

## THE ROLE OF CONSTITUTIONAL COURTS IN UPHOLDING THE RULE OF LAW IN EMERGENCY SITUATIONS

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**Abstract.** *The way in which the security of the State and its democratic institutions, human rights, and the safety of its officials and population are protected in emergency situations constitutes one of the benchmarks of the rule of law. From this perspective, the role of the constitutional courts is a prominent one since the courts are the guarantor of the Constitution, as a fundamental law enshrining all the values and rules of organizing and functioning of the public authorities. In Romania, both the Constitutional Court and the ordinary tribunals have encountered numerous requests from individuals. The citizens have challenged and questioned the acts of public authorities, raising sensitive issues, balancing competing fundamental rights, and, finally, the rule of law as a general principle enshrined in article 1 of the Constitution. In our study, we will present the case law of the Romanian Constitutional Court which is more relevant for the role of this court and constitutional courts in general in protecting democratic values in the context of emergencies, with special reference to the relationship and powers of the public authorities.*

**Keywords:** rule of law, emergency situations, constitutional courts, constitutional review

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### 1. Introduction

One of the main reference documents characterizing the complex dimensions of the rule of law is *Rule of law checklist* adopted by the Venice Commission<sup>1</sup>. According to this document, a dimension that it should be taken into account to evaluate the respect of rule of law concerns emergency situations: “the exceptions permitted in the cases of emergency require parliamentary control and judicial review of the existence and duration of a declared emergency situation in order to avoid abuse”. Accordingly, the way in which the security of the State and of its democratic institutions, and the safety of its officials and population are protected in that situations, also by the constitutional review, constitutes one of the benchmarks of the rule of law.

Recently, in the context of Covid-19 pandemic, the Venice Commission recalled that «“[it] the concept of emergency rule” is founded on the assumption that in certain situations of political, military and economic emergency, the

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<sup>1</sup> [https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule\\_of\\_Law\\_Check\\_List.pdf](https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf)

system of limitations of constitutional government has to give way before the increased power of the executive. However, even in a state of public emergency the fundamental principle of the rule of law must prevail. (...). The rule of law further means that governmental agencies must operate within framework of the law and their actions must be subject to review by independent courts. The legal security of individuals must be guaranteed»<sup>2</sup>.

In Romania, as well as in other countries of the world, the pandemic determined challenges without precedent in our recent history. Both the Constitutional Court and the ordinary tribunals have encountered numerous requests from individuals, citizens who have challenged and questioned the acts of public authorities, raising sensitive issues, balancing competing fundamental rights and, finally, the rule of law as a general principle enshrined in the article 1 of the Constitution. Following a short introduction concerning constitutional framework on the state of emergency, we will present the case-law of Romanian Constitutional Court which is more relevant for the role of this court and constitutional courts in general in protecting the democratic values, the rule of law, in the context of emergencies, with special reference to the relationship and powers of the public authorities.

## **2. Constitutional framework on the state of emergency. Measures adopted by the Romanian authorities in the context of the pandemic**

Romania is a semi-presidential republic, the main model taken into account when drafting the Constitution in 1991 being the French one. The legislative power is exercised by Parliament, characterized as “*the supreme representative body and the sole legislative authority of the country*” (Article 61 of the Constitution). In fulfilling its constitutional role, Parliament shall adopt constitutional, organic and ordinary laws, as well as resolutions. Executive power is exercised by the President and the Government. According to Article 80 of the Constitution, “*The President of Romania shall represent the Romanian State and is the safeguard of the national independence, unity and territorial integrity of the country. The President of Romania shall guard the observance of the Constitution and the proper functioning of public authorities. To this effect, the President shall act as a mediator between the Powers in the State, as well as between the State and society.*” The President shall adopt decrees of a regulatory nature (for example, the one on the establishment of the state of emergency) or individually ones. According to Article 101(1) of the Constitution, “*The Government shall, in accordance with its government programme accepted by Parliament, ensure the implementation of the domestic and foreign policy of the country, and exercise the*

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<sup>2</sup>[CDL-AD(2011)049, Opinion on the draft law on the legal regime of the state of emergency of Armenia, § 44, cited in the recent study Respect for democracy, human rights and the rule of law during states of emergency – reflections, CDL-PI(2020)005rev, 26 May 2020.]

