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Role of the Constitutional Courts in Upholding and Applying the ConstitutionalPrinciples

Questionnaire For the National Reports

I. The role of the constitutional court in defining and applying explicit/implicit constitutional principles.

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1. Does the constitutional court or equivalent body exercising the power of constitutional review (hereinafter referred as the constitutional court) invoke certain constitutional principles (e.g. separation of powers; checks and balances; the rule of law; equality and non-discrimination, proportionality, reasonableness, human dignity, etc.) in the process of constitutional adjudication?To what extent does the constitutional court go in this regard? Does the constitution or any other legal act regulate the scope of constitutional decision-making in terms of referring to specific legalsources within the basic law that the constitutional court may apply in its reasoning?

The Constitution of Romania dedicates to the Constitutional Court a separate title – *Title V* (Articles 142 to 147), which includes provisions on the role of the Court, its structure, the term of office of its members, the methods of designation of Judges and election of the president of the Court, the requirements that need to be met for becoming a Judge of the Court, the incompatibilities, the independence and the irremovability, the powers of the Constitutional Court, as well as the effects of the Court's decisions.

Law no. 47/1992 on the organisation and functioning of the Constitutional Court was adopted based on the aforementioned constitutional texts[1]. The first Chapter — *General provisions* — of Law no. 47/1992 — explicitly mentions the role of the Constitutional Court as "*guarantor for the supremacy of the Constitution*" and its position as "*sole authority of constitutional jurisdiction in Romania*" (Article 1), whilst setting out the regulatory acts that may form the subject matter of constitutional review, specifying that they are unconstitutional if they "*infringe the provisions or principles of the Constitution*". [Article 2 (2) of the Law].

It is thus concluded that the organic law of the Romanian Constitutional Court expressly distinguishes between "*provisions*" and "*principles*" of the Constitution, as basis for constitutional review. As a result, the Constitutional Court, makes a distinction as well, in its decisions,

[1] Republished in Official Gazette no. 807 of 3 December 2010.

between provisions and principles of the Constitution, even when it decides on initiatives for revision of the constitutional provisions (which implicitly requires the classification of those provisions as belonging to the scope of constitutional "*principles*" or constitutional "*provisions*").

Thus, for example, in its decision whereby it ruled on the most recent initiative for revision of the Constitution, the Constitutional Court held that "*the law for revision, adopted by Parliament, must be examined by the Constitutional Court, prior to the referendum organised under the terms of Article 151 (3) of the Basic Law, to ascertain, on the one hand, whether the Court's decision on the draft law or proposal for a revision of the Constitution has been complied with and, on the other hand, whether the modifications and additions to the draft or the proposal for a revision in the debate and parliamentary adoption procedure comply with the constitutional principles and provisions relating to revision. In the absence of such a control mechanism there is a risk of circumvention of the generally binding effect of the Constitutional Court's decision on the initiative for the revision of the Constitution, rendering ineffective the constitutional review carried out, consequences that are incompatible with the principles of the rule of law and with the role of the Constitutional Court*". (Decision no. 80/2014, Official Gazette no. 246 of 7 April 2014, par. 435)

2. What constitutional principles are considered to be organic in your jurisdiction? Are there any explicit provisions in the constitution setting out fundamental principles? Is there any case-law in respect of basic principles? How often does the constitutional court make reference to those principles?

Title I of the Romanian Constitution is entitled ***General Principles***. Under this title, the first article of the Constitution sets forth the characteristics of the Romanian State, as well as a number of principles defining it and supporting the entire constitutional edifice, as follows:

Article 1. The Romanian State

(1) Romania is a sovereign, independent, unitary, and indivisible National State.

(2) The form of government of the Romanian State is the Republic.

(3) Romania is a democratic and social state governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the Romanian people's democratic traditions and the ideals embodied by the December 1989 Revolution, and shall be guaranteed.

(4) The State shall be organised based on the principle of the separation and balance of powers - legislative, executive, and judicial - within the framework of a constitutional democracy.

(5) Observance of the Constitution, of its supremacy, and the laws shall be obligatory in Romania.

The other rules classified by the constitutional legislator as "*general principles*", and therefore included under Title I of the Constitution, refer to: sovereignty (Article 2), territory (Article 3), unity of the people and equality between citizens (Article 4), nationality (Article 5), right to identity (Article 6), Romanians abroad (Article 7), pluralism and political parties (Article 8), trade unions, employers' organisations and professional associations (Article 9), international

relations (Article 10), international law and national law (Article 11), national symbols (Article 12), official language (Article 13), capital city (Article 14).

A special place is dedicated to what the doctrine has called the "*hard core*" of the Constitution, i.e. those intangible values, which cannot be changed, not even by the derived constitutional legislator, and which constitute the "*limits on matters of revision*". "the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, or territorial integrity, independence of judiciary, political pluralism, or official language" (Article 152 of the Constitution). The compliance with the said limits is examined, *ex officio*, by the Constitutional Court, when ruling on initiatives for the revision of the Constitution.[2]

Frequently, the Court is asked to rule on the infringement, by the impugned rules, of the principles contained in the Constitution, in particular in Article 1, and adjudicates to that effect, ascertaining either the compliance or the violation thereof, as the case may be. Below we shall give some relevant examples:

a). "*As concerns* ***the provisions of the first sentence of Article 1 (3) of the Constitution, which enshrines the principle of the State governed by the rule of law****, the Court held, in its case-law (see Decision no. 70 of 18 April 2000, Official Gazette no. 334 of 19 July 2000) that it concerns the major purposes of State activity, seen as what the doctrine usually calls the rule of law, expression which involves the subordination of the State to the law, ensuring the means that enable that law to censor the policy options and, in that context, to weight possible abusive and discretionary tendencies of State structures. The rule of law ensures the supremacy of the Constitution, the linking of all laws and regulatory acts thereto, the existence of the separation of public powers, which must act within the boundaries of the law, i.e. within the boundaries of a law expressing the general will. The rule of law enshrines a number of safeguards, also jurisdictional, to ensure respect for the rights and freedoms of citizens, by State's self-restraint, and by public authorities' confinement to the limits of the law*" (Decision no. 17 of 21 January 2015, Official Gazette no. 79 of 30 January 2015).

b) "Reference to administrative acts, which in terms of legal hierarchy are placed on a lower level than laws, in a critical area for national security, with an impact on citizens' fundamental rights and freedoms, ***is in breach of the constitutional provisions contained in Article 1 (5) relating to the principle of legality***. A legal provision must be precise and unequivocal, and it must establish clear and foreseeable rules, the application of which does not allow for arbitrariness or abuse. In addition, the rule should regulate in a uniform manner, and it should establish minimum requirements applicable to all its addressees. However, as long as the orders or the decisions are issued by the managing bodies of public institutions or authorities designated by law, it is quite obvious that the law unduly relativises the regulation of this area, leaving it up to each entity to establish, in a differentiated way, some key measures, as for example the minimum requirements for cyber security, the method of service, and the data and information accompanying the notification." (Decision no. 17 of 21 January 2015, Official Gazette no. 79 of 30 January 2015).

c). "*The State is not allowed to adopt legislative solutions which can be seen as disrespectful to religious or philosophical beliefs of parents, which is why the organisation of school activity must*

[2] According to the same constitutional text, no revision shall be possible if it leads to the suppression of any of the citizens' fundamental rights and freedoms, or their safeguards.

be subordinated to achieving a conciliation purpose in the exercise of functions undertaken in the process of education and teaching of religion while respecting the right of parents to ensure the education in accordance with their own religious beliefs. As part of the constitutional system of values, the freedom of religious conscience is characterised by tolerance, especially in relation to ***human dignity guaranteed by Article 1 (3) of the Basic Law****, which dominates as supreme value the whole system of values. This reason excludes, in principle, that the activities and conduct arising from a certain attitude due to religious beliefs or non-religious philosophical convictions be subject to sanctions imposed by the State for such conduct, irrespective of the religious motivations of the person concerned*." (Decision no. 669 of 12 November 2014, Official Gazette no. 59 of 23 January 2015).

