

ROMANIAN OMBUDSMAN AND CONSTITUTIONAL COURT, DEFENDERS OF FUNDAMENTAL RIGHTS AND PARTNERS OF PUBLIC AUTHORITIES TO ENSURE THE RULE OF LAW, IN THE CONTEXT OF COVID-19 PANDEMIC

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Abstract

Currently, both internationally and nationally, the Covid-19 pandemic generates an atypical situation, with profound effects on the social and political aspects of society. The provocation of such an element of novelty is transposed also in the legal plan under the aspect of the regulations meant to ensure the establishment of clear rules of conduct, with obvious impact on the fundamental rights and freedoms. The present study proposes an analysis of the relations between the Ombudsman and the Constitutional Court, fundamental institutions of the state, which contributed to ensuring respect for fundamental rights. The Ombudsman raised before the Constitutional Court a series of constitutionality issues of some normative acts which urgently regulated aspects necessary for the management of the pandemic, with implications on fundamental rights, (the right to free movement, the right to health care, the right to property, free access to justice, the right to intimate, family and private life, economic freedom). These issues to be analyzed concerned the constitutionality control of some provisions regarding the adoption of measures during the state of emergency established by the Decree of the Romanian President, the establishment of sanctions for violating the rules established in the normative acts on the state of emergency, the establishment of quarantine, the establishment of the state of alert, as well as other measures in the field of public health in situations of epidemiological and biological risk.

The analysis of the activity of the two institutions highlights the efficiency of legal mechanisms that ensure the protection of fundamental rights in Romania and emphasizes, especially during this period, the need to perpetuate loyal cooperation between state authorities, in the spirit of principle and separation and balance and the rule of law, as a solid guarantee of respect for fundamental rights.

Keywords: Ombudsman, Constitutional Court, fundamental rights protection, rule of law, constitutional review, Covid-19 pandemic.

1. Introduction

The atypical situation generated by the Covid-19 pandemic brought to the level of social and legal reality a series of aspects that aimed at the constitutional observance of certain rights and freedoms or fundamental principles with impact on fundamental rights and freedoms.

In this context, is to be analyzed the relationship between two fundamental institutions, the Romanian Ombudsman, as guardian of the individuals rights and freedoms¹ of and the Constitutional Court in its capacity of “*guarantor of the supremacy of the Constitution*”², whose constitutional and legal role reveals the importance of their current functioning in the Romanian state governed by the rule of law, according to the provisions of art. 1 par. (3) of the Constitution. The importance of this analysis lies in highlighting some concrete situations that raised constitutional problems, solved by the way of constitutional review, the legal mechanism by which the rule of law and the rights and freedoms are effectively secured. Thus, the involvement of the two state institutions in ensuring and guaranteeing the observance of fundamental rights and freedoms in the

rule of law is highlighted, so that their establishment by the Fundamental Law does not become a simple illusory declaration, with purely theoretical valences.

Health-crisis period of COVID-19 was marked by the adoption of legislative acts (laws and Government emergency ordinances), by which the state authorities, faced with the challenges of intense looking to protect population of the threat of COVID-19 imposed a number of measures to combat the virus and imposed a number of new rules. However, the respect for fundamental rights remained an inherent imperative of the rule of law.

In exercising its constitutional and legal role, Ombudsman raised before the Constitutional Court some issues of unconstitutionality in the case of some normative acts regulating measures during the state of emergency imposed by the Decree of the Romanian President establishing the state of emergency on the Romanian territory, the establishment of contravention sanctions for violating the rules established in the normative acts regarding the state of emergency, the establishment of quarantine, the establishment of the state of alert, as well as other measures in the field of public health in epidemiological and biological risk situations. Starting from the jurisprudence of the

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¹ See art. 58 para. (1) of the Romanian Constitution of 1991, revised by the Constitutional Law no. 29/2003, approved by referendum on 18-19 October 2003, republished in the Official Gazette of Romania, part I, no. 767 of 31 October 2003.

² See art. 142 para. (1) of the Romanian Constitution.

Constitutional Court, concretized for example, by Decision no. 152 of May 6, 2020³, Decision no. 457 of June 25, 2020⁴, Decision no. 458 of June 25, 2020⁵, or Decision no. 751 of October 20, 2020⁶, without carrying out an analysis of the opportunity of the actions of the Ombudsman in this context, which exceeds this scientific approach, the present paper proposes an analysis of the issues that have been subject to constitutional review, summarizing the criticisms of unconstitutionality brought by the Ombudsman regarding these normative acts, the solutions pronounced by the Constitutional Court in these cases and considerations that substantiated them.

2. Paper Content

As an introduction, we consider it useful to present in essence the constitutional and legal grounds that give the Ombudsman the right to refer to the Constitutional Court with exceptions of unconstitutionality, within the *a posteriori* constitutionality control⁷. In this sense relevant are the considerations stated by the Constitutional Court by Decision no. 464 of July 18, 2019 on the legislative proposal to revise the Constitution of Romania⁸, according to which “limiting the power of the Ombudsman to challenge directly before the Constitutional Court the constitutionality of only those laws regarding the relations between citizens and public authorities is unconstitutional”, and, “the elimination of the power of the Ombudsman to directly challenge the constitutionality of the laws before the Constitutional Court violates the limits of the revision established in art. 152 par. (2) of the Constitution, being a suppression of an institutional guarantee associated with the defence of fundamental rights and freedoms”.

The Court reiterated, in this context, the fact that the constitutional protection of the citizen is an ascending one, so that the constitutional revisions must also grant an increasing protection to him”. The protection of fundamental rights and freedoms, within the meaning of art. 152 par. (2) of the Constitution can know only an ascending orientation⁹.

According art. 146 lit. d) of the Constitution, “The Constitutional Court has the following attributions: [...] d) decides on the exceptions of unconstitutionality regarding the laws and ordinances, raised before the courts or commercial arbitration; the exception of unconstitutionality can also be raised directly by the People's Advocate ;”.

In applying these constitutional provisions, Law no. 35/1997 on the organization and functioning of the Ombudsman¹⁰, provides in art. 15 para. (1) letter i): „(1) The People's Advocate has the following attributions: [...]; i) may directly notify the Constitutional Court for the unconstitutionality of laws and ordinances;”.