*general management of public administration.*” In exercising its constitutional role, the Government shall adopt simple and emergency ordinances and decisions.

The Romanian Constitution expressly regulates the concept of “state of emergency”. *The regime of the state of siege and of the state of emergency* shall be regulated, according to Article 73(3) letter g) of the Constitution, by organic law. In the internal hierarchy of regulatory acts, the organic laws shall occupy the first place immediately below the constitutional laws, being adopted by Parliament with the absolute majority<sup>3</sup> of the Deputies and Senators.

According to the Constitution, the Government may also regulate in the fields covered by organic laws, but only exceptionally, by emergency ordinance, under the conditions strictly provided for by the Constitution in Article 115 - *Legislative delegation*. Thus, the Government can adopt emergency ordinances only in extraordinary situations<sup>4</sup>, the regulation of which cannot be postponed. The emergency ordinances are subject to the approval of the Parliament. Given the specific regime, the Government emergency ordinances seem the most appropriate for a rapid intervention in exceptional situations such as those determined by the state of emergency. However, it should be taken into consideration that in order to prevent the abuse of the executive in the field of legislation, in 2003, on the occasion of the revision of the Constitution, the possibility of primary regulation of the Government was substantially limited. Thus, the constitutional text with reference to *the legislative delegation* was supplemented with a new paragraph, according to which “*emergency ordinances cannot be adopted in the field of constitutional laws, or affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, and cannot establish steps for transferring assets to public property forcibly.*” As a result of this constitutional amendment, by virtue of the *tempus regit actum* principle, in Romanian legislation there are currently government ordinances with different legal regimes, depending on the date of their adoption/approval - before or after the revision of the Constitution. This aspect was reflected in the constitutional review, which distinguished between the regulatory field of Government emergency ordinances depending on the time of their adoption/entry into force. As a result, some of the regulations adopted by the Government during the COVID-19 pandemic by emergency ordinance (therefore under the constitutional text limiting the regulatory scope of these regulatory acts, introduced in 2003) were found unconstitutional precisely because they affected human rights and fundamental freedoms.

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<sup>3</sup> majority vote of the members of each Chamber

<sup>4</sup> The concept of “extraordinary case” (Article 115 of the Constitution) is different from the one of “emergency case” (Article 93), the latter having distinct regulation and specific rules

As regards the public authorities with powers in the matter, Article 93(1) of the Romanian Constitution establishes that “*The President of Romania shall, according to the law, institute the state of siege or the state of emergency in the entire country or in some territorial-administrative units, and ask for the Parliament’s approval for the measure adopted, within five days of the date of taking it, at the latest.*” In the exercise of this constitutional power, according to Article 100 (1) of the Constitution, the President shall issue “*decrees which shall be published in the Official Gazette of Romania*”, which shall be countersigned by the Prime Minister, based on Article 100(2) of the Basic Law and approved by a resolution of Parliament.

In Romania, the pandemic required many measures to limit its effects and protect the population, but also an effort to adapt the work of public authorities and the legislative framework. At the beginning of the pandemic, the latter consisted of the Government Emergency Ordinance No 1/1999 on the state of siege and the state of emergency,<sup>5</sup> approved by Law no. 453/2004, as well as of the Government Emergency Ordinance no.21/2004 on the National Emergency Management System<sup>6</sup>, therefore acts of the executive. According to Article 8<sup>1</sup> of the Government Emergency Ordinance no.21/2004,<sup>7</sup> in order to adopt the strategic decisions necessary for the management of emergencies determined by the types of risk established by Government decision, *the National Committee for Special Emergency Situations* shall be established and it shall operate.<sup>8</sup>