d). "From a constitutional perspective, ***human dignity*** involves two inherent dimensions, namely the relationship between people, which concerns people's right to have their fundamental rights and freedoms respected, with the correlative obligation to respect the fundamental rights and freedoms of others , as well as humans' relationship with the environment, including the animal world, which involves, as concerns the animals, man's moral responsibility to care for these creatures in such a way to illustrate the attained level of civilization." (Decision no. 1 of 11 January 2012, Official Gazette no. 53 of 23 January 2012; Decision no. 80 of 16 February 2014, Official Gazette no. 246 of 7 April 2014).

e)."*There can be no antinomy between* ***Article 1(1) of the Constitution concerning the unitary character of the State*** *and Article 120 of the Constitution concerning the* ***principle of decentralisation****, on the contrary, they are complementary, as the latter is aimed at a better administration and management of local resources*" (Decision no. 1 of 10 January 2014, Official Gazette no. 123 of 19 February 2014).

f). Through a legislative act, the legislator cannot "*amend or abolish a judgement (...) without thereby infringing* ***the principle of the separation of powers***" (Decision no. 333 of 3 December 2002, Official Gazette no. 95 of 17 February 2003).

g)."***The principle of separation and balance of powers*** *presupposes the existence of mutual control between State powers, in terms of exercising in accordance with the law their specific duties, seen as a specific mechanism of a democratic Stated based on the rule of law, in order to avoid abuse by one or the other State power*" (Decision no. 1109 of 8 September 2011, Official Gazette no. 773 of 2 November 2011).

h)."*The provisions conferring on courts the power to abolish legal rules established by law and to create instead other rules or to replace them with rules contained in other regulatory acts are unconstitutional, because they infringe* ***the principle of the separation of powers enshrined in Article 1 (4) of the Constitution*** *and the provisions of Article 61 (1), in accordance with which Parliament is the sole legislative authority of the country*" (Decision no. 1325 of 4 December 2008, Official Gazette no. 872 of 23 December 2008).

i). "*Regulation by means of ordinances and emergency ordinances constitutes, as expressly provided for in Article 115 of the Constitution, a power exerted by the Government on the basis of legislative delegation, and the non-compliance with the delegation limits laid down by the Constitution itself constitutes prohibited interference with Parliament's legislative power, i.e., a violation of* ***the principle of separation of powers***" (Decision no. 544 of 28 June 2006, Official Gazette no. 568 of 30 July 2006).

j)"*According to the Constitution, the Public Ministry is part of the judiciary, not of the executive power or of the public administration. Therefore, participation of the prosecutor in the settlement of cases before courts is not liable to undermine* ***the principle of separation of powers***" (Decision no. 681 of 15 December 2005, Official Gazette no. 33 of 13 January 2006).

k)*"It is questionable whether a retirement allowance may be paid by the Romanian State to members of the People's Councils by reason of the principles governing the 1991 Constitution , as such would be in disregard of* ***«justice» as supreme value of the Romanian State set out in Article 1 (3) of the Constitution of Romania*** *(«justice» is considered in the case-law of the Constitutional Court as one of the core values of the rule of law, as proclaimed in Article 1 (3) of the Constitution — see Decisions nos. 1358 and 1360 of 21 October 2010, published in the Official Gazette of Romania, Part I, no. 761 of 15 November 2010) and, consequently, that would amount to a privilege contrary to Article 16 (1) of the Constitution."*(Decision no. 22 of 20 January 2016, published in the Official Gazette of Romania, Part I, no. 160 of 2 March 2016).

3. Are there any implicit principles that are considered to be an integral part of the constitution? If yes, what is the rationale behind their existence? How they have been formed over time? Do they originate from certain legal sources (e.g. domestic constitutional law or the constitutional principles emanating from international or European law; newly-adopted principles or ones re-introduced from the former constitutions)? Has academic scholars or other societal groups contributed in developing constitutionally-implied principles?

There are principles which, although they have not been expressly referred to in the Constitution, they have been inferred, by means of case-law, from the constitutional provisions.

Thus, for example, **the 1991 Constitution of Romania has not expressly enshrined the principle of separation of powers, but it organised the authorities according to the requirements thereof**. As a result, the Constitutional Court has often relied on the principle of separation of powers in its decisions adopted before 2003, even though there was no express constitutional provision. Upon the 2013 revision, this principle has been enshrined *expresisverbis* in Article 1 (4), as follows: "*The State shall be organized based on the principle of the separation and balance of powers - legislative, executive, and judicial - within the framework of a constitutional democracy*". The constitutional rules give expression to a flexible separation of powers, the three powers having a relationship of cooperation and mutual control.

An example of a principle which is not expressly enshrined, but is being developed in the case-law of the Constitutional Court, is that of **constitutional loyalty**. The Court's case-law has evolved from a simple enunciation of the concepts of '*loyalty*' and '*loyal behaviour*', to the substantiation of some '*rules of constitutional loyalty'* as safeguards of the principle of separation and balance of powers[3].

[3] See, with regard to the meaning of the principle of fair conduct of public authorities, Decision no. 1257/2009, published in Official Gazette no. 758 of 6 November 2009, Decision no. 1431/2010, published in Official Gazette no. 758 of 12 November 2010, Decision no. 51/2012, published in Official Gazette no. 90 of 3 February 2012, Decision no. 727/2012, published in Official Gazette no. 477 of 12 July 2012 and Decision no. 924/2012, published in Official

Another example of a principle that does not have an express constitutional enshrinement, and has emerged and was developed further as a result, in particular, of the reception of the case-lawof the European Court of Human Rights[4]and of the Court of Justice of the European Union[5], is the **principle of legal certainty**. Thus, by *Decision no. 404 of 10 April 2008* (Official Gazette no. 347 of 6 May 2008), the Court has held that, although this principle is not expressly enshrined in the Constitution of Romania, "it can be inferred from the provisions of Article 1 (3), according to which Romania is a democratic and social state governed by the rule of law, and from the preamble to the Convention for the protection of human rights and fundamental freedoms, as interpreted by the European Court of Human Rights in its case-law (*Decision no. 686 of 25 November 2014, Official Gazette no. 68 of 27 January 2015*)."According to the Court, the principle of legal certainty is a fundamental component of the rule of law, as enshrined in the provisions of Article 1 (3) of the Basic Law (*Decision no. 570 of 29 May 2012, Official Gazette no. 404 of 18 June 2012; Decision no. 615 of 12 June 2012, Official Gazette no. 454 of 6 July 2012*).

4. What role does the constitutional court has played in defining the constitutional principles? How basic principles have been identified by the constitutional court over time? What method of interpretation (grammatical, textual, logical, historical, systemic, teleological etc.) or the combination thereof is applied by the constitutional court in defining and applying those principles? How much importance falls upon *travauxpreparatoires* of the constitution, or upon the preamble of the basic law in identifying and forming the constitutional principles? Do universally recognised legal principles gain relevance in this process?

The Constitutional Court is **the guarantor for the supremacy of the Constitution. As a result, it has exclusive competence to conduct the review of constitutionality and, in that context, to interpret constitutional provisions and principles**.

