rights/competences of one institution over another. The Court shall judge in the light of the observance of the powers conferred by the Constitution.

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

No. As regards human rights, according to Article 20 of the Constitution, "(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to." (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions." Romania has become party to the Convention for the protection of human rights and fundamental freedoms following its ratification by Law No 30/1994, published in the Official Gazette of Romania, Part I, No 135 of 31 May 1994, assuming the obligation to comply with the provisions of this Convention, as well as the interpretation given by the European Court of Human Rights to this Convention, within the limits laid down in that Convention, in accordance with the provisions of Article 46, according to which "the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties"[88].

[88] See, in this respect, Decision No 233 of the Constitutional Court of 15 February 2011, published in the Official Gazette of Romania, Part I, No 340 of 17 May 2011.

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

The Constitutional Court of Romania has a rich jurisprudence on the quality of the law, which are the principle considerations by reference to which, in the case before the court, the criticism of unconstitutionality regarding the violation of the principle of legality is analysed in its component on the quality of the law/regulation. The Court, in its case-law, established that the essential feature of the rule of law is the supremacy of the Constitution and the obligation to respect the law[89] and that "the rule of law ensures the supremacy of the Constitution, the correlation of all laws and all regulatory acts with it"[90], which means that it "involves, as a priority, compliance with the law, and the democratic state is, par excellence, a state where the rule of law prevails"[91]. The Court also noted that "the principle of legality is one of constitutional rank",[92]so that "the violation of the law immediately results in disregarding Article 1 paragraph (5) of the Constitution, which provides that compliance with laws is mandatory. The violation of this constitutional obligation implicitly entails the application of the principle of the rule of law, enshrined in Article 1 paragraph (3) of the Constitution"[93]. According to the Court's case-law regarding the violation of the constitutional provisions of Article 1 (5) in its component on the quality of the law, one of the requirements of the principle of compliance with laws concerns the quality of regulatory acts[94]. In order to be complied with by its addressees, the law must meet certain requirements of precision, clarity and predictability so that those addressees can adapt their conduct accordingly. In this respect, the Constitutional Court has held in its case-law that, as a matter of principle, any regulatory act must satisfy certain qualitative conditions, including predictability, which presupposes that it must be sufficiently precise and clear to be applied; thus, the wording of the regulatory act with sufficient precision allows the persons concerned – who may, if necessary, seek the advice of a specialist – to foresee to a reasonable extent, in the circumstances of the case, the consequences that may result from a particular act. Of course, it may be difficult to draft laws of complete precision and a certain suppleness may even prove desirable, suppleness which must not, however, affect the predictability of the law[95]. At the same time, the Constitutional Court referred to the case-law of the European Court of Human Rights, which found that the meaning of the concept of predictability depends to a large extent on the context of the text in question, the scope it covers and the number and quality of its addressees[96]. The predictability

[89] Decision of the Constitutional Court No 232 of 5 July 2001, published in the Official Gazette of Romania, Part I, No 727 of 15 November 2001, Decision of the Constitutional Court No 234 of 5 July 2001, published in the Official Gazette of Romania, Part I, No 558 of 7 September 2001, or Decision of the Constitutional Court No 53 of 25 January 2011, published in the Official Gazette of Romania, Part I, No 90 of 3 February 2011.

[90] Decision of the Constitutional Court No 22 of 27 January 2004, published in the Official Gazette of Romania, Part I, No 233 of 17 March 2004.

[91] Decision of the Constitutional Court No 13 of 9 February 1999, published in the Official Gazette of Romania, Part I, No 178 of 26 April 1999.

[92] Decision of the Constitutional Court No 901 of 17 June 2009, published in the Official Gazette of Romania, Part I, No 503 of 21 July 2009.

[93] Decision of the Constitutional Court No 783 of 26 September 2012, published in the Official Gazette of Romania, Part I, No 684 of 3 October 2012.

[94] Decision of the Constitutional Court No 1 of 10 January 2014, published in the Official Gazette of Romania, Part I, No 123 of 19 February 2014, paragraph 225.