The President of Romania established the state of emergency by Decree no. 195 of 16 March 2020<sup>9</sup>, which was extended by Decree no.240 of 14 April 2020<sup>10</sup>. The Parliament adopted Resolution no.3/2020 for approving the measure adopted by the President of Romania regarding the establishment of the state of emergency on the entire territory of Romania<sup>11</sup> and Resolution no.4/2020 for approving the measure adopted by the President of Romania regarding the

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<sup>5</sup> Official Gazette no. 22 of 21 January 1999; it was adopted in 1999 in response to the internal political and social crisis that began in December 1998 as a strike of coal miners from an industrial region in decline escalated into open confrontation with the police and, by the beginning of January 1999, threatened to degenerate into a general riot led by the miners- see Elena- Simina TĂNĂSESCU, COVID -19 and constitutional law: Romania, [https://drive.google.com/file/d/1p\\_eKoNqCH-bM\\_P7pkgau-9ElRo8kIGR\\_/view](https://drive.google.com/file/d/1p_eKoNqCH-bM_P7pkgau-9ElRo8kIGR_/view)

<sup>6</sup> Official Gazette no. 361 of 26 April 2004

<sup>7</sup> Amended by the Government Emergency Ordinance no. 68 of 14 May 2020, Off. Gazette no. 391 of 14 May 2020

<sup>8</sup> Resolution no. 10 of 14 March 2020 for the proposal to establish the state of emergency in Romania and to approve additional measures to manage the SARS-VOC-2 Coronavirus epidemic, Official Gazette no. 0 of 2 February 2020

<sup>9</sup> Official Gazette no. 212 of 16 March 2020

<sup>10</sup> Official Gazette no. 311 of 14 April 2020

<sup>11</sup> Official Gazette no. 224 of 19 March 2020

extension of the state of emergency on the entire territory of Romania<sup>12</sup>. In the same context, other regulatory acts were adopted, such as the Government Emergency Ordinance no.11/2020 on emergency medical stocks, as well as some measures related to the establishment of quarantine<sup>13</sup> approved with supplements by Law no. 20/2020, and the Government Emergency Ordinance no.34/2020 for the amendment and supplement of the Government Emergency Ordinance No 1/1999 on the state of siege and the state of emergency<sup>14</sup>.

Those acts were challenged before the Constitutional Court. Following the ascertainment of the unconstitutionality of the Government Emergency Ordinance no.34/2020<sup>15</sup>, Law no.55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic<sup>16</sup> was adopted, as well as numerous other subsequent acts, including the decisions of the Government on the establishment and extension of the state of alert, a measure that replaced, in Romania, the state of emergency (Government Decision no.394/2020 on the declaration of a state of alert and the measures to be taken during it to prevent and combat the effects of the COVID-19 pandemic, extended successively by several Government decisions<sup>17</sup>). Likewise, numerous other administrative acts were adopted.

### **3. Relevant case law in relations with specific measures adopted in the context of the pandemic**

#### **3.1. Powers of the President and the Government versus Parliament's power in relation to *the state of emergency* and *the state of alert* caused by the pandemic**

The state of emergency [enshrined in Article 73(3) letter g) and in Article 93 of the Romanian Constitution] is defined by the provisions of Article 3 of the Government Emergency Ordinance No 1/1999, subsequently amended and supplemented, as follows: “*the set of exceptional measures in a political, economic and public order domain applicable throughout the country or in some administrative-territorial units which shall be established in the following situations: a) the existence of current or imminent serious dangers regarding national security or the functioning of constitutional democracy, b) the imminence of the occurrence or production of calamities that make it necessary to prevent, limit or remove, as appropriate, the consequences of disasters.*” Detailing the procedure for establishing the state of emergency, the provisions of Article 10 of

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<sup>12</sup> Official Gazette no. 320 of 16 April 2020