Decisions and rulings issued by the Court are final and generally binding. In this respect, the Constitutional Court held that Article 147 (4) of the Constitution, which enshrines the generally binding effect of its decisions "does not make a distinction according to the types of decisions delivered by the Constitutional Court, or according to the content of these decisions, which leads to the conclusion that **all decisions of this Court, as a whole, are generally binding**"[6]. Furthermore, in its settled case-law, starting with the Plenum's Decision no. 1/1995[7], the Court has held that the force of res judicata accompanying legal acts, including decisions of the Constitutional Court, attaches not only to the operative part, but also to the reasons underlying it. Therefore — according to the Court — the Parliament, the Government, and the public authorities and institutions, must fully comply with both the reasoning part and the operative part of the decisions delivered by the Constitutional Court. **This specific effect of the Constitutional Court's acts is a consequence of its role, which would not be fully realised**

Gazette no. 787 of 22 November 2012, Decision no. 972/2012, published in Official Gazette no. 800 of 28 November 2012, Decision no. 449/2013, published in Official Gazette no. 784 of 14 December 2013.

[4] Pursuant to Article 20 of the Constitution of Romania

[5] Pursuant to Article 148 of the Constitution of Romania

[6] Decision no. 2 of 11 January 2012, published in Official Gazette no. 131 of 23 February 2012.

[7] Published in Official Gazette no. 16 of 26 January 1995.

without recognising the binding value of the Court's interpretation of the texts and concepts of the Basic Law, in line with the meaning resulting from the constitutional legislator's intention.

When examining whether an infraconstitutional rule is in line with the Constitution, **the Constitutional Court is necessarily carrying out the official interpretation of the Constitution in the sense that it explains and develops the constitutional principles and rules, seeing that it remains a "living law"**. The meaning of these concepts and principles, established by the Constitutional Court, "*is socially accepted and determines the constitutional status of the society*" and the elimination of possible divergences of interpretation between the other addressees of the constitutional rules and in this way it achieves the constitutional substantiation of the law-making activity, i.e. law enforcement, guiding the evolution of the entire legal system[8]. In this way, the Court and, in general, constitutional courts "extend" also the scope of constitutional law.

The papers underlying the adoption and, then, the revision of the Constitution, are certainly considered by the Constitutional Court, which often relies on the historical and teleological interpretation in carrying out the constitutional review. To substantiate its decisions, the Court also uses other methods of interpretation (literal, logical, systematic).

5. What is a legal character of the constitutional principles? Are they considered to be the genesis of the existing constitutional framework? What emphasis is placed upon the fundamental principles by the constitutional court in relation to a particular constitutional right? Are basic principles interpreted separately from the rights enumerated in the constitution or does the constitutional court construe fundamental principles in connection with a specific constitutional right as complementary means of latter's interpretation? Can the basic principles in your jurisprudence constitute a separate ground for unconstitutionality without their connection with a concrete constitutional norm? Is there any requirement in law placed upon the judicial acts of enforcement of constitutional principles?

Referring to the history of the adoption of the initial text of Article 1 of the Constitution, upon presenting the Constitution Drafting Committee Report on Title I, Professor Ion Deleanu was pointing out that[9] the Commission's intention was, first, to identify the constituent elements of the Romanian State, the nation, the territory, the political and legal organisation and the public power, and to establish their main attributes.

On these sources and principles used in the review of constitutionality, it had been held, inter alia, that "the entire constitutional regulation is subject to general principles, aimed at illustrating the provisions Article 1 (3) of the Basic Law, according to which Romania is a democratic and social State governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the Romanian people's democratic traditions and the

[8]*The XIVth Congress of the Conference of European Constitutional Courts — Problems of legislative omission in constitutional jurisprudence, Vilnius, 2009 — General report published by the Constitutional Court of the Republic of Lithuania*, p. 51.
[9]*OdiseeaelaborăriiConstituției,* pp.157-158

ideals embodied by the December 1989 Revolution, and shall be guaranteed. [...] The breach by the legislation not only of the texts, but also of the principles of the Constitution, renders such legislation unconstitutional. [...]". At the same time, a differentiation was made between "general principles", expressly regulated in Title I of the Constitution and the principles to be gleaned from the entire regulation of the Basic Law, such as the principle of separation of powers (specifically enshrined upon the revision of the Constitution, in 2003) or that of equal opportunities of political parties[10], invoked by the Constitutional Court as well, even though not specifically enshrined in the Constitution.

Upon examining the most recent initiative for the revision of the Constitution, concerning also a series of general principles, the Court held, with regard to the constitutional principles' significance and role, that: "***the general principles of a system are defined as a set of guiding sentences where the structure and development of that system are subordinated thereto. In a Basic Law, taken as a whole, the general principles constitute the framework on which all other rules thereof are grafted***." (Decision no. 80/2014, cited above, para. 21-22)

6. What are the basic principles that are applied most by the constitutional court? Please describe a single (or more) constitutional principle that has been largely influenced by constitutional adjudication in your jurisdiction. What contribution does the constitutional court has made in forming and developing of such principle(s)? Please, provide examples from the jurisprudence of the constitutional court.

Of all the principles expressly enshrined or developed in the case-law, a significant development in the context of the review of constitutionality regards, for example, ***the principle of legality***, also in terms of incorporating the rules of legislative technique for drafting normative acts.

The constitutional basis for relying on the rules of legislative technique in the review of constitutionality has been identified in Article 1 (3) "*Romania is a* […] *State governed by the rule of law*", and in Article 1 (5), "*Observance of the Constitution, of its supremacy, and the laws shall be obligatory in Romania*". The Constitutional Court made the following correlation between the two rules contained in Article 1 of the Constitution: "*the principle of legality is a principle of constitutional rank*"[11] so that "*law breaking has as immediate consequence the overriding of Article 1 (5) of the Constitution of Romania, which provides that observance of the law shall be mandatory. The breach of this constitutional duty would implicitly result in the infringement of the principle of the rule of law enshrined in Article 1 (3) of the Constitution*".[12]The Court also stated that "*although the rules of legislative technique do not have constitutional value, [...] by their regulation the legislator has imposed a number of binding criteria for the adoption of any legislative act, and the compliance therewith is necessary in order to ensure systematisation, harmonisation and coordination of legislation, as well as the content and legal form appropriate to each legislative act*".[13]Thus the Court has referred expressly to the provisions of Law no. 24/2000, bearing in mind that: "*in accordance with Article 1 (2) of Law no. 24/2000 on legislative*

[10]Victor Dan Zlătescu, *Dissenting Opinion to Decision no. 73 of 4 June 1996*, published in the Official Gazette of Romania, Part I, no. 255 of 22 October 1996

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

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

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

technique for drafting normative acts, [...] «regulatory acts shall be initiated, drawn up, adopted and implemented in accordance with the provisions of the Constitution of Romania, republished, with the provisions of this law, as well as the principles of the legal order», and according to Article 3 (1) of the same Law, «the legislative technique rules shall be mandatory upon drawing up the draft law by the Government and the legislative proposals by Deputies, Senators, or citizens upon exercising the right of legislative initiative [...]». The obligation to comply with these legal provisions also follows from the provisions of Article 1 (5) of the Constitution, according to which, «Observance of the Constitution, of its supremacy, and the laws shall be obligatory in Romania»."[14]Developing further the aforementioned reasoning, the Court also found that "*in its case law, it has held that «The essential feature of the rule of law is the supremacy of the Constitution and the obligation to respect the law»[15] and that «the rule of law ensures the supremacy of the Constitution, correlating all laws and regulatory acts with the Constitution»[16]which means that it «entails, as a matter of priority, observance of the law, whilst the democratic State is essentially a State governed by the rule of law»[17][...] and therefore, compliance with the provisions of Law no. 24/2000 on the legislative technique for drafting normative acts is a genuine criterion of constitutionality through the application of Article 1 (5) of Constitution (ad similis, see Decision no. 1 of 10 January 2014, cited above, and Decision no. 17 of 21 January 2015, published in Official Gazette of Romania, Part I, no. 79 of 30 January 2015, paragraphs 95 and 96)*."[18]