Symmetrically, Law no. 47/1992 on the organization and functioning of the Constitutional Court¹¹, provides in art. 32: “The Constitutional Court decides on the exceptions of unconstitutionality raised directly by the People's Advocate regarding the constitutionality of a law or ordinance or of a provision of a law or ordinance in force.”

Based on these constitutional and legal provisions, the Ombudsman raised directly before the Constitutional Court a series of unconstitutionality exceptions that concerned provisions from Government emergency ordinances or provisions from laws that produced legal effects in the context of the COVID-19 pandemic.

2.1. Analysis of the constitutionality of some provisions regarding the establishment and application of contravention fines, in case of violation of the rules established for combating the pandemic in relation to the principle of legality and the presumption of innocence

The problem of establishing and applying contravention fines, in case of violation of the rules established for combating the pandemic was analyzed on the occasion of solving the exception of unconstitutionality¹² of the provisions of art. 9, art. 14 lit. c¹)-f) and art. 28 of the Government Emergency Ordinance no. 1/1999 regarding the state of siege regime and the regime of the state of emergency and of the emergency ordinance, as a whole, as well as

³ Published in the Official Gazette of Romania, Part I, no. 387 of 13 May 2020.

⁴ Published in the Official Gazette of Romania, Part I, no. 578 of July 1, 2020.

⁵ Published in the Official Gazette of Romania, Part I, no. 581 of July 2, 2020.

⁶ Published in the Official Gazette of Romania, Part I, no. 1264 from December 21, 2020.

⁷ “Even if the exceptions of unconstitutionality are not limited to fundamental rights or freedoms that the Ombudsman was given the power to petition the Constitutional Court, this is itself a legal instrument of intervention institutional to achieve its mission, namely the protection of human rights and fundamental freedoms”. see Benke K., M.S. Costinescu, Control of constitutionality in Romania: the exception of unconstitutionality, Hamangiu Publishing House, Bucharest, 2020, p. 117.

⁸ Published in the Official Gazette of Romania, Part I no. 646 of August 5, 2019.

⁹ Decision no. 80 of February 16, 2014, published in the Official Gazette of Romania, Part I, no. 246 of April 7, 2014.

¹⁰ Republished in the Official Gazette of Romania, Part I, no. 181 of February 27, 2018.

¹¹ Published in the Official Gazette of Romania, Part I, no. 807 of December 3, 2010.

¹² The object of the exception of unconstitutionality is art. 9, art. 14 lit. c¹)-f) and art. 28 of the Government Emergency Ordinance no. 1/1999 regarding the state of siege and the regime of state of emergency, published in the Official Gazette of Romania, Part I, no. 22 of January 21, 1999, approved with amendments and completions by Law no. 453/2004, with subsequent amendments and completions, Government Emergency Ordinance no. 1/1999, as a whole, as well as the Government Emergency Ordinance no. 34/2020 for the amendment and completion of the Government Emergency Ordinance no. 1/1999 regarding the state of siege and the regime of state of emergency, published in the Official Gazette of Romania, Part I, no. 268 of March 31, 2020, as a whole.

of the Government Emergency Ordinance no. 34/2020 for the amendment and completion of the Government Emergency Ordinance no. 1/1999 on the state of siege and the state of emergency, as a whole.

Ombudsman considered that art. 9 and art. 28 of the Government Emergency Ordinance no. 1/1999, violates the provisions of the Constitution contained in art. 1 par. (5) regarding the principle of legality and of art. 23 par. (11) on the presumption of innocence, arguing, essentially, that the criticised provisions impose a general obligation to respect certain rules, without criminalize a concrete act and impose sanctions, without giving minimum objective criteria in their application, which can generate arbitrariness.

By Decision no. 152 of May 6, 2020, Constitutional Court, with unanimous votes¹³ decided the admission of the exception of unconstitutionality formulated by the People's Advocate and found that the provisions of art. 28 of the Government Emergency Ordinance no. 1/1999 are unconstitutional.

The Court noted that in the matter of regulating the legal regime of contraventions, the Government Emergency Ordinance no. 1/1999 is a special law that provides the sanction of a fine and, as complementary sanctions, the confiscation of goods intended, used or resulting from the contravention, the prohibition of access by applying the seal by the competent bodies, the temporary suspension of activity, the abolition of works and restoration some arrangements. The application of contravention sanctions, respectively the actual sanctioning of the subject of law for disregarding the norms of contravention law, takes place according to some principles: the principle of legality of contravention sanctions, the principle of proportionality of contravention sanctions and the principle of uniqueness in idem).

Regarding the principle of the quality of the laws, the Court reiterated its jurisprudence¹⁴ and invoked the jurisprudence of the European Court of Human Rights¹⁵, holding that the rule must be drafted with sufficient precision to enable the citizen to monitor his conduct so that he is able to provide for a reasonable measure, the consequences that could result from the commission of a certain deed. The law must clearly define the applicable contraventions and sanctions, being necessary that the recipient of the norm knows from the text of the applicable legal norm which are the acts, facts or omissions that can engage his contravention liability.

The Court has noted that art. 28 par. (1) corroborated with art. 9 par. (1) of the Government Emergency Ordinance no. 1/1999 does not clearly and unequivocally indicate the acts, facts or omissions that constitute contraventions, nor do they allow their easy identification, by referring to the normative acts with

which the incriminating text is in connection. Thus, art. 9 par. (1), which speaks of "*all the measures established in this emergency ordinance, in the related normative acts, as well as in the military ordinances or in orders, specific to the established state*", cannot be considered a reference norm, since it is not indicates accurately the legal referenced. Thus, the legislator enacted provisions that are unable to achieve the purpose for which they were established.

The provisions of art. 28 par. (1), by the phrase "non-compliance with the provisions of art. 9 constitutes a contravention", qualifies as a contravention the violation of the general obligation to respect and apply all the measures established in the Government Emergency Ordinance no. 1/1999, in the related normative acts, as well as in the military ordinances or in orders, without expressly distinguishing the acts, facts or omissions that may attract the contravention liability. Implicitly, the establishment of the facts whose commission constitutes contraventions is left, arbitrarily, at the free discretion of the ascertaining agent, without the legislator having established the criteria and conditions necessary for the operation of ascertaining and sanctioning the contraventions. At the same time, in the absence of a clear representation of the elements that constitute the contravention, the judge himself does not have the necessary benchmarks in the application and interpretation of the law, on the occasion of resolving the complaint on the record of finding and sanctioning the contravention.