<sup>13</sup> Official Gazette no. 102 of 11 February 2020

<sup>14</sup> Official Gazette no. 268 of 31 March 2020

<sup>15</sup> by Decision no. 152 of 6 May 2020, Official Gazette no. 387 of 13 May 2020

<sup>16</sup> Official Gazette no. 396 of 15 May 2020

<sup>17</sup> Official Gazette no. 410 of 18 May 2020

the Government Emergency Ordinance No 1/1999 stipulate that they “*shall be established by the President of Romania by decree, countersigned by the Prime Minister and immediately published in the Official Gazette of Romania.*” Pursuant to Article 12 of the same regulatory act, the President of Romania shall request the Parliament to approve the measure adopted within maximum 5 days from the establishment of the state of siege or the state of emergency, and in case Parliament does not approve the established state, according to Article 13, “*The President of Romania shall immediately revoke the decree, the ordered measures ceasing to be applicable*”. The decree establishing the state of siege or the state of emergency shall be immediately notified to the population through the mass media, together with the urgent enforcement measures, which shall enter into force immediately [Article 11, first sentence].

The establishment of the state of emergency produces, in constitutional terms, a series of legal effects: Parliament shall function for the entire duration of the state of emergency, regardless of the period in which it is declared [Article 93(2) of the Constitution], the Constitution cannot be revised throughout the state of emergency [Article 152(3) of the Constitution], if it were to cease, the term of office of Deputies and Senators should be extended de jure until the cessation of the state of emergency [Article 63(1) of the Constitution] Parliament cannot be dissolved during the whole period of establishing the state of emergency [Article 89(3) of the Constitution]<sup>18</sup>.

As concern “*the state of alert*”, which replaced in Romania the initial measure of state of emergency, is legal concept which is not stipulated in Constitution, being regulated exclusively by law. In accordance with Article 2 of Law no.55/2020, “*the state of alert represents the response to an emergency situation of special magnitude and intensity, determined by one or more types of risk, consisting of a set of temporary measures, proportional to the level of severity manifested or predicted and necessary to prevent and eliminate imminent threats to life, human health, the environment, important material and cultural values or property*”. Trying to create the same model from the perspective of executive-legislative relationships, the Parliament established by Article 4(1) of Law no.55/2020, that the Government shall be competent to establish the state of alert by decision, “*approved in full or with amendments*” by Parliament. However, in this way, the constitutional regime of Government decisions changed. Upon the notification of the Advocate of the People regarding the distortion of the legal regime of the Government decisions, the Court found as unconstitutional this legal “*construction*”, namely the Government decision approved by the Parliament. The legal regime of the state of alert must comply with the constitutional regime

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<sup>18</sup> See Decision no. 152 of 6 May 2020, Official Gazette no.387 of 13 May 2020

governing the relationships between Parliament and the Government and their acts.”

### 3.2. Adapting the activity of the Parliament and Judiciary. Relevant case-law

Likewise, the restrictions thus imposed affected the activity of public authorities, which had to identify solutions in order to be able to operate under the given conditions. The difficulties are more obvious in the case of institutions such as Parliament, because the legislatures’ very operation is based on the assembly of many people together<sup>19</sup>. In order to adapt the parliamentary activity to the new conditions, the Rules of the Senate were amended, introducing a new article<sup>20</sup>, as following: «Article 133<sup>1</sup> (1) In exceptional situations, ascertained by the competent authorities, such as epidemics, pandemics, extreme natural phenomena, earthquakes, acts of terrorism and other situations that make impossible the presence of parliamentarians at the Senate headquarters, meetings of the Standing Bureau of the Senate, meetings of the parliamentary group leaders, meetings of the parliamentary committees as well as the meetings of the Plenum of the Senate will be held by electronic means (...).»“

A group of senators notified the Constitutional Court arguing that the new procedure does not provide any of the democratic guarantees provided by the Constitution regarding the functioning of the Chambers of Parliament. The Constitutional Court rejected the referral<sup>21</sup>, noting, inter alia, that “the Standing Bureau of the Senate, under the conditions of the existence of the emergency situation decreed under Article 93 of the Constitution, took the necessary administrative measures for the good organization of the activity”.