Supporting this interpretation of the principle of legality, highlighting, in particular, ***the quality of the law***, the Court has stated that it is a "*fundamental State institution acting as guarantor for the supremacy of the Constitution, the rule of law and the principle of separation and balance of powers*"[19]. All these "***include, inter alia, the Court's competence, certainly within the limits of the Constitution, to ensure compliance of the entire legislation with the fundamental rules and principles***".[20]

This special development of the principle of legality in the case-law of the Constitutional Court was carried out by reception of the case-law of the European Court of Human Rights whereby the latter has ruled on **the concept of "law" which appears in a number of articles of the Convention in the sense that it encompasses both law of legislative origin and that deriving from case-law, and it implies some qualitative conditions, inter alia, those of accessibility and foreseeability** (see, inter alia, judgment of 15 November 1996 in Case Cantoni v. France, paragraph 29, judgment of 22 June 2000 in Case Coeme and Others v. Belgium, paragraph 145, judgment of 7 February 2002 in Case E.K. v. Turkey, paragraph 51).According to its settled case-law, the term "prescribed by law" requires firstly that the adopted measure should have a basis in national law, but it also refers to the quality of that law: it must be **accessibleto the persons concerned and formulated with sufficient precision to enable them - if need be, with appropriate legal advice - to foresee, to a degree that is reasonable**

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

in the circumstances, the consequences which a given action may entail (see, inter alia, judgment of 8 June 2006 in Case *Lupşa v. Romania*, paragraph 32). In other words, **only a rule formulated with sufficient precision to enable an individual to regulate his or her conduct could can be considered a "law"**. The individual must be able to foresee the consequences which a given action may entail (see, inter alia, judgment of 26 April 1979 in Case *Sunday Times v. the United Kingdom*). The significance of the notion of foreseeability depends to a large extent on the context of the text at issue, the field it is designed to cover and the number and status of those to whom it is addressed (see, inter alia, judgment of 28 March 1990 in Case *Groppera Radio AG and Others v. Switzerland*, paragraph 68, judgment of 8 June 2006 in Case *Lupşa v. Romania*, paragraph 37). The foreseeability of the law does not preclude the concerned person to request proper advice in order to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, inter alia, judgment of 13 July 1996 in Case *Tolstoy Miloslavsky v. the United Kingdom*, paragraph 37). This is usually the case with professionals, who are used to having to proceed with a high degree of caution when pursuing their occupation. It may also be expected from them to pay particular attention to the assessment of the risks involved (*Cantoni*, cited above, paragraph 35). According to the same court, precisely because of the principle of generality of laws, their content cannot provide absolute precision. One type of regulatory technique is to use broad categories rather than exhaustive lists. Likewise, many laws use the effectiveness of more or less vague formulas, to avoid excessive rigidity and to adapt to changing situation. Interpretation and application of such texts depends on practice (see, inter alia, judgment of 25 May 1993 in case *Kokkinakis v. Greece*, paragraph 40, judgement Cantoni, cited above, paragraph 31, judgement *Dragotoniu and Militaru — Pidhorni* v. Romania, and judgment of 24 May 2007, paragraph 36). The decisional function entrusted to courts serves precisely to remove the doubts that might exist in the interpretation of rules, taking into account the evolution of the daily practice, provided that the result is consistent with the substance of the offence and clearly foreseeable" (see, inter alia, judgment of 22 November 1995 in case S.W. v. the United Kingdom, paragraph 36, and *Dragotoniu and Militaru — Pidhorni* v. Romania, cited above, paragraph 37).

On the grounds of Article 20 of the Constitution, in many cases the Constitutional Court has applied the case-law of the European Court of Human Rights relating to the requirements of accessibility and foreseeability of the law, noting the unconstitutionality of regulations which did not meet these requirements.[21]The Court has held that "*in order to be compatible with the principle of the rule of law, the law must meet the requirements of* ***accessibility*** *(the rules governing the matter of interception of communications must be regulated by law),* ***clarity*** *(the rules must have a fluent and comprehensible wording, without syntactic difficulties or obscure or ambiguous passages, being formulated in a specific legal regulatory language and style, concise, austere, with strict compliance with the rules of grammar and spelling),* ***precision*** *and* ***foreseeability*** *(lexcerta, the rule should be clearly and precisely drafted so as to enable any individual — if need be with appropriate advice — to regulate his or her conduct*

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

and to be able to foresee, to a reasonable extent, the consequences which a certain act may entail)"[22].

Thus, for example, upon declaring the unconstitutionality of the provisions of Article II (1) and (3) of Law no. 249/2006 amending and supplementing Law no. 393/2004 on the status of local officials, the Court stated that "*the legal provisions under review, due to their improper wording, do not comply with the requirements of legislative technique for legal norms. [...]"; in that case, the conclusion of the Court was that "the legal texts under review do not comply* ***with the four criteria of clarity, precision, foreseeability and predictability*** *as to enable an individual to regulate his or her conduct and, therefore, avoid the consequences of the breach thereof*." [23]

Developing its case-law in the same vein, in a case[24] in which it found unconstitutional the provisions of Law no. 298/2008 on the retention of data generated or processed by providers of publicly available electronic communications services or of public communications networks, and amending Law no. 506/2004 concerning the processing of personal data and the protection of privacy in the electronic communications sector, transposing into national law an European Directive, the Court held that "***the lack of a precise legal regulation, which would determine precisely the data necessary to identify the users- natural or legal persons, opens the door to abuses*** *in the activity of retention, processing and use of data stored by providers of publicly available electronic communications services or of public communications networks. The restriction on the exercise of the right to private life, secrecy of correspondence and freedom of expression, must [...] occur in a clear, foreseeable and unequivocal manner as to remove, if possible, authorities' arbitrariness or abuse in this area. The addressees of the legal norm [...] must have a clear understanding of the applicable legal rules in order to adapt their conduct and to foresee the consequences arising from the breach thereof*." The Court sanctioned "the ambiguous wording", the non-compliance with the legislative technique, the lack of a definition of certain terms of the law, the use of unclear phrases. In its analysis, the Court found that "*compliance with the rules of legislative technique, within the set of specific rules of the law-making activity, is a key factor in the implementation of all drafting requirements deriving from the obligation to respect the fundamental human rights. [...] an accurate regulation of the scope of Law no. 298/2008 is all the more necessary given, in particular, the complex nature of the rights subject to limitation, and the consequences that a possible abuse of the public authorities would have on the private life of the persons to whom the law is addressed [...]*." The follow-up legislation having as object rules by which the legislator sought to transpose the same Directive was found unconstitutional due to the breach, *inter alia*, of Article 1 (5) of the Constitution, in terms of lack of precision in the legislation[25].