The criticized legal provisions do not respect the principle of proportionality either, a principle that has its origin in the provisions of art. 53 par. (2) of the Constitution and which allows the restriction of the exercise of certain fundamental rights or freedoms only insofar as such a limitation is necessary in a democratic society and is proportionate to the situation that determined it. The provisions of art. 28 of the Government Emergency Ordinance no. 1/1999 does not concretely foresee the facts that attract the contravention liability, but also establish for all these deeds, regardless of their nature or gravity, the same main sanction. Regarding the complementary contravention sanctions, although the law stipulates that they are applied according to the nature and gravity of the deed, as long as the deed is not circumscribed, obviously its nature or gravity cannot be determined in order to establish the applicable complementary sanction.

In conclusion, the Court found that, since the provisions of the law subject to constitutional review impose a general obligation to comply with an indefinite number of rules, with identifiable difficulty, and establish sanctions for offenses, without

¹³ See the concurrent opinion formulated by two judges of the Constitutional Court.

¹⁴ For example, Decision no. 51 of 16 February 2016, published in the Official Gazette of Romania, Part I, no. 190 of 14 March 2016, Decision no. 405 of 15 June 2016, published in the Official Gazette of Romania, Part I, no. 517 of July 8, 2016.

¹⁵ For example, Judgment of 15 November 1996 in *Cantoni v. France*, paragraph 29; Judgment of 12 February 2008 in *Kafkaris v. Cyprus*, paragraph 140; Judgment of 21 October 2013 in *Del Rio Prada v. Spain*, paragraphs 78, 79 and 91.

incriminating concrete facts, it violates the principles of legality and proportionality. The Court has found that art. 28 of the Government Emergency Ordinance no. 1/1999, characterized by a deficient legislative technique, do not meet the requirements of clarity, precision and predictability and is thus incompatible with the fundamental principle regarding the observance of the Constitution, its supremacy and the laws, provided by art. 1 par. (5) of the Constitution, as well as with the principle of proportional restriction of fundamental rights and freedoms, provided by art. 53 par. (2) of the Constitution.

The imprecision of the analyzed text of law affects, consequently, the constitutional guarantees that characterize the right to a fair trial, enshrined in art. 21 par. (3) of the Constitution, including its component regarding the fundamental right to defence, provided by art. 24 of the Constitution.

2.2. Issue of constitutionality concerning the affecting of some rights and fundamental freedoms by adopting a Government emergency ordinance

Ombudsman alleged the violation of art. 115 par. (6) of the Constitution, according to which “Emergency Ordinances [...] may not affect the regime of fundamental state institutions, rights, freedoms and duties provided by the Constitution”, arguing that the Government Emergency Ordinance no. 34/2020 which amends the Emergency Government Ordinance no. 1/1999 on the state of siege and the state of emergency, by the manner of evasive and general regulation of contraventions and of the applicable sanctions, by suspending the application of legal norms regarding decision-making transparency and social dialogue during the state of siege and the state of emergency affect fundamental rights, such as the right to private property, the right to work and social protection of labour and the right to information. The Ombudsman stressed that the premise of any regulation, even during a state of emergency, must be the rule of law, a principle that enshrines a series of guarantees to ensure respect for the rights and freedoms of citizens, and the inclusion of public authorities in the frame of law.

Analyzing these criticisms, the Constitutional Court admitted the exception of unconstitutionality and found that the Government Emergency Ordinance no. 34/2020 is unconstitutional, as a whole¹⁶.

The Court held that the Emergency Government Ordinance no. 34/2020 modifies the legal regime of the state of siege and of the state of emergency under the aspect of contravention liability in case of non-compliance or immediate non-application of the measures established in the Government Emergency Ordinance no. 1/1999, introducing complementary contravention sanctions, such as the confiscation of the goods intended, used or resulting from the contravention and the temporary suspension of the activity. Taking into considerations the legal nature of

administrative sanctions, it turns out that they affect the fundamental right to property, as well as the economic freedom.

At the same time, the suspension of legal norms on transparency in decision making and social dialogue during the emergency state affect fundamental rights such as the right to information, the right to work and to social protection of labour, as well as the regime of a fundamental institution of the state (Economic and Social Council). In these circumstances, the Court found that Government Emergency Ordinance no. 34/2020 is unconstitutional, as a whole, as it was adopted in violation of the constitutional provisions contained in art. 115 par. (6).

2.3. Analysis of the constitutionality of the legal provisions regarding the competence of the President of Romania in the establishment of the state of emergency

Ombudsman invoked also the exception of unconstitutionality of Emergency Government Ordinance no. 1/1999, arguing that its legal provisions allow Romanian President to legislate in areas where the Constitution requires the Parliament or Government intervention. The Ombudsman claimed that in applying the legal criticized provisions, by the Decree of the President of Romania no. 195/2020 on the establishment of the state of emergency on the territory of Romania and by Decree no. 240/2020 on the extension of the state of emergency on the territory of Romania were temporarily restricted, expressly, but also implicitly, a series of rights: the right to free movement, the right to work, the right to education, free access to justice, the right to strike, the right to intimate, family and private life, freedom of assembly, the right to free movement, economic freedom.

Analyzing these criticisms, the Constitutional Court rejected the exception of unconstitutionality and found that the provisions of the Government Emergency Ordinance no. 1/1999 are constitutional in relation to the criticisms made¹⁷.

Court held essentially that Decree of the President of Romania establishing the state of emergency is an administrative normative act, setting out the concrete measures to be taken and fundamental rights and freedoms whose exercise will be restricted. This act is issued under the condition of being approved by a decision of the Parliament, the non-fulfilment of the condition entailing the immediate revocation of the decree and the cessation of the applicability of the ordered measures. The President's administrative act concerns a relationship with Parliament and is exempt from judicial review by administrative litigation, but may be subject to constitutional review by the Constitutional Court, whether or not Parliament approves the state of emergency.

Court observed that the Emergency Government Ordinance no. 1/1999 rigorously establishes the limits

¹⁶ See Decision no. 152 of 6 May 2020, cited above.