[95] Decision of the Constitutional Court No 743 of 2 June 2011, published in the Official Gazette of Romania, Part I, No 579 of 16 August 2011, Decision of the Constitutional Court No 1 of 11 January 2012, published in the Official Gazette of Romania, Part I, No 53 of 23 January 2012 or Decision of the Constitutional Court No 447 of 29 October 2013, published in the Official Gazette of Romania, Part I, No 674 of 1 November 2013

[96] Decision of the Constitutional Court No 772 of 15 December 2016, published in the Official Gazette of Romania, Part I, No 315 of 3 May 2017, para. 22 and 23.

of the law does not preclude the person concerned from being required to seek a good advice in order to assess, at a reasonable level in the circumstances of the case, the consequences that might arise from a particular action[97]. In the light of the principle of general applicability of laws, the Strasbourg Court held that their wording could not be absolutely precise. One of the standard regulatory techniques consists of resorting mor to general categories rather than exhaustive lists. Thus, many laws use, by force of things, more or less vague formulas, the interpretation and application of which depend on practice. However clearly a legal rule may be drafted, in any legal system, there is an inevitable element of judicial interpretation. The need to elucidate unclear points and adapt to changing circumstances will always exist. Again, while certainty is highly desirable, it could lead to excessive rigidity, but the law must be able to adapt to changes in the situation. The decision-making role conferred on the courts is precisely aimed at removing the doubts which persist when interpreting the rules, since the progressive development of law through case-law as a source of law is a necessary and well-rooted component in the legal tradition of the Member States.

As such, according to the settled case-law of the Constitutional Court, the law must meet the three quality requirements resulting from Article 1 (5) of the Constitution – clarity, precision and predictability. The Court has held that compliance with laws is mandatory, but a legal subject cannot be required to comply with a law which is not clear, precise and predictable, since they cannot adapt their conduct according to the normative hypothesis of the law. That is why one of the requirements of the principle of compliance with laws concerns the quality of regulatory acts. Therefore, any regulatory act must satisfy certain qualitative conditions, i.e. be clear, precise and predictable.[98] It is therefore incumbent upon the legislator, in the regulatory act, irrespective of the area in which it exercises that constitutional power, to show increased attention in the compliance with the principle of clarity and predictability of the law. The Court has held that the requirement of clarity of the law concerns the unequivocal nature of the subject matter of the regulation, that of precision refers to the accuracy of the chosen legislative solution and the language used, whereas the predictability of the law concerns the purpose and consequences it entails[99]. The Court also held that the legislator must refer to regulations which are a benchmark of clarity, precision and predictability, and that errors of assessment in the drafting of regulatory acts must not be perpetuated in the sense of themselves becoming a precedent in the legislative activity; on the contrary, these errors must be corrected in order for the regulatory acts to contribute to achieving greater security of legal relations[100].

As regards the rule of interpretation *In claris non fit interpretatio*, it can be applied in the analysis of the incidence of binding acts of the European Union in the context of the constitutionality review, respectively if the author of the referral of unconstitutionality invokes non-compliance with the provisions of Article 148 of the Constitution[101]. In this regard, the

[97] Judgment of 24 May 2007 in Dragotoniu and Militaru-Pidhorni v. Romania, par. 35, and Judgment of 20 January 2009 in Sud Fondi – S.R.L. and Others v. Italy, par. 109.

[98] For example, Decision No 1 of the Constitutional Court of 10 January 2014, published in the Official Gazette of Romania, Part I, No 123 of 19 February 2014, para. 223-225, Decision of the Constitutional Court No 363 of 7 May 2015, published in the Official Gazette of Romania, Part I, No 495 of 6 July 2015, para. 16-20, Decision of the Constitutional Court No 603 of 6 October 2015, published in the Official Gazette of Romania, Part I, No 845 of 13 November 2015, para. 20-23, or Decision of the Constitutional Court No 405 of 15 June 2016, published in the Official Gazette of Romania, Part I, No 517 of 8 July 2016, para. 45, 46, 55.

[99] Decision of the Constitutional Court No 183 of 2 April 2014, published in the Official Gazette of Romania, Part I, No 381 of 22 May 2014, par. 23.