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

[22] Decision no. 51 of 16 February 2016, published in Official Gazette of Romania, Part I, no. 190 of 14 March 2016
[23]For example, by Decision no. 61 of 18 January 2007, published in Official Gazette of Romania, Part I, no. 116 of 15 February 2007
[24] Decision no. 1258 of 8 October 2009, published in Official Gazette of Romania, Part I, no. 798 of 23 November 2009
[25] See, for example, Decision no. 440 of 8 July 2014, published in Official Gazette of Romania, Part I, no. 653 of 4 September 2014

fair trial, regarded, in this case, as a guarantee of individual freedom(...). In conclusion, the Court holds that the lack of clarity, precision and foreseeability of the provision complained of is likely to infringe the provisions of Article 21 (3) of the Constitution, given that the person subject to the pre-trial detention measure may not benefit of a fair trial, since the rule in question can be interpreted by the courts with a wide margin of discretion in terms of the scope of offences for which this measure can be ordered. However, the purely subjective assumptions should be excluded from the legislative hypothesis under examination."[26]

Similarly, in another case, the Court found that, "*given the intrusive nature of **technical supervision measures**, it is essential that it is carried out in a **clear, precise and foreseeable regulatory framework** both for persons subject to this measure and for the prosecution and the courts. Otherwise, this would result in the possibility of random/abusive violation of some basic fundamental rights in a State governed by the rule of law: personal, family and private life and the secrecy of correspondence. It is generally accepted that the rights referred to in Articles 26 and 28 of the Constitution are not absolute, but the restriction thereof must be carried out in compliance with the provisions of Articles 1 (5) and 21 (3) of the Basic Law, and the degree of precision of the terms and concepts used should be high, given the nature of the fundamental right restricted. Therefore, the standard of protection of constitutional personal, family and private life and of the secrecy of correspondence requires that limitation thereof take place within a legislative framework setting out, in a clear, precise and foreseeable manner, the bodies which are authorised to carry out operations which constitute interference in the protected scope of rights. Therefore, the Court deems justified the legislator's choice that the technical supervision warrant be enforced by the public prosecutor and the criminal investigation authorities, which are judicial bodies according to Article 30 of the Code of Criminal Procedure, as well by specialised police officers, to the extent they may receive the assent to act as criminal police officers, under the terms of Article 55 (5) of the Code of Criminal Procedure. This option is not justified, however, as concerns the inclusion, under Article 142 (1) of the Code of Criminal Procedure, of the phrase «other specialised State bodies», which are not specified in the Code of Criminal Procedure or in other special laws*." For all of those reasons, the Court found that the provisions subject to criticism violate the constitutional provisions contained in Article 1 (3) on the rule of law in its component relating to guaranteeing citizens' rights and in Article 1 (5) which enshrines the principle of legality.[27]

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

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

II. Constitutional principles as higher norms? Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in Constitutions and judicial review of constitutional amendments.

Rapporteurs:

Daniel Marius MORAR
Judge

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1. Do the constitutional principles enjoy certain degree of superiority in relation to other provisions in the basic law? How are constitutional principles and other constitutional provisions related to international law and/or to the European Union law? Are there any provisions in international or the European Union law that are deemed superior than the national constitutional principles? If yes, how such higher international provisions are applied with regard to the national constitutional principles? What is the prevailing legal opinion among both academic scholars and practitioners in your jurisdiction about attaching higher value to certain constitutional principles over other provisions of basic law?

1. 1. Upon examining the regulatory content of the Constitution of Romania, one can note that there are **three categories of social relations** governed by the constitutional rules:

- *social relations concerning the State power* (main State authorities, the relations between them);
- *social relations concerning the fundamental rights, freedoms and duties of citizens*;
- *other social relations considered crucial for society* (the characteristics of the Romanian State, the territory,the nationality, the official language, the economy and the public finances, the revision of the Constitution, etc.).

Each of these social relations' categories concern separate, distinct issues with particular relevance for the functioning of the Romanian State. As the regulatory object is complex and radically different, no comparison can be made***between the rules governing such social relations in terms of their importance and no hierarchy can be established in terms of legal force***. Their paramount importance in the organisation and functioning of the State — in view of the material content criterion, on the one hand, and the formal criterion— their inclusion in the Basic Law, on the other hand, places them on the same hierarchical level, at the top of the pyramid of the Romanian regulatory system.

1. 2.*The relationship between domestic law and international law*is established in the Constitution of Romania in Articles 11 and 20, which read as follows:

Article 11 — "*International Law and Domestic Law:*

(1) The Romanian State pledges to fulfil as such and in good faith any obligations as may derive from the treaties to which it has become a party.

(2) Once ratified by Parliament, subject to the law, treaties shall be part of domestic law.

(3) Where a treaty to which Romania is to become party comprises provisions contrary to the Constitution, ratification shall only be possible after a constitutional revision."

Article 20 — "*International Human Rights Treaties:*

(1) The constitutional provisions relative to the citizens' rights and freedoms shall be interpreted and applied in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party.

(2) Where inconsistency exists between the covenants and treaties on fundamental human rights to which Romania is a party, and national law, the international regulations shall prevail except where the Constitution or domestic laws comprise more favourable provisions."

From a combined reading of those two constitutional rules the following principles emerge:

- the commitment of the Romanian State to meet ***fully and in good faith*** its obligations resulting from the Treaties to which it is a party;
- once the international instruments and treaties are ratified by the Romanian Parliament, they become domestic rules pertaining to the national law;
- ***the supremacy of the Constitution of Romania over international law***: Romania can ratify an international treaty containing provisions contrary to the Constitution only after prior revision of the national Basic Law;
- the interpretation and application of constitutional provisions on citizens' rights and freedoms is made in accordance with the Universal Declaration of Human Rights and the covenants and other treaties to which Romania is a party;
- in the matter of human rights, the conflict between an international treaty to which Romania is party and the national law is settled in favour of the ***international treaty only where it contains more favourable provisions***.

1. 3. 1. A special regulation in the Constitution of Romania concerns ***the relationship between national law and EU law***, which is set out in Article 148 (2) and (4), according to which: *"(2) Following accession, provisions in the founding Treaties of the European Union, as well as other binding regulations under community law shall prevail over any contrary provisions of domestic law, while observing provisions in the accession instrument. [...]*

(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that any obligations arising from the accession instrument and from provisions under paragraph (2) are put into effect."

The Court has consistently held in its case-law that it is not for it to assess the compatibility of a provision of national law with the Treaty on the Functioning of the European Union in the light of Article 148 of the Constitution. Such competence, namely to determine whether an inconsistency exists between national law and the Treaty, belongs to the ordinary court, which, in order to arrive at a fair and lawful conclusion, ex officio or upon a request from the interested party, may refer a question to the Court of Justice of the European Union for a preliminary ruling within the meaning of Article 267 of the Treaty. If the Constitutional Court would assume jurisdiction to rule on the compliance of national law with EU law, such would lead to a possible conflict of jurisdiction between the two courts, which, at this level, is inadmissible."

In all cases where it used the concepts of “domestic rules” and “national law”, the Court has had in view solely the infraconstitutional legislation, the Constitution preserving its hierarchically superior position by virtue of Article 11 (3) of the Basic Law.

1. 3. 2. The case-law of the Constitutional Court has evolved with regard to this matter: emphasizing that it is neither a positive legislator nor a court with jurisdiction to interpret and apply European law in the disputes relating to subjective rights of citizens, the Court noted that the reference to a rule of European law in the context of the review of constitutionality, by means of Article 148 (2) and (4) of the Constitution of Romania, implies a cumulative conditionality: on the one hand, that rule must be sufficiently clear, precise and unambiguous in itself or its meaning must have been established in a clear, precise and unequivocal manner by the Court of Justice of the European Union and, on the other hand, the rule must possess a certain level of constitutional relevance, so that its regulatory content may support the possible infringement by the national law rule of the Constitution — the only direct rule of reference in the constitutional review. In such a case, the Constitutional Court's approach is distinct from the mere implementation and interpretation of the law, a competence that belongs to courts and administrative authorities, or from any possible issues relating to the legislative policy promoted by Parliament or the Government, as the case may be.

Given the aforementioned cumulative conditionality, it remains at the discretion of the Constitutional Court whether it applies in the constitutional review the judgments of the Court of Justice of the European Union, or it address itself questions for a preliminary ruling with regard to the content of the European rule. Such an attitude depends on the cooperation between the national Constitutional Court and the European Court, and on their judicial dialogue, without need to bring into discussion issues relating to the establishment of hierarchies between these bodies.