The Court explained that

«even in the event of a state of mobilization, a state of war, a state of siege or a state of emergency, the meetings of the plenary / standing committees do not take place automatically by electronic means, but it is necessary that, by their nature, the events that follow one another during the state of mobilization, the state of war, the state of siege or the state of emergency make impossible the presence of the parliamentarians at the Senate headquarters. (...) Such power of the Standing Bureau does not concern the exercise of national sovereignty or the exercise of sovereignty in its own name by a group constituted in the Standing Bureau of a Chamber; on the contrary, the decision to hold the plenary meetings

<sup>19</sup> For developments see Ittai Bar-Siman-Tov (2020) Covid-19 meets politics: the novel coronavirus as a novel challenge for legislatures, *The Theory and Practice of legislation*, 8: 1-2, 11-48, <https://doi.org/10.1080/20508840.2020.1800250>

<sup>20</sup> Through the Resolution of the Senate no. 16 of 26 March 2020, *Official Gazette* no. 252 of 26 March 2020

<sup>21</sup> Decision no.156 of 6 May 2020, *Official Gazette* no. 478 of 5 June 2020

by electronic means is a technical and urgent measure that ensures the continuity of the functioning of the Parliament, a required premise for the exercise of national sovereignty by Parliament. Otherwise, Parliament would be prevented from exercising its constitutional role, with direct effects on Article 2(1) of the Constitution»<sup>22</sup>.

The Court emphasized that

“public authorities must carry out their activity according to the provisions of the Constitution, even under the conditions of the decreed state of emergency. They cannot assign new powers or infringe the powers of other public authorities, as the principle of legality is not limited/ suspended during the state of emergency. (...) The powers of public authorities must be exercised during this period so as not to prejudice or jeopardize the values in consideration and safeguarding of which the decree has been issued.”<sup>23</sup>

Likewise, the courts of law and even Constitutional Court had to adapt their work. Whether we are talking about traditional or constitutional justice, ways have had to be identified to ensure that the resolution of cases continues while respecting both the restrictive conditions and the fundamental rights and freedoms of citizens. This means new solutions both in terms of the actual activity of court employees, judges, and staff, the communication of procedural documents, the conduct of court hearings. In Romania, the digitization of some activities in the judicial system was necessary anyway, even without the constraints induced by the pandemic situation. However, this context has led to additional pressures, prioritizing the adoption of digital solutions that have led to a desired modernization of justice. Beyond the challenges regarding the resources, coherence, and technical compatibility of the identified solutions, the fundamental issue that arises in this context is the observance of the rule of law, understood as a set of guarantees associated with justice and the right to a fair trial.

During the pandemic, it was established (Article 3 (1) of Law No 114/2021 regarding some measures in the field of justice in the context of the COVID-19 pandemic, published in the Official Gazette of Romania, Part I, no. 457 of 29 April 2021) that *“In civil cases, where possible, with the agreement of the parties, the courts of law may decide that the hearings be held by audiovisual telecommunication means that allow the verification of the parties’ identity and guarantee the security, integrity, confidentiality and quality of transmission, providing the necessary measures for this purpose.”* The desire to make this solution permanent led to the adoption of a regulation proposing that, *upon the request of the offender who filed the contravention complaint, with the approval of the court of law, the court hearings on the merits and appeals take place exclusively through audiovisual telecommunications systems that allow the*

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<sup>22</sup> Ibidem, paragraph 57

<sup>23</sup> Ibidem



*verification of the parties' identity and guarantee the security, integrity, confidentiality and quality of the transmission, the courts of law providing the necessary measures for this purpose. If the offender who filed the contravention complaint has requested to be tried by audiovisual telecommunications systems, all procedural documents in that case shall be communicated exclusively by e-mail. The hearing of other persons, witnesses or experts, shall take place through the same audiovisual telecommunications systems. The party proposing the administration of the evidence with the witness or the offender, in the case of ex officio administration of the evidence with witnesses or in the hearing of witnesses or experts, will ensure the possibility of the witnesses and experts to participate in the hearing by videoconference at the location established by the court of law. Hearing recording is mandatory.»*