¹⁷ See Decision no. 152 of 6 May 2020, cited above.

within which the President can act, and there are no equivocal provisions regarding the character of an administrative act for the execution of the law by the President's decree.

The restraint of certain rights is not done by presidential decree, the provisions of art. 14 lit. d) of the Government Emergency Ordinance no. 1/1999 constituting only the norm by which the primary legislator empowers the administrative authority (the President of Romania) to order the execution of the law, respectively of the provisions of art. 4 of the same normative act which expressly provides for the possibility of restricting the exercise of rights. Acting within the limits of his legal powers, the President identified the rights and freedoms whose exercise was to be restricted (free movement, right to privacy, family and private life, inviolability of home, right to education, freedom of assembly, right to private property, right to strike, economic freedom).

The Court also found that no legal provision in Government Emergency Ordinance no. 1/1999, does not entitle the President to adopt norms with the rank of law, so that the Constitutional Court did not hold the violation of the invoked constitutional norms.

Also Court said that accepting the state of emergency, the Romanian Parliament was required to verify the fulfilment of constitutional and legal conditions that presidential decree must comply with.

Regarding the criticism of unconstitutionality in relation to art. 115 par. (6) of the Constitution, in terms of affecting certain fundamental rights, the Court held that the Government Emergency Ordinance no. 1/1999, by its very incidence hypothesis - crisis situations that impose exceptional measures that are instituted in cases determined by the appearance of serious dangers to the defence of the country and national security, of constitutional democracy or to prevent, limit or eliminate the consequences of disasters - it is aimed at restricting the exercise of certain fundamental rights or freedoms. Therefore, a normative act with such an object of regulation affects both the fundamental rights and freedoms of the citizens, as well as the fundamental institutions of the state, falling within the scope of the interdiction provided by art. 115 par. (6) of the Constitution. Therefore, the legal regime of the state of siege and the state of emergency, in the current constitutional framework, can be regulated only by a law, as a formal act of the Parliament, adopted in compliance with the provisions of art. 73 par. (3) lit. g) of the Constitution, in the regime of organic law.

At the same time, the Court noted that Government Emergency Ordinance no. 1/1999 was adopted and entered into force prior to the amendment of the Romanian Constitution in 2003, and the provisions of art. 115 par. (6) invoked as being

violated were introduced by the Law on the revision of the Romanian Constitution no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003. Therefore, at the date of adoption of the criticized normative act, the constitutional norm did not limit the legislative prerogative of the Government to affect the regime of fundamental state institutions or the rights and freedoms provided by the Constitution, so that Government Emergency Ordinance no. 1/1999 was considered to be adopted in compliance with the constitutional framework in force at that time, retaining its constitutional character.

2.4. Analysis of the constitutionality of the establishment of the state of alert in relation to the right of free access to justice and the right of person injured by a public authority

The issue of establishing the state of alert was submitted to the constitutionality control on the occasion of solving the exception of unconstitutionality¹⁸ of the provisions of art. 4 par. (3) and (4), as well as of art. 65 lit. s) and §), of art. 66 lit. a), b) and c) regarding the references to art. 65 lit. s), §) and t) and of art. 67 par. (2) lit. b) regarding the references to art. 65 lit. s), §) and t) of Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic.

The Ombudsman invoked the violation of the constitutional provisions contained in art. 1 par. (4) and par. (5) regarding the principle of separation and balance of powers in the state and the quality of the law, art. 21 on free access to justice, art. 52 regarding the right of the person injured by a public authority, art. 108 regarding the acts of the Government and in art. 126 par. (6) regarding the courts, claiming that the provisions of art. 4 par. (3) and (4) of Law no. 55/2020 are unconstitutional because they allow an intervention of the Parliament on the Government's decision to establish the state of alert and exclude this decision from the scope of administrative acts subject to judicial control.

Regarding the provisions of art. 65 lit. s) and §), of art. 66 lit. a), b) and c) and of art. 67 para. (2) lit. b) of Law no. 55/2020, the Ombudsman claimed that they lack clarity and predictability, as the material object of the contravention is uncertain and ambiguous, due to the reference to a legal norm that does not exist in the active substance of the legislation, contrary the constitutional provisions of art. 1 par. (5) regarding the quality of the law.

By Decision no. 457 of June 25, 2020, the Constitutional Court admitted the exception of unconstitutionality raised directly by the People's Advocate and found that the provisions of art. 4 par. (3) and (4) of Law no. 55/2020 are unconstitutional¹⁹.

¹⁸ The object of the exception of unconstitutionality is the provisions of art. 4 par. (3) and (4), of art. 65 letters s) and §), of art. 66 lit. a), b) and c) and of art. 67 para. (2) lit. b) of Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic, published in the Official Gazette of Romania, Part I, no. 396 of May 15, 2020.

¹⁹ Regarding the provisions of art. 65 lit. s) and §), of art. 66 lit. a), b) and c) regarding the references to art. 65 lit. s), §) and t) and of art. 67 para. (2) lit. b) regarding the references to art. 65 lit. s), §) and t) of Law no. 55/2020, the Court found that the provisions governing in

The Court held that the provisions of art. 4 par. (1) of Law no. 55/2020 set up the competence of the Government to establish, by decision, the state of alert. The concept of alert state is defined in art. 2 of the same law, by which is meant "*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 forecast and necessary for the prevention and removal of imminent threats to life, health, the environment, important material and cultural values or property.*"

According to art. 4 par. (2) of Law no. 55/2020, "The state of alert is established on the entire territory of the country or only on the territory of some administrative-territorial units, as the case may be." For the situation in which the state of alert is established on at least half of the administrative-territorial units on the territory of the country, the legislator provided the rule according to which the measure established by Government decision it is subject to the approval of Parliament, which may approve it in full or with amendments. Thus, the "approval in full or with modifications" presupposes the intervention of the Parliament on the Government's decision to establish the state of alert. Thus, a new institution appears configured through the criticized legal texts, namely that of the Government decision approved / modified by the Parliament, an institution created probably by "analogy" with the institution of the decree establishing the state of siege or state of emergency, which benefits of constitutional consecration and express constitutional rules.

Instead, the institution of the state of alert is an exclusive creation of the legislator. This institution must comply - pursuant to art. 1 par. (5) of the Constitution which enshrines the observance of the Constitution and its supremacy - the constitutional framework of reference, respectively, in this case, the constitutional regime that governs the relations between the Parliament and the Government and their acts.