[100] Decision of the Constitutional Court No 390 of 2 July 2014, published in the Official Gazette of Romania, Part I, No 532 of 17 July 2014, par. 32.

[101] Article 148 – Integration into the European Union – "(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a

Court held that "the use of a rule of European law in the context of the constitutional review as a rule interposed to the reference one entails, pursuant to Article 148 (2) and (4) of the Constitution of Romania, cumulative conditionality: on the one hand, that rule must be sufficiently clear, precise and unequivocal in itself, or its meaning must have been clearly, precisely and unequivocally established by the Court of Justice of the European Union, and, second, the rule must be confined to a certain level of constitutional relevance, so that its normative content supports the possible breach by national law of the Constitution – the only direct reference rule in the context of constitutional review.[102]"

20. What is the intensity review of your Court in case of the legitimate aim test?

In order to carry out the proportionality test, the Constitutional Court of Romania determines, first, the aim pursued by the legislator through the measure criticised and whether it is a legitimate one, since the proportionality test will be able to relate only to a legitimate aim. It is an empirical analysis, as the Court analyses, for example, the economic context or the explanatory memorandum of the legislative measure promoted by the primary or delegated legislator. The first text of proportionality was drafted by the Court by Decision No 266 of 21 May 2013 on the exception of unconstitutionality of the provisions of Article 82 of Audiovisual Law No 504/2002, published in the Official Gazette of Romania, Part I, No 443 of 19 July 2013.

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

The text of Article 53 of the Constitution lays down the conditions and limits of the restriction of the exercise of certain rights or freedoms[103]. It takes into account the fundamental rights and freedoms enshrined in Chapter II of Title II of the Constitution of Romania. According to the principle of proportionality, any measure taken must be appropriate – objectively capable of achieving the goal, necessary – indispensable for the achievement of the aim and proportionate – the right balance between the specific interests in order to be fit for the purpose pursued. Thus, in order to carry out the proportionality test, the Court must, first

law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators. (2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. (3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union. (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented. (5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval."

[102] Decision of the Constitutional Court No 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, No 286 of 28 April 2015, or Decision of the Constitutional Court No 668 of 18 May 2011, published in the Official Gazette of Romania, Part I, No 487 of 8 July 2011.

[103] Article 53. – Restriction on the exercise of certain rights or freedoms – (1) The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.
(2) Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom."

of all, determine the aim pursued by the legislator by the criticised measure and whether that measure is legitimate, since the proportionality test may relate only to a legitimate aim[104].

22. Does your Court go through every applicable limb of the proportionality test?

Yes.

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

No. The Constitutional Court of Romania assesses regulatory acts by reference to constitutional norms and principles, and the framework in which it judges is determined by the law and by the referral that is the subject of the Court's analysis.

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

No. The proportionality test is applicable in cases where non-compliance with Article 53 of the Constitution is invoked.

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of appreciation your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

No. The requirements arising from the case-law of the European Court of Human Rights regarding the application of the principle of proportionality have been accepted in the case-law of the Constitutional Court of Romania, and the standard of protection of fundamental rights governed by the Constitution of Romania is not lower than that established by the Convention for the protection of human rights.

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

No.

IV. Other peculiarities

Gheorghe Stan, judge
Cristina Titirișcă, assistant-magistrate

[104] Decision of the Constitutional Court No 462 of 17 September 2014, published in the Official Gazette of Romania, Part I, No 775 of 24 October 2014.

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

The powers of the Constitutional Court of Romania are expressly and exhaustively provided by Article 146 of the Constitution and, correlatively, by Law No 47/1992 on the organisation and functioning of the Constitutional Court, republished[105], as subsequently amended and supplemented. The same regulatory acts also establish the legal subjects entitled to bring the matter before the Constitutional Court of Romania. As such, the Constitutional Court is subject only to the Constitution and its organic law of organisation and functioning, and, as the sole authority of independent constitutional jurisdiction, the Court alone has the right to decide, in the exercise of its duties, on its competence, which cannot be challenged by any other public authority[106].