1. 3. 3. On the other hand, in the practice of the Constitutional Court, there were cases where it was requested to exercise the constitutionality review in relation to national legislation transposing into national law European Union instruments (Directives). A relevant example in this regard is Law no. 298/2008 on the retention of data generated or processed by providers of publicly available electronic communications services or of public communications networks, and amending Law no. 506/2004 concerning the processing of personal data and the protection of privacy in the electronic communications sector, published in Official Gazette of Romania, Part I, no. 780 of 21 November 2008, which transposed into national law Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC. Following an a posteriori constitutional review, the law was declared unconstitutional by the Constitutional Court Decision no. 1.258 of 8 October 2009, published in Official Gazette of Romania, Part I, no. 798 of 23 November 2009. In its decision, the Court noted that Law no. 298/2008, reflecting the Directive’s provisions, introduces a rule on continued retention of personal data for a period of 6 months from their interception. In relation to personal rights, such as the right to private life and the freedom of expression, as well as to the processing of personal data, the generally accepted rule is that these rights must be respected and guaranteed, as well as kept confidential, and the State has, in this respect, largely negative obligations, i.e. to refrain, in order to avoid, as far as possible, its interference in the exercise of the respective right or freedom. However, the obligation laid down by law to retain such data, as an exception or

derogation from the principle of protection of personal data and of the confidentiality thereof, by its nature, extent and scope renders that principle meaningless.

By carrying out the review of constitutionality of the law transposing the European Directive, ***the Constitutional Court indirectly carries out a review of constitutionality of the EU instrument****, depriving it of legal effect on the national territory*.

We should emphasize that, subsequently, Directive 2006/24/EC was declared invalid by the judgment of 8 April 2014 of the Court of Justice of the European Union delivered in the joined cases C-293/12 — Digital Rights Ireland LTD/Minister for Communicatios, Marine and Natural Resources and Others and C-594/12 — KartnerLandesregierung and Others. In its judgment, the European Court has found that the examined Directive infringes the provisions of Article 7, Article 8 and Article 52 (2) of the Charter of Fundamental Rights of the European Union, which enshrine the right to respect for private life, the right to protection of personal data and the principle of proportionality.

2. How are the constitutional principles related to each other? Is there any hierarchy within those principles? What approach has the constitutional court taken in terms of determining a hierarchy within the constitution? Is it possible to conclude from the jurisprudence of the constitutional court that it has given principal status to some constitutional principles over the rest of the basic law?

2. 1. As already mentioned in Section 1. 1., the constitutional rules regulate the three types of fundamental social relations in the State, without establishing a legal hierarchy within the Constitution*. All constitutional rules, irrespective of their regulatory object, have the* ***samebinding authority*** *and apply with the* ***same legal force***. Typically, the rules do not contain antinomies likely to generate conflicts in terms of application, so that their addressees are obliged to respect themfully, ***without invoking the primacy of one principle over another***. The role to ensure balance, as well as uniform interpretation and application of the Constitution pertains to the Constitutional Court, which, in the performance of its statutory tasks, has the role to ensure observance of the supremacy of the Basic Law.

From amongst the ***fundamental rights*** enshrined in the Constitution of Romania, we can distinguish and classify, according to their material content, without setting any hierarchy, the following categories: *principle-rights* (universality of rights, equality, non-retroactivity of the law, free access to justice), *inviolabilities* (right to life and right to physical and mental integrity, individual freedom, right to defence, free movement, personal, family and private life, secrecy of correspondence, inviolability of the home), *social, economic and cultural rights and freedoms* (right to education, right to work, right to property, right to marry, access to culture, etc.*), rights that are exclusively political* (right to vote, right to stand as a candidate), *social and political rights and freedoms* (freedom of conscience, freedom of expression, freedom of association, freedom of assembly, etc.), *guarantee-rights* (right of petition, right of a person aggrieved by a public authority).

In its case-law, the Court has held that the fundamental rights enshrined in the Constitution do not have an abstract existence, as they are exercised in conjunction with other constitutional provisions. Furthermore, the provisions of the Constitution must be interpreted systematically

and by taking into account their purpose, without absolutising one of them, up to removing all others that are equally important. In that regard, the Court has distinguished in the Basic Law two categories of rights, i.e. *absolute rights* (for example, the right to life and the right to physical and mental integrity), which the State cannot prejudge in any situation, and *relative rights* whose exercise may be restricted under certain conditions. One example is Decision no. 356 of 25 June 2014, published in Official Gazette of Romania, Part I, no. 691 of 22 September 2014, issued by the Court upon having ruled on the constitutionality of the provisions introducing in the Romanian legislation the concept of extended confiscation, noting that the lawful acquisition of property enshrined in the constitutional rule of Article 44 is a rebuttable presumption, since it constitutes a guarantee of the right to property, which is a relative and not an absolute right.

2. 2. An atypical case in the Constitutional Court's case-law is *Decision no. 511 of 12 December 2013*, published in the Official Gazette of Romania, Part I, no. 75 of 30 January 2014, whereby the Constitutional Court, having carried out the constitutional review over the legislative solution on declaring the non-applicability of statutory limitations to main criminal penalties for murder and for intentional crimes followed by the victim's death, held that the seriousness of the infringement of the social values protected by criminalising them requires a strong response from the State, and such need for justice does not disappear by the mere passage of time in relation to the time when they were committed.The right to life is an inalienable attribute of the person and the supreme value in the hierarchy of human rights, as it is a right without which the exercise of all other rights and freedoms guaranteed by the Constitution and by the international instruments for the protection of fundamental rights would become illusory, reason why this right has an axiological character, including both a subjective entitlement and an objective function, i.e. that of guiding principle of the State's activity, the latter having the obligation to protect the fundamental right to life of the person. In such a case, the legislator had to choose between the principle of legal certainty and fairness, where both are fundamental components of the rule of law. As it is for the legislator to decide which principle is to prevail, the legislator, without any arbitrary interference and taking into account the overriding value of the right to life enshrined in Article 22 (1) of the Constitution of Romania, has opted for the immediate application of the stricter limitation provisions, also with regard to crimes previously committed, for which the limitation period for enforcement of the sentence had not expired yet.As a consequence, the Court found that the choice of the legislator to regulate the non-applicability of statutory limitations to main criminal penalties for murder and for intentional crimes followed by the victim's death for which, on the date of entry into force of the provisions of law subject to criticism, the enforcement limitation period had not elapsed, does not result in any constitutionally relevant infringement.

3. How is the constitution amended in your jurisdiction? What is the procedure for the constitutional amendment set out in the basic law? How the constitution was established originally and does it explicitly provide for unamendable (eternal) provisions? Is there any difference between the initial manner of constitutional adoption and the existing procedure of the amendment to the basic law? Has the constitutional principles ever been subjected to change in your jurisdiction? If yes, what were the reasons behind it?

3. 1. The Constitution of a State necessarily reflects the state of development of a society, being the result of popular will at a certain historical time, subject to the political, historical, social,

economic and cultural realities of the respective community. This law is valid as long as it provides a stable legal framework for the society, and as long as the citizens identify themselves with its values, respecting them and ensuring their continuity.

3. 2. The Constitution of Romania was adopted by the Constituent Assembly during its meeting of 21 November 1991. The Constituent Assembly was a body elected by universal, equal, direct, secret and freely expressed vote, for the purpose to draw up the Basic Law. The Constitution has entered into force after approval by the national referendum of 8 December 1991 (which subsequently became the national day of the Constitution). The Constituent Assembly was dissolved after the adoption of the Constitution, which constituted the legal basis for the organisation of free and democratic elections for the new Parliament of Romania.

3. 3. A revision of the Constitution is required whenever it no longer corresponds to the demands of society, and this is a democratic exercise for adapting legal rules to the new values thereof. In accordance with the principle of legal symmetry, the constituent power that adopts a constitution (the originating constituent) may modify it in accordance with the rules laid down in the constitution subject to modifications (derived constituent).