But, by "approval in full or with modifications" on the Government decision on the state of alert, Parliament combines the legislative and executive functions, contrary to the principle of separation and balance of powers enshrined in art. 1 par. (4) of the Constitution. At the same time, a confusing legal regime of the Government decisions is created, such as to raise the issue of their exemption from judicial control, with the consequence of violating the provisions of art. 21 and art. 52 of the Constitution, which enshrines the free access to justice and the right of the injured person by a public authority.

Hence, the Court held that the formulated criticisms are well-founded, with the consequence of the unconstitutionality of art. 4 para. (3) and (4) of Law no. 55/2020.

2.5. Analysis of the constitutionality regarding the Minister of Health competence on the establishment by its order, the prevention and management of emergencies caused by epidemics and transmissible diseases, treatment or hospitalization and to decide the measure of quarantine in relation to individual freedom, right to free movement and the right to intimate, family and private life

The issues on the Minister of Health competence to establish by its order the measures on prevention and management of emergencies caused by epidemics and communicable diseases for which declaration, treatment or hospitalization are required and the establishment of quarantine were subject to constitutional review with the occasion of solving the exception of unconstitutionality²⁰ of the provisions of art. 25 par. (2) of Law no. 95/2006 on the reform in the field of health and of art. 8 par. (1) of the Government Emergency Ordinance no. 11/2020 on emergency medical stocks, as well as some measures related to the establishment of quarantine.

The Ombudsman claimed that the criticized legal provisions infringed the provisions of the Constitution contained in: art. 1 par. (5) regarding the obligation to respect the Constitution, its supremacy and the laws, art. 23 par. (1) regarding the inviolable character of the individual freedom and of the security of the person, art. 25 on free movement, art. 26 regarding intimate, family and private life, art. 53 regarding the restriction of the exercise of some fundamental rights or freedoms and art. 115 para. (6) regarding the interdiction to affect by emergency ordinances the rights and freedoms provided by the Constitution, as well as art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, on the right to liberty and security of person.

The Ombudsman claimed that the provisions of art. 25 par. (2) of Law no. 95/2006 and those of art. 8 par. (1) of the Government Emergency Ordinance no. 11/2020 are unconstitutional because they assign the power of an administrative authority, the minister of health, to set the mandatory quarantine and hospitalization to prevent the spread of contagious diseases, which involve measures restricting fundamental rights without being established in legislation the conditions, the procedure and the limits within which the public administration authorities can act in the sense of restricting these rights, respectively

contravention area proved lack of accessibility, clarity, precision and predictability, being contrary to art. 1 para. (5) of the Constitution which enshrines the principle of legality, the component regarding the quality of the law.

²⁰ The object of the exception of unconstitutionality is art. 25 para. (2) of Law no. 95/2006 on health care reform, republished in the Official Gazette of Romania, Part I, no. 652 of August 28, 2015, and art. 8 para. (1) of the Government Emergency Ordinance no. 11/2020 on medical emergency stocks, as well as some measures related to the establishment of quarantine, published in the Official Gazette of Romania, Part I, no. 102 of February 11, 2020.

the guarantees that protect the citizens from a possible illegal, discretionary or abusive application of these measures.

By Decision no. 458 of June 25, 2020, with unanimous votes, regarding the provisions of art. 25 par. (2) the first sentence of Law no. 95/2006 and of art. 8 par. (1) of the Government Emergency Ordinance no. 11/2020, and with a majority of votes²¹, regarding the provisions of art. 25 par. (2) the second thesis of Law no. 95/2006, the Constitutional Court admitted the exception of unconstitutionality and found that the provisions of art. 25 par. (2) the second thesis of Law no. 95/2006 and of art. 8 par. (1) of the Government Emergency Ordinance no. 11/2020 are unconstitutional. Also, the Constitutional Court rejected, as unfounded, the exception of unconstitutionality and found that the provisions of art. 25 par. (2) the first sentence of Law no. no. 95/2006 are constitutional in relation to the formulated criticisms.

Thus, the Court held that art. 25 par. (2) of Law no. 95/2006 obviously aims to face critical situations, which call for firm, coherent and adequate interventions for the defence of public health, which may also involve restrictions on the exercise of certain rights or fundamental freedoms.

The art. 25 par. (2) the first sentence of Law no. 95/2006, which enshrines the competence of the Minister of Health to issue orders in order to establish measures for the prevention and management of emergencies generated by epidemics, is not contrary to the provisions of the Constitution, but is an expression of the role of public administration to ensure law enforcement and to satisfy the general interest of society - the protection of public health. An eventual exceeding of the constitutional and legal framework in which the Minister of Health acts in application of the analyzed text of law may be subject to the control of the administrative contentious courts, not representing an aspect that belongs to the control of the Constitutional Court.

Regarding art. 25 par. (2) the second thesis of Law no. 95/2006, the Court noted that Health Minister has the power to determine diseases for which declaration, treatment or hospitalization are required. As the regulation does not establish the criteria on the basis of which the Minister decides in the sense indicated above, it appears that he enjoys, in reality, the freedom to establish the conditions under which, in the case of certain communicable diseases, the declaration, treatment or compulsory hospitalization are required. The provisions of art. 25 par. (2) the second thesis of

Law no. 95/2006 expressly refers to the measures regarding the obligation of the persons who have been diagnosed with some communicable diseases to declare this diagnosis, to follow treatment or to be hospitalized, even without their consent. This text of the law is the only regulatory framework for these measures and, consequently, the only ground for primary legislation under which the Minister can issue orders to oblige citizens to declare, receive treatment or hospitalize if they have a transmissible disease. The provisions of art. 25 par. (2) the second thesis of Law no. 95/2006, having an incomplete character, entrust the Minister of Health with the fulfilment of the obvious legislative omissions in the regulated matter, by issuing orders.

Recalling its jurisprudence, which stated the principle that any law must meet certain qualitative conditions, among them the predictability²², the Court held that the task of the minister is to complete the regulation regarding the conditions in which the persons with communicable diseases are obliged to declare, to undergo treatment or to be hospitalized, as well as the freedom to modify at any time and without respecting certain limits, the provisions of art. 25 par. (2) the second thesis of Law no. 95/2006 acquire an unpredictable, uncertain and difficult to anticipate character, being contrary to the provisions of art. 1 par. (5) of the Constitution, from which derive the conditions regarding the quality of the legal norm.