At the same time, the Constitutional Court judges within the limits of its referral, and the possibility of extending its analysis to other legal provisions than those mentioned in the referral by its author is regulated separately in the case of *a priori* constitutionality review, subject to the Court's assessment that the legal provisions on which it extends its analysis "necessarily and obviously cannot be dissociated" from those in respect of which it has already been invested[107], as well as in the case of the *a posteriori* constitutionality review, subject to the admission of the exception of unconstitutionality, in which case "the Court will also rule on the constitutionality of other provisions of the contested act, from which, necessarily and obviously, the provisions mentioned in the referral cannot be dissociated"[108].

Therefore, in the light of the foregoing, the judicial reference is not a ground of unconstitutionality to be relied upon by the parties, so that statistics can be drawn up in this respect of the number of cases in which it is invoked. The judicial reference, understood as a margin of appreciation/opportunity of law-making, is invoked by the Constitutional Court of Romania on a case-by-case basis, depending on the reasoning leading to a solution or another of the Court, being one of the arguments on the basis of which that solution is based. Moreover, in the light of the Constitution and of Law No 47/1992, judicial deference is not an element in respect of which there is an obligation to invoke or analyse it in the recitals of the Court's decision.

28. Has your Court have grown more deferential over time?

Judicial deference, i.e. the margin of appreciation of the primary or delegated legislator, is assessed on a case-by-case basis in the case-law of the Constitutional Court, depending on the specific elements of the case brought before the court.

29. Does the deferential attitude depend on the case load of your Court?

No. Judicial deference is one of the arguments used by the Court to demonstrate the logical-legal reasoning upon which it pronounces its decision in a given case.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

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[105] Official Gazette of Romania, Part I, No 807 of 3 December 2010.
[106] Decision of the Constitutional Court No 713 of 9 November 2017, published in the Official Gazette of Romania, Part I, No 345 of 19 April 2018.
[107] Article 18 (1) of Law No 47/1992, republished, as subsequently amended and supplemented.
[108] Article 31 (2) of Law No 47/1992, republished, as subsequently amended and supplemented.

The Constitutional Court cannot base its decision on reasons other than those advanced by the author of the referral, as the document instituting proceedings sets out the procedural framework before the Constitutional Court.

As concerns the exception of unconstitutionality (the *a posteriori* constitutional review), the Court held that the direct submission of an exception of unconstitutionality to it is inadmissible[109]. Similarly, the procedural framework established by the referral cannot be extended by submitting an application to intervene in the its own interest or in the interest of a party, in which sense, in its case-law, the Court has held that, having regard to the provisions of Law No 47/1992, the provisions of the Civil Procedure Code relating to applications to intervene are applicable only to civil proceedings and not in front of the Constitutional Court, which exercises its powers under an independent judicial proceedings[110].

There are two situations in which the Constitutional Court of Romania rules ex officio, both under the procedure of the Constitution revision (constitutional laws): The Court shall rule ex officio on the initiatives to revise the Constitution [Article 146 a) second thesis] and on the revision law after its adoption by the Parliament [Article 23 of Law No 47/1992].

As a first step[111], the object of the constitutional review carried out by the Court ex officio is the initiative to revise the Constitution. As regards the limits of this first review, Article 19 of Law No 47/1992 stipulates the obligation of the Court to rule "on the observance of constitutional provisions in regard of such revision". Regardless of the author of the review initiative, in the sense that its initiator is either the President of Romania, at the proposal of the Government, or at least a quarter of the number of deputies or senators, or at least 500.000 citizens with the right to vote – legal subjects expressly and exhaustively referred to in Article 150 (1) of the Constitution –, it shall be submitted to the Constitutional Court for verification by the constitutional court of the requirements for revision[112]. The decision of the Court shall

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[109]Decision of the Constitutional Court No 3 of 6 January 1994, published in the Official Gazette of Romania, Part I, No 145 of 8 June 1994.

[110] Decision of the Constitutional Court No 82 of 15 January 2009, published in the Official Gazette of Romania, Part I, No 33 of 16 January 2009.

[111] Decision of the Constitutional Court No 539 of 17 September 2018, published in the Official Gazette of Romania, Part I, No 798 of 18 September 2018, par. 23.