The Romanian Constitution contains specific rules (Title VIII — Revision of the Constitution) on the procedural and substantive limits of the amending laws. The following constitute specific rules:

Article 150 — "*Initiative of Revision:*

(1) A revision of the Constitution may be initiated by the President of Romania at the proposal of the Government, by at least one quarter of all Deputies or Senators, as well as by at least 500,000 citizens having the right to vote.

(2) The citizens who initiate a revision of the Constitution must belong to at least half the number of the counties in the country, and in each of these counties or in the Municipality of Bucharest, at least 20,000 signatures must be recorded in support of such initiative."

- Article 151 — "*Procedure of revision:*

(1) The bill or proposal for revision must have been adopted by the Chamber of Deputies and by the Senate, by a majority of at least two-thirds of the members of each Chamber.

(2) If agreement cannot be reached following the mediation procedure, the Chamber of Deputies and the Senate shall, in a joint session, decide by the vote of at least three-quarters of the number of Deputies and Senators.

(3) Revision shall be final after approval by a referendum held within 30 days from enactment of the bill or proposal concerning such revision."

- Article 152 — "*Limits on matters of revision:*

(1) None of the provisions in this Constitution concerning the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, or territorial integrity, independence of judiciary, political pluralism, or official language shall be object of revision.

(2) Likewise, no revision is possible if it leads to the suppression of any of the citizens' fundamental rights and freedoms, or their safeguards.

(3) The Constitution may not be revised during a state of siege or a state of emergency, or at wartime."

3. 3. 1. In terms of ***revision procedure***, the Constitution of Romania falls within the category of rigid constitutions, whereas any amending legislation needs to go through a special procedure, derogating from the normal legislative procedure. Thus, the provisions of Articles 150, 151 and 152 (3) of the Constitution of Romania lay down the conditions for adopting a law for revision:

i) the initiative of revision may be exercised by the following *subjects of law*:

- *the President of Romania* at the proposal of the Government;
- at least *one quarter of all Deputies or Senators* (the Romanian Parliament is organised according to the bicameral system: the Chamber of Deputies and the Senate);
- *at least 500 000 citizens* having the right to vote (over 18 years of age), belonging to at least half the number of the counties in the country (Romania is organised administratively and territorially into 41 counties, plus the capital city Bucharest, having a similar status with the county) and in each of these counties or in the Municipality of Bucharest, at least 20 000 signatures must be recorded in support of such initiative;

ii) the Constitution may not be revised during a state of siege or a state of emergency, or at wartime (*temporal limits of revision*);

iii) the proposal for revision is *discussed successively in each Chamber of Parliament and is adopted by qualified majority vote*: at least two-thirds of the members of each Chamber;

iv) if the second Chamber adopts the law in a different wording from that approved by the First Chamber, the chairman of the Chamber of Deputies and chairman of the Senate will initiate a *mediation procedure*; if agreement cannot be reached following the mediation procedure, the two Chambers shall, in a joint session, decide by the vote of at least three-quarters of the number of Deputies and Senators;

v) within 30 days from the enactment of the law for revision, the Government organises the *referendum for approval of the law*;

vi) the law for revision of the Constitution shall enter into force on the day of publication in the Official Gazette of Romania, Part I, of the ruling of the Constitutional Court for confirmation of the results of the referendum.

3. 3. 2. Although, as mentioned above, constitutional rules are characterised by equal legal force, the Constitution distinguishes within its limits on matters of revision a number of ***immutable and peremptory social values, which cannot be subject to any constitutional modification****, namely: the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, the territorial integrity, the independence of the judiciary, the political pluralism and the official language*. Indirectly, in the current Romanian constitutional regime, given the interdiction regulated by the Constitution itself, these values acquire a higher, extra-judicial value, as an expression of a national ideal. All these ***material/substantive limits*** are contained in Article 152 (1) of the Constitution.

3. 4. The 1991 Constitution of Romania has been amended and supplemented only once, by means of the Revision Law no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003, approved by the national referendum of 18-19 October 2003, and entered into force on 29 October 2003, the day of publication in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003 of the Constitutional Court Ruling no. 3 of 22 October 2003 for the confirmation of the results of the national referendum. The purpose of the initiative for revision was the adoption of constitutional rules required for Romania's accession to the constituent treaties of the European Union and to the North Atlantic Treaty, in line with the provisions of Article 11 (3) of the Constitution in force.

4. Should constitutional amendment procedure be subjected to judicial scrutiny or should it be left entirely up to the political actors? What is the prevailing legal opinion in this regard among academic scholars and other societal groups in your jurisdiction?

The compliance with the procedure for adopting laws of revision of the Constitution constitutes the subject matter of the constitutional review carried out by the Constitutional Court of Romania; the power to review constitutional laws is the only power that can be exercised *ex officio*, in accordance with Article 146 (a) second sentence and (l), and Article 146 (i) of the Constitution of Romania. The Constitutional Court carries out such review in three stages:

i) *constitutional review of the initiative for revision*: checking the compliance with the provisions of Article 150 of the Constitution concerning the subjects of law who have competence in this area (mentioned above at point 3) and the provisions of Article 152 (3) of the Constitution of Romania, which enshrine the interdiction to revise the Basic Law during a state of siege or a state of emergency, or at wartime;

ii*) the constitutional review of the law of revision adopted by Parliament*: checking the compliance with the provisions of Article 151 regarding the parliamentary procedure for the adoption of constitutional laws;

iii) *the confirmation of the results of the national referendum approving the law of revision*: checking the compliance with the procedure for the organising and holding of a referendum.

The judicial acts issued by the Constitutional Court in the three stages of the procedure of adoption of the constitutional law (2 decisions and 1 ruling) are generally binding and effective only for the future, as of their publication in the Official Gazette of Romania.

Whereas the Constitutional Court's exclusive competence to verify the laws of revision of the Constitution with regard to matters specifically delineated by the Basic Law was established as early as 1991 by the originating constituent assembly, neither the academia nor the civil society has ever brought in discussion in Romania any positive conflict of jurisdiction between the Constitutional Court and the political actors involved in the decision-making process.

5. Does the constitution in your jurisdiction provide for constitutional overview of the constitutional amendment? If yes, what legal subjects may apply to the constitutional

court and challenge the constitutionality of the amendment to the basic law? What is the legally-prescribed procedure of adjudication in this regard?

5. 1. The Constitution of Romania provides, in addition to the review of the initiation procedure and of the procedure for adoption of the legislative act (***the review of the procedural limits***), also the review of the normative content of the initiative for revision and of the law adopted by the Romanian Parliament (***the review of material limits***). The two types of constitutional review are carried out simultaneously, in the first two stages, outlined above in Section 4 sub-paragraphs i) and ii). The constitutional basis for the review of the normative content lies in the provisions of Article 152 (1) and (2) of the Constitution governing the substantive limits of the revision, namely: the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, the territorial integrity, the independence of judiciary, the political pluralism and the official language. Moreover, no revision shall be possible if it leads to the suppression of any of the citizens' fundamental rights and freedoms, or their safeguards.

As mentioned previously, the review of laws for revision of the Constitution is carried out by the Constitutional Court, on its own initiative, without being required a notification from a specific subject challenging the content of the legislative act or the procedure undergone by the constitutional law. In other words, ***the Constitutional Court is obliged to check all the amendments proposed by the initiators of the law for revisions, as well as all the amendments adopted by Parliament, and to rule on the compliance with the constitutional provisions concerning the limits on matters of revision***.