However, the effects of the found unconstitutionality issues appear even more significant if it is taken into account that the compulsory hospitalization of persons with communicable diseases involve measures that infringe fundamental rights and freedoms (individual freedom, free access to justice, the right to free movement).

In its analysis, the Court started from the regulation of individual freedom through the provisions of art. 23 of the Constitution, also retaining the provision in this matter from international legal acts²³ and aspects of the case law of the European Court of Human Rights²⁴.

Court held that the legal detention of a person liable to transmit a contagious disease is a deprivation of liberty that can be accepted in a society to ensure public health and safety, but is only allowed with the conditions and procedure established by law, being excluded arbitrariness. Also, any person must enjoy the possibility of challenging in court the measure of social medical detention in a short time, so that, in case of finding the illegality of the ordered measure, the person can be released.

²¹ See the separate opinion formulated by one of the judges of the Constitutional Court.

²² See, to that effect, Decision no. 903 of July 6, 2010, published in the Official Gazette of Romania, Part I, no. 584 of August 17, 2010 or Decision no. 447 of January 29, 2013, published in the Official Gazette of Romania, Part I, no. 674 of November 1, 2013.

²³ Article 3 of the Universal Declaration of Human Rights: "Every human being has the right to life, liberty and security of person"; Article 9, paragraph 1, of the International Covenant on Civil and Political Rights: "Every individual has the right to the liberty and security of his person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except for legal reasons and in accordance with the procedure laid down by law."; Article 5 of the Convention for the Defense of human rights and fundamental freedoms regarding the right to liberty and security.

²⁴ See Judgment of 25 January 2005 in *Enhorn v. Sweden*, Judgment of 8 January 2009 in *Kuimov v. Russia*, Decision of 7 May 2013 in *Koufaki and Adedy v. Greece*, or Judgment of 20 March 2018 in *Mehmet Hasan Altan v. Turkey*.

Analyzing the domestic legislation regulating the measure of involuntary hospitalization²⁵, the Court noted that provisions of art. 25 par. (2) the second thesis of Law no. 95/2006, referred to a hypothesis that the legal texts mentioned above do not cover, respectively the one in which the hospitalization can be ordered against the will of the person in order to prevent the spread of a communicable disease. However, the provisions of Law no. 95/2006 are not accompanied by safeguards appropriate to you and, through this legislative omission, violated the constitutional provisions of art. 23 par. (1), art. 53 and art. 20, by reference to the provisions of art. 5 paragraph 1 letter e) and paragraphs 4 and 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms and of art. 9 paragraph 1 of the International Covenant on Civil and Political Rights.

The mere mention of a measure of deprivation of liberty, such as compulsory hospitalization to prevent the spread of transmissible diseases, cannot, however, be regarded as sufficient to satisfy the condition of legality. Only the law, not the subsequently acts, must provide the reasons and conditions under which such a measure may be ordered, the person's right to appeal against the act under which the measure was taken and ensure safeguards for effective access to justice. The legislator must also keep in mind that the provisions on compulsory hospitalization are the last option that the authorities can use to achieve the goal of preventing the spread of a transmissible disease, so it is necessary to regulate other measures of lower severity to be applied, if effective. The legislature should not ignore the impact that compulsory hospitalization can have on people in care or in the care of the person admitted.

The hospitalisation to prevent the spread of communicable diseases involves the restriction of other fundamental rights such as the right to free movement and, in some cases, the right to intimate, family and private life, enshrined in art. 25 and 26 of the Constitution and therefore, it is necessary to comply with the constitutional requirements of art. 53 regarding the restriction of the exercise of certain rights or freedoms.

Regarding the provisions of art. 8 para. (1) of the Government Emergency Ordinance no. 11/2020, the Court addressed a similar argument and noted that they provide, essentially, the quarantine and competence of the Minister of Health on this measure, representing the only regulatory primary legislation on establishing quarantine measure. Thus, the legislator left it to this administrative authority to establish the types of quarantine, the conditions for the establishment and termination of the measure, ignoring the need to regulate guarantees for the observance of the fundamental rights of the persons to whom this measure was applied. The regulation is therefore lacking in clarity and predictability, so that a person

cannot reasonably anticipate the concrete manner and extent of the restrictive measures of rights. Therefore, the provisions of art. 8 par. (1) of the Government Emergency Ordinance no. 11/2020 do not meet the conditions regarding the quality of the normative acts deriving from the constitutional provisions of art. 1 par. (5).

The unconstitutional character of the norm appears all the more obvious since, similar to the obligatory hospitalization to prevent the spread of a transmissible disease, quarantine involve, depending on the form of the measure, the restriction, if not the deprivation of liberty of the person. Therefore, it is necessary to establish by law, the conditions for the establishment of quarantine, the forms that this measure may take, and its procedure, so as to represent a legal framework flexible for the appropriate intervention of the administrative authorities. It is also imperative to ensure an effective right of access to justice, especially when quarantine acquires all the characteristics of a deprivation of liberty.

Court also stated that "in exceptional circumstances, such as the one determined by spreading virus infection COVID-19, the establishing of energetic, prompt and appropriate measures is, in fact, a response of authorities to the obligations set forth in art. 34 par. (2) of the Constitution, according to which "the State is obliged to take measures to ensure hygiene and public health". Also, both compulsory hospitalization in order to prevent the spread of transmissible diseases and the quarantine measure are restrictions on the exercise of fundamental rights and freedoms that can be justified given the reasons for the need to ensure public safety and health. However, the measures in question have severe effects on the person rights and freedoms and therefore the relevant regulations must strictly comply with all constitutional requirements. The exceptional, unpredictable nature of a situation cannot be a justification for violating the rule of law, legal and constitutional provisions regarding the competence of public authorities or those regarding the conditions under which restrictions may be imposed on the exercise of fundamental rights and freedoms. National authorities - especially the central and local authorities - are best placed to identify and establish the set of actions needed for appropriate intervention at each stage of the pandemic, but the measures can only be based on a primary legal framework, which is subject to the constitutional and international provisions regarding the restriction of the exercise of certain rights or freedoms. Given that the crisis situation generated by a pandemic is the inevitable premise of such restrictions, national legislation must be accompanied by clear and effective safeguards against any abuse or discretionary or illegal act"

²⁵ See for example, art. 108 letter b), art. 109 para. (2) and art. 110 Criminal Code, art. 184 para. (5), art. 247 and 248 of the Code of Criminal Procedure, Law on mental health and protection of persons with mental disorders no. 487/2002, republished in the Official Gazette of Romania, Part I, no. 652 of September 13, 2012.