[112] Article 150 of the Constitution – Initiative of revision: "(1) Revision of the Constitution may be initiated by the President of Romania on the proposal of the Government, by at least one quarter of the number of Deputies or Senators, as well as by at least 500,000 citizens with the right to vote. (2) The citizens who initiate the revision of the Constitution must belong to at least half the number of the counties in the country, and in each of the respective counties or in the Municipality of Bucharest, at least 20,000 signatures must be recorded in support of this initiative."

Article 152 of the Constitution – Limits of revision: "(1) The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision. (2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof. (3) The Constitution shall not be revised during a state of siege or emergency, or in wartime."

- If the initiative of revision belongs to citizens, together with the rules of the organic law of the Constitutional Court governing its competence to verify the constitutionality of citizens' initiatives for the revision of the Constitution, the provisions of Article 7 of Law No 189/1999 on the exercise of legislative initiative by citizens, republished in the Official Gazette of Romania, Part I, No 516 of 8 June 2004, as subsequently amended, are applicable. These provisions determine the subject of the review conducted by the Court regarding the fulfilment of the condition laid down in Article 150 of the Constitution. According to Article 7 (1) of Law No 189/1999, republished: The Constitutional Court, ex officio or on the basis of the notice from the President of the Chamber of Parliament with which the initiative was registered, shall verify: a) the constitutional nature of the legislative proposal which is the subject of the initiative; b) the fulfilment of the conditions relating to the publication of this proposal and whether the lists of supporters submitted are attested in accordance with Article 5; c) meeting the minimum number of supporters to promote the initiative, provided for in Article 74 and, as the case may be, Article 150 of the Constitution, republished, as well as compliance with territorial dispersion in counties and Bucharest, provided for in the same articles"

be communicated to the initiator(s), and the revision initiative shall be submitted to the Parliament, in the form of a draft law or a legislative proposal, as the case may be, only together with the decision of the Constitutional Court.

The second review[113] carried out ex officio by the Constitutional Court during the procedure for the revision of the Constitution shall take place, pursuant to Article 146 point l) of the Constitution and Article 23 of Law No 47/1992, immediately after the draft law or, as the case may be, the legislative proposal for the revision of the Constitution was adopted by the Parliament and became a law for the revision of the Constitution, i.e. after the completion of the parliamentary legislative procedure for the revision of the Constitution. The object of the constitutional review carried out by the Constitutional Court is, this time, the law on the revision of the Constitution. Regarding the limits of this type of constitutionality review, the ordinary legislator did not regulate benchmarks different from those fixed for the exercise of the first type of control, regarding the draft law or legislative proposal for the revision of the Constitution. In this regard, Article 23 (2) of Law No 47/1992 provides that "The decision which ascertains that constitutional provisions concerning revision have not been complied with shall be sent to (...)", which is also found in Article 19 final sentence of the same law. From the scheme of the provisions of Articles 19-23 of Law No 47/1992, in relation to the succession of the stages characterising the procedure for the revision of the Constitution, it follows that, when carrying out the second type of review, exercised over the law for the revision of the Constitution, the Court will not re-examine the same aspects that were the object of the review exercised over the draft law or of the legislative proposal on the revision of the Constitution, insofar as, during the parliamentary legislative procedure for the adoption of the respective legislative proposal or draft law, its content has not undergone substantive changes. In the event that no specific normative difference in content is found, the Court will report its review – within the scope of all the "constitutional provisions on revision" and which, in particular, are found in Title VII – Revision of the Constitution, Articles 150-152 of the Constitution – only to those not considered by the Court when the previous decision on the constitutionality of the revision initiative was delivered. If, on the contrary, in exercising its role as a sovereign legislative authority, the Parliament, within the parliamentary procedure for the revision of the Constitution, has made changes to the legislative proposal/draft law for the revision of the Constitution and there is a specific difference in substantial normative content at the level of the constitutional law, then it is for the Court to reassess the new content of the revision law in relation to the provisions of Article 152 of the Constitution, on the limits of revision.

Therefore, even in the event of an ex officio referral, the Constitutional Court is bound by the analysis within the limits laid down by the Basic Law and cannot base its judgments on grounds which have not been raised by the parties.