However, by Decision No 19 of 26 January 2022<sup>24</sup>, the Constitutional Court found the unconstitutionality of this law. The Court noted that, both in the current regulation and in the law impugned in the present case, it is for the court of law to decide whether to hold hearings *by audiovisual telecommunications*. In other words, the holding of hearings by audiovisual telecommunications on contravention matters is and remains an option, at the discretion of the court of law, which is to ensure all the requirements of equal rights, the right to a fair trial, the right to defence and the administration of justice.

Having examined, from that point of view, the challenges formulated in the referral according to which the law does not govern whether and under what circumstances the court of law may reject the offender's application, the Court held that the assessment to be made by the court of law in approving the requested measure aims, in essence, at two categories of issues: technical and legal. The technical assessment does not require special regulation, as it involves the examination of clearly determined conditions, having an objective nature - the existence or not of an infrastructure necessary for holding court hearings by means of audiovisual telecommunications. Therefore, the legal assessment, given the scope of the law, is one with a high degree of complexity, imposing a precise regulatory framework. However, the impugned law does not establish criteria for the court of law to be able to decide whether or not to approve the offender's request to hold court hearings exclusively through audiovisual telecommunications systems. Thus, in accordance with the challenges formulated, the Court notes that the approval of the request for judging cases on contravention matters by means of audiovisual telecommunications must be established by a clear and precise regulation, circumscribed by the requirements imposed by Article 20 of the Constitution in conjunction with Article .6 - *The right to a fair trial* of the Convention for the Protection of Fundamental Rights and Freedoms.

<sup>24</sup> Official Gazette no.183 of 24 February 2022

### **3.3 Protection of the fundamental rights or freedoms**

#### **3.3.1 Constitutional requirements of the restriction of the human rights and fundamental freedoms**

Numerous measures restricting the exercise of fundamental rights and freedoms have been taken in the context of the COVID-19 pandemic<sup>25</sup>. The CCR was notified both from the perspective of the public authorities' competence on the adoption of rights restrictive measures and the proportionality of the measures established.

We will present here, as concerns the matters of authorities' competence, the Court decisions which has sanctioned the restriction on the exercise of fundamental rights and freedoms by the Government Emergency Ordinance<sup>26</sup>. The regulatory act which restricts/affects citizens' fundamental rights and freedoms or fundamental institutions of the State can only be a law, as a formal act of the Parliament, adopted in compliance with the provisions of Article 73(3) letter g) of the Constitution, as an organic law. The Court invoked the provisions of Article 53 of the Constitution, according to which *"(1) The exercise of certain rights or freedoms may only be restricted by law and only, if necessary, as the case may be, for: 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 of 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."* It also invoked the provisions of Article 115 of the Constitution - *Legislative Delegation*, which prohibit the Government from adopting emergency ordinances that "may affect" the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights. The Court thus found the unconstitutionality of the Government Emergency Ordinance no.34/2020 for amending and supplementing the Government Emergency Ordinance No 1/1999, because through its normative content it aimed at restricting the exercise of the right to property, the right to work and social protection, the right to information, economic freedom.