2.6. Analysis on the constitutionality measure of isolation in a sanitary unit or in an alternative location attached to the sanitary unit in relation to access to justice and individual freedom

The regulation of the measure of isolation in a sanitary unit or in an alternative location attached to the sanitary unit was subject to the constitutionality control on the occasion of solving the exception of unconstitutionality²⁶ of the provisions of art. 8 par. (3) - (9) and of art. 19 of Law no. 136/2020 on the establishment of measures in the field of public health in situations of epidemiological and biological risk.

The Ombudsman claimed that the criticized legal texts infringed the constitutional provisions of art. 147 par. (4) regarding the effects of the decisions of the Constitutional Court, with the consequence of affecting art. 21 and art. 23 on the free access to justice and individual liberty, as well as art. 1 par. (5) on the obligation to respect the Constitution, its supremacy and the laws.

The Ombudsman argued, in essence, that the legislative solution regarding isolation in a health unit or in an alternative location attached to the health unit is constitutional, only insofar as this type of isolation is required as a last resort measure, after all other measures, of a lower severity, were exhausted. The solitary confinement in a health unit or at an alternative location attached to the health unit, established *ope legis*, without regulating the possibility of doctors, the public health directorate and judges to order the application of a less severe form of isolation (isolation at home) proved the non-observance by the legislator of the Constitutional Court Decision no. 458 of June 25, 2020 and the violation of free access to justice since the judge is limited to solving the action for annulment of the decision regarding the measure of isolation or extension of isolation in health units ordered by the public health directorate. Another vice of unconstitutionality raised by the Ombudsman was about the lack of provisions on competent authorities with enforcement of the measure of isolation in a health facility when the contagious person opposes the measure.

By Decision no. 751 of October 20, 2020, with unanimous votes, regarding the provisions of art. 8 par. (3) - (9) and of art. 19 par. (2) - (6) of Law no. 136/2020 and with a majority of votes, regarding the provisions of art. 19 par. (1) of the same law, the Constitutional Court rejected as unfounded the exception of unconstitutionality and found that the provisions of art. 8 par. (3) - (9), with reference to the phrase "isolation in a sanitary unit or to an alternative location attached to the sanitary unit", and of art. 19 of Law no. 136/2020 are constitutional in relation to the criticisms made.

The Court held, in essence, that the provisions of art. 8 par. (3) - (9) of Law no. 136/2020 regulates the

conditions under which the isolation of persons in situations of epidemiological and biological risk may be ordered.

The provisions of Law no. 136/2020 establish the standards that the authorities and the persons involved in the decision-making process regarding the disposition and application of the isolation measure must respect so as to create a correct balance between the need to prevent the spread of a contagious infectious disease, imminent community transmission and the freedom of individuals. According to the law, the need to ensure a correct balance between the general interest of public health protection and the imperative to respect the person's freedom, as well as the proportionality of the isolation measure with the considered situation are established as mandatory benchmarks when ordering the isolation of persons.

As it appears from the content of art. 8 of Law no. 136/2020, there are two types of isolation: preventive isolation of the person for at least 48 hours, for the purpose of clinical examinations, laboratory and biological evaluations until receiving the results thereof and the extension of it the measure of isolation in a health care facility or in an alternative location attached to the health unit or, as the case may be, at the person's home or at the location declared by him.

According to the law, the isolation measure ceases on the date of confirmation of the person as cured based on clinical and para clinical examinations or on the recommendation of the doctor who finds that the risk of transmitting the disease no longer exists. Also, the isolation ceases as a result of the finding of illegality of the measure by the court.

Court noted that the measure of preventive isolation of a sick person with suggestive signs and symptoms specific to the case definition or of a person carrying the highly pathogenic agent, even if he does not show suggestive signs and symptoms, for a maximum of 48 hours, in a health unit or a another location attached to the health unit is an adequate and proportionate measure with the purpose pursued by the legislator, namely to ensure the medical examination of the person and to guarantee, at the same time, the protection of public health and the protection of the person's health. The legislator has the freedom to establish the concrete measures to ensure the achievement of the objectives shown above, being essential the observance of their proportional character.

The modality of application of the measures provided by Law no. 136/2020 is made by order of the Minister of Health, this being the authority which, depending on the concrete situation of epidemiological and biological risk, assesses the most appropriate measures necessary to be applied in order to prevent the spread of infectious diseases. In elaborating this decision, the Minister of Health will have to

²⁶ The object of the exception of unconstitutionality is constituted by the provisions of art. 8 para. (3) - (9), with reference to the phrase "isolation in a sanitary unit or to an alternative location attached to the sanitary unit", and of art. 19 of Law no. 136/2020 on the establishment of measures in the field of public health in situations of epidemiological and biological risk, published in the Official Gazette of Romania, Part I, no. 634 of July 18, 2020.

circumscribe all the guarantees that Law no. 136/2020 regulates them in order to respect the fundamental rights and freedoms of persons, so that all measures are proportionate to the situation that determined them, limited in time to it and applied in a non-discriminatory manner.

Therefore, Law no. 136/2020 enshrines a set of measures that can be instituted in situations of epidemiological and biological risk. However, the application of these measures is not done directly, based on the legal provisions, but in a mediated way, by order of the Minister of Health, ensuring at the same time a balance between the public interest and the imperative of respecting the fundamental rights of persons. Equally, the obligation to ensure fairness and proportionality of the measure isolation lies doctor examining the state of the sick person and the test results and will assess and recommend complicated those measures which are best suited his situation fits within the limits set by the Minister of Health. The same obligation belongs to the health directorates, which analyze the measure recommended by the doctor, and may mention or reject it.