As regards the possibility for the Constitutional Court of Romania to reclassify the grounds invoked by the author of the referral of unconstitutionality on the basis of a constitutional provision other than that invoked by this one, namely as regards the determination of the subject of the exception of unconstitutionality, the Court has held in its case-law that, in the exercise of the constitutional review, the constitutional court must take into account the real intention of the party who raised the exception of unconstitutionality, since otherwise the Court would be bound by a strictly formal procedural criterion, namely the formal indication by the author of the exception of the legal text criticised[114].

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[113] Decision of the Constitutional Court No 539 of 17 September 2018, par. 31 et seq.

[114] Decision of the Constitutional Court No 775 of 7 November 2006, published in the Official Gazette of Romania, Part I, No 1006 of 18 December 2006; Decision of the Constitutional Court No 297 of 27 March 2012, published in the Official Gazette of Romania, Part I, No 309 of 9 May 2012; Decision of the Constitutional Court No 244 of 6 April 2017, published in the Official Gazette of Romania, Part I, No 529 of 6 July 2017.

Therefore, considering the real will of the author of the exception of unconstitutionality, as it emerges from the grounds of the exception[115], from the analysis of the criticisms of unconstitutionality, the Constitutional Court may consider as having been invoked another constitutional ground other than the one mentioned by the author in those grounds/the one retained in the summary judgment instituting the proceedings, which establishes the procedural framework before the Constitutional Court.

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

No, the Constitutional Court rules within the limits of its referral, on the regulatory act the constitutionality of which is disputed. As regards the *a posteriori* constitutional review, the content elements of the act of referral to the Court are strictly determined by the law and establish the procedural framework in which the Constitutional Court will resolve the exception of unconstitutionality[116]. This procedural framework cannot be amended before the Constitutional Court by requesting the extension of the constitutionality review with regard to normative texts other than those retained in the document instituting the proceedings or by adding other constitutional provisions in support of the formulated exception of unconstitutionality. According to the settled case-law of the Court[117], the constitutional dispute takes place only within the limits determined by the summary judgment instituting the proceedings, without being possible of being altered by either of the parties. Therefore, the direct invocation before the Court of constitutional grounds other than those indicated at the time of raising the exception of unconstitutionality before the court or extending the constitutional review to other provisions which have not been discussed by the parties is inadmissible. Thus, there have been situations in which the author of the exception of unconstitutionality, in the oral conclusions before the Constitutional Court, has invoked another constitutional basis, in addition to or instead of what was shown by raising the exception of unconstitutionality before the court. In such a situation, the Court held[118] that the parties must state, in writing or orally, their exception of unconstitutionality at the time of its invocation, i.e. must indicate the provisions and/or principles of the Constitution allegedly violated by the criticised provisions of law. The exception thus invoked is discussed by the parties and the court must formulate its opinion on its merits, all of which aspects following to be mentioned in the document instituting the proceedings before the Constitutional Court.

[115] According to Article 10 (2) of Law No 47/1992, "The institutions of proceedings shall be made in writing and they shall be motivated.".

[116] See Benke Károly, Mihaela Senia Costinescu, *Constitutionality Control in Romania. Exception of Unconstitutionality*, Hamangiu Publishing House, Bucharest, 2020, p. 137 et seq.

[117] Decision of the Constitutional Court No 1.069 of 14 July 2011, published in the Official Gazette of Romania, Part I, No 638 of 7 September 2011; Decision of the Constitutional Court No 528 of 15 May 2012, published in the Official Gazette of Romania, Part I, No 401 of 15 June 2012; Decision of the Constitutional Court No 272 of 23 May 2013, published in the Official Gazette of Romania, Part I, No 564 of 4 September 2013; Decision of the Constitutional Court No 572 of 12 July 2016, published in the Official Gazette of Romania, Part I, No 885 of 4 November 2016, or Decision of the Constitutional Court No 548 of 13 July 2017, published in the Official Gazette of Romania, Part I, No 897 of 15 November 2017.

[118] Decision of the Constitutional Court No 256 of 25 April 2017, published in the Official Gazette of Romania, Part I, No 571 of 18 July 2017.