5. 2.*The procedure of constitutional review* of initiatives for the revision of the Constitution and of the law for revision, carried out *ex officio* by the Constitutional Court, is set forth in Articles 20 to 23 of Law no.47/1992 on the organisation and functioning of the Constitutional Court, which read as follows:

i) *before submission to Parliament* in order to initiate the legislative procedure for the revision of the Constitution, the initiative for revision, accompanied by the opinion of the Legislative Council, is handed in to the Constitutional Court, which has to adjudicate on the observance of constitutional provisions in regard of such revision within ten days. On receiving the legislative proposal, the President of the Court designates a Judge-Rapporteur and sets the date for adjudication proceedings. The Constitutional Court adjudicates on the initiative for revision by the vote of two thirds of the number of Judges. The decision of the Court is communicated to the initiators of the bill or legislative proposal, or to their representative, as the case may be, who present it to Parliament only together with the decision of the Constitutional Court;

ii) *within 5 days as of the adoption of the law for revisionof the Constitution by Parliament*, the Constitutional Court adjudicates on that law. On receipt of the law, the President of the Court designates a Judge-Rapporteur and sets the date for adjudication proceedings; the Court adjudicates on the law for revision by the vote of two thirds of the number of Judges. The decision which ascertains that the constitutional provisions concerning revision have not been complied with is sent to the Chamber of Deputies and to the Senate in order to re-examine the law for the revision of the Constitution and bring it into accord with the decision of the Constitutional Court.

5. 3. The effects of the decisions delivered by the Constitutional Court. If the review reveals the infringement of the interdictions laid down in the Basic Law, the Court issues ***a decision***

whereby it declares unconstitutional the initiative for revision*, and, as a consequence, the act is sent back to the initiator in order to remedy the detected errors* (in the first stage of review), *or the Court issues* ***a decision whereby it declares unconstitutional the law for revision adopted by Parliament****, and, as a consequence, the law is sent back to the legislative forum in order to be brought into accord with the Constitutional Court's decision* (in the second stage of review). The Court's rulings are binding and have the effect of halting the revision procedure, which remains in the stage it was when such rulings were adopted, if the subjects of law, i.e. the authorities to whom such rulings are addressed, do not act accordingly.

If the review reveals that the constitutional provisions on the limits on matters of revision have been complied with, the Court issues a decision whereby it declares constitutional the initiative for revision, and, subsequently, it issues a decision on the constitutionality of the law for revision adopted by Parliament, on the basis of Article 151 (3) of the Constitution, and a national referendum for approval is organised.

6. Is the constitutional court authorised to check constitutionality of the amendment to the basic law on substantive basis or is it only confined to review on procedural grounds? In the absence of explicit constitutional power, has the constitutional court ever assessed or interpreted constitutional amendment? What has been the rationale behind the constitutional court's reasoning?Has there been a precedent when the constitutional court had elaborated on its authority to exercise the power of judicial review of constitutional amendments either on substantive or procedural grounds? What is legal effect of a decision of the constitutional court finding the constitutional amendment in conflict with the constitution? Please, provide examples from the jurisprudence of the constitutional court.

6. 1. As noted above in Sections 4 and 5, the Constitutional Court of Romania has the power to verify the laws for revision of the Constitution from both the procedural and the substantive viewpoint. *The legal basis for this prerogative lies in the Constitution itself [Article 146 (a) and (l)], as well as in Law no. 47/1992 on the organisation and functioning of the Constitutional Court [Articles 19 to 23]*.

After the adoption in November 1991 of the Romanian Constitution, the Basic Law has been subject to six initiatives for revision. The only one that has successfully completed the entire procedure was the revision initiated in 2003, which concerned the amendment of the constitutional rules for the purpose of the Euro-Atlantic Integration of Romania (see Section 3. 4.). All the other initiatives got stuck in the parliamentary procedure, after the Constitutional Court issued its decision in the first stage, i.e. that of review of the initiative for revision.

6. 2. The following decisions of the Constitutional Court are relevant for our study:

- *Decision no. 799 of 17 June 2011* (published in the Official Gazette of Romania, Part I, no. 440 of 23 June 2011) on the bill for revision of the Constitution of Romania, initiated by the President of Romania at the proposal of the Government. The Court found that the legislative proposal on revision of the Constitution of Romania was initiated with the observance of the procedural limits, but declared it unconstitutional due to the breach of the substantive limits of revision in terms of 5 of the proposed modifications (the

modifications were aimed at the cancellation of one of the safeguards of the right to property, of some fundamental rights of the person holding a public office, of the free access to justice, and of the independence of the judiciary). The Court has submitted to the President of Romania its observations on several provisions of the bill for the revision of the Constitution.

- *Decision no. 80 of 16 February 2014* (published in the Official Gazette of Romania, Part I, no. 246 of 7 April 2014) on the legislative proposal for the revision of the Constitution, signed by 108 Senators and 236 Deputies. The Court found that the legislative proposal on revision of the Constitution of Romania was initiated with the observance of the procedural limits, but declared it unconstitutional due to the breach of the substantive limits of revision in terms of 26 of the proposed modifications (by way of example, we recall the amendments aimed at: introducing the possibility of legal representatives of national minorities to establish, according to the Statute of National Minorities adopted by law, own decision-making and executive bodies; the infringement of some fundamental rights: the right of defence in criminal proceedings, the secrecy of correspondence; the conditions and the limits of the right to property, the discontinuation of the special protection enjoyed by disabled persons, the removal of the full reparation of damage suffered by the person aggrieved by a public authority; the universities' autonomy; the statute of Deputies and Senators; the relations between President and Parliament; the increase in the number of representatives of civil society in the Superior Council of Magistracy; the powers of the Constitutional Court). Likewise, the Court has submitted to Parliament its observations regarding the removal of some of the proposed amendments, without declaring them unconstitutional, the reformulation of some of the proposed amendments, and the re-systematisation of the legislative act.
- At thepresent time, there is an ongoing procedure concerning a new initiative for revision of the Constitution aimed at changing the constitutional rules on marriage, so that the Constitution would expressly regulate the concept of marriage entered into by a man and a woman. This procedure was initiated by citizens and it was verified by the Constitutional Court, which, by Decision no. 580 of 20 July 2016, not yet published in the Official Gazette of Romania, has declared that the procedural and material limits of revision have been complied with, so that the proposal for revision was sent for debate to Parliament.

7. Is there any tendency in your jurisdiction towards enhancing constitutional authority in respect of constitutional court's power to check amendments to the basic law? Do academic scholars or other societal groups advocate for such development? How the judicial review is observed in this regard? Would the expansion or recognition of constitutional court's authority encourage the realisation of constitutional ends or threaten its viability? Please, elaborate on existing discussion in your jurisdiction.

In Romania, the Constitutional Court exercises its powers in the framework and within the limits laid down by the Constitution and its law of organisation and functioning. The authority of the decisions issued by the Constitutional Court is unquestionable, given that they *are legally binding* in the Romanian regulatory and judicial system. Whereas the legal basis underlying the Court's competences and its decisions' legal force is the State's supreme law itself, no public

authority calls into question the final and generally binding effect of the decisions issued by this Court.

On the other hand, nothing can generate an authority higher than the good faith in the interpretation and application of the constitutional rules, the strength and consistency of legal arguments, the censorship of activist trends, and the clarity and foreseeability of the decisions issued. These are the reasons why, although the Constitutional Court is sometimes accused of authoritarianism and activism, and thus publicly criticised for its decisions, especially by the political circles, the access to the Constitutional Court is seen as a balancing factor in society and as a solution to the excesses of the legislative power, its decisions being received with confidence by citizens and by State authorities.

Fortunately, *the Romanian legal and constitutional framework is clear, foreseeable and generous with regard to the powers of the Court*, so that the Constitutional Court has never had to resource to artifices, by means of case-law, in order to deal with requests referred to it (therefore, it has never been the case that such issue be discussed at academic, university or civil society level in support of some additional powers). Therefore, *the judicial review carried out by the Constitutional Court is based**exclusively** on the Constitution and the law*, which, by establishing its powers, have created a strong and independent institution with the role of guarantor of the supremacy of the Basic Law and, implicitly, of the principles of a State governed by the rule of law.