Hence, the task of ensuring a gradual application of the measure of isolation, so that the restriction of the exercise of fundamental rights and freedoms of the person is achieved only to the extent strictly necessary to prevent the spread of an infectious disease belongs to several institutional actors who, given both data on the existence and the evolution of an epidemiological and biological risk situation and the risks it presents for public health, but also the concrete situation of the examined patient, will determine the necessity, place and duration for which this measure can be ordered.

The hypothesis that, in certain extraordinary circumstances, the Minister of Health may consider that the most appropriate measure to prevent the spread of an infectious disease can only be to isolate infected persons in health facilities or in alternative locations attached to them cannot be ruled out. This hypothesis does not contradict *per se* those established by the Constitutional Court by Decision no. 458 of 25 June 2020 as long as this measure is ordered for a limited time, in a non-discriminatory manner and in proportion to the factual situation that determines it, aims to prevent the spread of an infectious disease, dangerous to human safety and public health and is established to protect the public interest and do not create an imbalance between the need to protect public health and the imperative to respect the person's freedom.

In order to guarantee the observance of all these conditions, the provisions of art. 15 par. (4) of Law no. 136/2020 provide for the possibility of challenging in court, by any interested person, the administrative acts of a normative nature regarding the establishment, modification or termination of the measures provided by law. Also, pursuant to art. 17 of Law no. 136/2020,

the person against whom the measure of isolation in a health unit or a location attached to the health unit was ordered has the possibility to challenge in court the individual administrative act by which this measure was instituted.

Thus, Law no. 136/2020 ensures the guarantees of exercising the right of access to justice, so that, as provided by art. 21 par. (1) of the Constitution, the person concerned " *may apply to the judiciary for the defence of his rights, freedoms and legitimate interests* ". The fact that the provisions of the criticized law do not provide for the possibility for the court to order another measure than the one ordered by the doctor or by the public health director cannot be considered as infringing the right of free access to justice or the right to defence, while the person concerned can obtain in court the solution of not applying an administrative measure that is disproportionate or illegal. In conclusion, the Court has appreciated that the provisions of art. 8 par. (3) - (9) of Law no. 136/2020 complied with the invoked constitutional provisions.

3. Conclusions

The observance of fundamental rights and freedoms, established as supreme values of the rule of law, requires therefore that the public authorities, in achieving essential purposes of their work, to act continuously within the constitutional and legal framework so that potential discretionary tendencies can be avoid or removed. In this way, "the rule of law ensures the supremacy of the Constitution, the correlation of laws and all normative acts with it, the existence of the principle of separation of public powers which must act within the law, namely within a law expressing the general will" and "enshrines a series of guarantees, including jurisdictional ones, to ensure the observance of the rights and freedoms of the citizens through the self-limitation of the state, respectively the inclusion of the public authorities in the coordinates of the law"²⁷.

Thus, the rule of law and the observance of fundamental rights and freedoms are constantly in a relationship of interdependence, not being conceivable the existence of one in the absence of the other, even in the situation generated by the COVID-19 pandemic.

The issue of respect for fundamental rights during the Covid-19 pandemic has also been a concern of the European Commission for Democracy through Law (Venice Commission), an advisory body to the Council of Europe, which in the documents issued during this period stressed the need to compliance with democracy, the rule of law and human rights in the context of the health crisis. Thus, in the Information Document of 7 April 2020 entitled "Respect for democracy, the rule of law and human rights in the context of the health crisis caused by COVID-19. A set of tools for Member

²⁷ See the Constitutional Court Decision no. 17 of January 21, 2015, published in the Official Gazette of Romania, Part I, no. 79 of January 30, 2015.

States", the Venice Commission noted that: the Governments face terrible challenges in seeking to protect its populations from the threat of COVID-19 virus. It is also understood that the normal functioning of the society cannot be maintained, in particular in view of the main protection measures needed to combat the virus, namely isolation. In addition, it is accepted that the measures taken will inevitably infringe on the rights and freedoms that are an integral and necessary part of a democratic society governed by the rule of law. The main social, political and legal challenge that our Member States will face will be their ability to respond effectively to this crisis, while ensuring that the measures taken will not undermine our special long-term interest in protecting the fundamental values of democracy, the rule of law and human rights in Europe". The Venice Commission also emphasized that: "Even in emergencies, the rule of law must prevail" (see point 2.1. *The principle of legality*, point 2. *Respect for the rule of law and democratic principles in situations emergency* in the information document referred to above).

The interaction between the Romanian Ombudsman and the Constitutional Court at the beginning of the pandemic COVID-19 resulted in confirming the constitutionality of some normative adopted during this time, thus validating the effort of the state authorities to respond effectively in front of the health crisis. The result of this interaction was also the removal from active legislative fund those provisions that violated the Constitution, while the Constitutional Court decisions created eloquent constitutional benchmarks for the primary and

delegated legislator, allowing to legislate appropriate norms to combat the Covid-19 pandemic, while ensuring, in the conditions of deviation from the usual, the respect for fundamental rights and freedoms, without which it can not be conceived the existence of the rule of law.

From the analyzed perspective, it is useful to reiterate that for the proper functioning of the rule of law it is permanently necessary the cooperation between public authorities in the sphere of state powers, which should be manifested in the spirit of constitutional loyalty norms, loyal behaviour being an extension of the principle of separation and balance of powers²⁸. As the Constitutional Court stated²⁹ "loyal collaboration presupposes, beyond the respect for the law, the mutual respect of the state authorities/institutions, as an expression of some assimilated, assumed and promoted constitutional values. Constitutional loyalty can therefore be characterized as a value-principle intrinsic to the Fundamental Law, while loyal collaboration between state authorities/institutions has a defining role in the implementation of the Constitution". Such a loyal cooperation is also materialized in the fair and adequate reception of the actions undertaken in good faith by all participants in the state life. Otherwise, the constitutional norms would be purely declaratory, which is an inadmissible situation for a state that shares the democratic values part of European public order, as foreshadowed by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union³⁰.

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²⁸ See Constitutional Court Decision no. 1431 of November 3, 2010, published in the Official Gazette of Romania, Part I, no. 758 of November 12, 2010.

²⁹ See Constitutional Court Decision no. 611 of October 3, 2017, published in the Official Gazette of Romania, Part I, no. 877 of November 7, 2017.

³⁰ See Constitutional Court Decision no. 233 of February 15, 2011, published in the Official Gazette of Romania, Part I, No. 340 of May 17, 2011.

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