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<sup>25</sup> See also, for an extensive analysis concerning the case law on specific human rights in the same context - J. Lima, M.Safta - RESPONSES TO THE COVID-19 PANDEMIC FROM THE BRAZILIAN SUPREME COURT AND ROMANIAN CONSTITUTIONAL COURT, *Revista de drept Constitutional/Constitutional law Review* no.2/2021 [https://revistadedreptconstitutional.ro/wp-content/uploads/1contents/2021\\_2/Jairo\\_LIMA\\_Marieta\\_SAFTA\\_UJ\\_Revista\\_de\\_drept\\_constitutional\\_nr\\_2\\_2021\\_BT.pdf](https://revistadedreptconstitutional.ro/wp-content/uploads/1contents/2021_2/Jairo_LIMA_Marieta_SAFTA_UJ_Revista_de_drept_constitutional_nr_2_2021_BT.pdf)

<sup>26</sup> Decision no.152/2020, cited above

The decisions of the CCR determined the adoption of Law no.55/2020 by the Parliament on some measures to prevent and combat the effects of the COVID-19 pandemic. The preamble of the law states, *inter alia*, the very fact that a law adopted by Parliament shall be necessary “*since, in accordance with the provisions of Article 53 of the Romanian Constitution, republished, the exercise of certain rights or freedoms may be restricted only by law and only if required, as the case may be, inter alia, for the protection of order, public health, but also the citizens’ rights and freedoms; given that, in the context of the crisis situation caused by the COVID-19 pandemic, the Parliament of Romania must adopt, by law, restrictive measures, essentially temporary and, where appropriate, gradual, proportional to the level of severity predicted or manifested, necessary to prevent and eliminate imminent threats to conventional, union and constitutional rights to life, physical integrity and health of persons, without discrimination, and without infringing on the existence of other fundamental rights or freedoms*”.

### **3.3.2 The role of the Advocate of the People in the context of the COVID-19 pandemic**

The ascertainment by the Constitutional Court of Romania, upon the referral submitted by the Advocate of the People, of the unconstitutionality of some normative acts which restricted the exercise of certain rights and freedoms in the context of the COVID-19 pandemic has determined, in Romania, more intense debates than on other occasions regarding the way in which the Advocate of the People is or should be involved in the protection of fundamental rights and freedoms<sup>27</sup>.

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<sup>27</sup> We shall take into consideration Decision No 152 of 6 May 2020<sup>27</sup>, whereby the Constitutional Court allowed in part the exception of unconstitutionality raised directly by the Advocate of the People and found that the provisions of Article 28 of the Government Emergency Ordinance No 1/1999 on the state of siege and the state of emergency are unconstitutional. Likewise, the Court found that the Government Emergency Ordinance No 34/2020 amending and supplementing the Government Emergency Ordinance No 1/1999 on the state of siege and the state of emergency is unconstitutional, as a whole. On the same legal reasoning and upon the referral submitted by the same subject of law, by Decision No 157 of 13 May 2020<sup>27</sup> the Court found that the provisions of Article 4 of the Government Emergency Ordinance No 21/2004 on the National Emergency Management System are constitutional insofar as the actions and measures ordered during the state of alert do not aim at the restriction of the exercise of fundamental rights or freedom.

By Decision No 457 of 20 June 2020, the Court allowed the exception of unconstitutionality raised by the Advocate of the People and found that the provisions of Article 4(3) and (4), as well as of Articles 65 s) and §), 66 a), b) and c) regarding the references to Article 65 s), §) and t) and to Article 67 (2) b) regarding the references to Article 65 s), §) and t) of Law No 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic are unconstitutional.

Likewise, by Decision No 458 of 25 June 2020, having examined the referral submitted by the Advocate of the People in view of the provisions of Law No 95/2006 on health care reform and of the Government Emergency Ordinance no.11/2020 on emergency medical stocks, the Court

A similar polarization of the public interest regarding the institution of the Advocate of the People / Ombudsman is also noticed at international level, corresponding to the same period and the same issue. Thus, the role of the Advocate of the People is emphasized by the Venice Commission in a recent report<sup>28</sup>, where it is noted that, through their mandate to promote and protect human rights, such institutions may contribute crucially to flag human rights issues during emergency times and assist citizens affected by emergency measures. Therefore, “they may effectively complement parliamentary and judicial control” (paragraph 90). According to the Romanian Constitution, the Advocate of the People can directly refer to the Constitutional Court to adjudicate on the constitutionality of law, before the promulgation thereof [Article 146 a) first sentence of the Constitution]; to decide on exceptions as to the unconstitutionality of laws and ordinances after their promulgation and publication [Article 146 d) second sentence of the Constitution]<sup>29</sup>. Of course, the efficiency of such instruments depends on the way in which they are used, namely on the intensity of the dialogue between the Advocate of the People and the Constitutional Court.

However, the Advocate of the People was revoked in 2021, for reasons that were not very clearly substantiated. The Constitutional Court unanimously found the unconstitutionality of the Parliament decision to revoke the Advocate of the People. Resonating with the concurring opinion expressed in the decision of the Constitutional Court, we note that in order to be constitutionally accepted the revocation of this authority must identify concrete facts or obvious omissions in the exercise of its powers, by which the Advocate of the People violated rules which were explicitly identified in the Constitution or in its law of organization and functioning. The revocation of the Advocate of the People cannot take place for the accomplishment of his/her powers, but for the non-accomplishment of his/her powers or for the defective accomplishment of them or for excess of

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allowed in part the exception of unconstitutionality and found that the provisions of Article 25(2) second sentence (“as well as communicable diseases for which the declaration, treatment or hospitalization are mandatory shall be established by order of the Minister of Health”) of Law no. 95/2006 and of Article 8(1) of the Government Emergency Ordinance no.11/2020 are unconstitutional because these legal norms do not comply with the requirements of clarity and predictability of the law required by Article 1(5) of the Constitution and affect fundamental rights and freedoms as those contained in Article 23 (1), Article 25 and Article 26 of the Constitution, without complying with the constitutional conditions on the restriction of the exercise of fundamental rights or freedoms.

<sup>28</sup> Venice Commission, RESPECT FOR DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW DURING STATES OF EMERGENCY – REFLECTIONS, CDL-PI(2020)005rev, par. 88, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2020\)005rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)005rev-e)

<sup>29</sup> This possibility was regulated on the occasion of the revision of the Romanian Constitution, in 2003, thus making available to the Advocate of the People an important tool for accomplishing its constitutional role.

power<sup>30</sup>. In a very strong intervention in order to give effect to its decision, the Constitutional Court expressly stated in this case that, since the dismissal act, which is the cause of the termination of office for the Advocate of the People, ceases to produce legal effects and, pursuant to Article 147(4) of the Constitution, which enshrines the general binding nature and future effects of the decisions of the Constitutional Court from the date of publication of the decision, the office of the Advocate of the People is resumed by the person in question, who will continue to exercise the constitutional mandate for which she was appointed.<sup>31</sup>

#### **4. Conclusions. The role of the judiciary in preserving “democratic resilience” in the context of emergencies**

The context of the pandemic was perhaps a moment of awareness of the importance of fundamental rights and freedoms from both the population and the authorities called to defend these rights<sup>32</sup>.

The role of the Courts in such difficult circumstances like emergency situations is not easy at all. They have to put in balance the principles and provisions of the Constitution very carefully in order to protect all these values and to ensure also the social peace. As concern the decisions of the Romanian Constitutional Courts, in most of the cases presented there are also dissenting and concurring opinion, which means that strong debates took place in the Court as well.

The subject is much broader, as many of the citizens' appeals have as their object the legality and not the constitutionality of the measures adopted by the authorities. As a guarantor of the Constitution, however, the Constitutional Court rules only on constitutionality and not on legality, so these cases are not in the scrutiny of the constitutional review.

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<sup>30</sup> Livia Doina Stanciu, Simina Tănăsescu, dissenting opinion, Decision no.455 of 29 June 2021, published in the Official Gazette of Romania, Part I, no.666 of 6 July 2021.

<sup>31</sup> Decision no.455 of 29 June 2021, published in the Official Gazette of Romania, Part I, no.666 of 6 July 2021.

<sup>32</sup> For an extensive analysis see J. Lima, M.Safta – op. cit.