

**DECISION No. 63  
of 8 February 2017**

**on applications for resolving legal conflicts of a constitutional nature between the Executive authority – the Government of Romania, on the one hand, and the Legislative authority – the Parliament of Romania, on the other hand, as well as between the Executive authority – the Government of Romania, on the one hand, and the Judicial authority – the Superior Council of Magistracy, on the other hand, submitted by the President of the Superior Council of Magistracy, and the President of Romania, respectively**

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|--------------------------|------------------------------|
| Valer Dorneanu           | — president                  |
| Marian Enache            | — judge                      |
| Mircea Ștefan Minea      | — judge                      |
| Daniel Marius Morar      | — judge                      |
| Mona-Maria Pivniceru     | — judge                      |
| Livia Doina Stanciu      | — judge                      |
| Simona-Maya Teodoroiu    | — judge                      |
| Varga Attila             | — judge                      |
| Mihaela Senia Costinescu | — chief-assistant-magistrate |

1. It has been brought before this Court to adjudicate the application for resolving the legal conflict of a constitutional nature between the Executive authority – the Government of Romania, on the one hand, and the Legislative authority – the Parliament of Romania, on the other hand, as well as between the Executive authority – the Government of Romania, on the one hand, and the Judicial authority – the Superior Council of Magistracy, on the other hand, as is submitted by the President of the Superior Council of Magistracy. The application is grounded on provisions of Article 146 lit. e) of the Constitution, and of Article 11 (1) lit. A.e) and Articles 34, 35 and 36 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, is registered at the Constitutional Court under no. 1156 of 1 February 2017, and forms the Case no. 349E/2017.

2. The President of the Constitutional Court, subject to Article 216 (1) of the Civil Procedure Code in conjunction with Article 14 of Law no.47/1992, declares the hearing session open.

3. The roll call is answered by the parties, being represented as follows: counsels Laura Cristina Garcia and Ana-Maria Coculescu for the Superior Council of Magistracy, senator Șerban Nicolae for the Senate of Romania, and Eugen Nicolicea, MP, for the Chamber of Deputies. The representative of the Government is not present although duly summoned.

4. The President also orders the calling of parties in Case no. 359E/2017, concerning the application filed by the President of Romania with the Constitutional Court to rule upon the existence of a legal conflict of a constitutional nature between the Government, on the one hand, and Parliament and the Superior Council of Magistracy, on the other hand. The application is grounded on provisions of Article 146 lit. e) of the Constitution, and of Article 11 (1) lit. A.e), and Articles 34, 35 and 36 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, and is registered at the Constitutional Court under no. 1858 of 2 February 2017.

5. The roll call is answered by the parties, represented as follows: counsels Laura Cristina Garcia and Ana-Maria Coculescu for the Superior Council of Magistracy, senator Șerban Nicolae for the Senate of Romania, and Eugen Nicolicea, MP, for the Chamber of Deputies. The representative of the Government has not appeared although duly summoned. Presidential advisor Simina Tănăsescu, who represents the President of Romania as the applicant in Case no. 359E/2017 and has been invited to attend in conformity with Article 52 (3) of Law no. 47/1992, is also present in the courtroom.

6. The Court, having regard that aforementioned applications have an identical subject matter, questions whether Cases 349E/2017 and 359E/2017 be joined, and raises the issue *ex officio* for discussion by the parties.

7. As the parties have agreed to the joining of cases, the Court, subject to Article 53 (5) of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, orders that Case no. 359E/2017 is joined to Case no. 349E/2017, which was first registered.

8. The President of the Constitutional Court, subject to Article 216 (2) of the Civil Procedure Code in

conjunction with Article 14 of Law no. 47/1992, gives the floor to the representative of the Superior Council of Magistracy, who requests it be ascertained that legal conflicts of a constitutional nature do exist between the Executive authority – the Government of Romania, on the one hand, and the Legislative authority – the Parliament of Romania, on the other hand, as well as between the Executive authority – the Government of Romania, on the one hand, and the Judicial authority – the Superior Council of Magistracy, on the other hand, following the adoption of the Government Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code. Irrespective of the fact that the Government has later issued its Emergency Ordinance no. 14/2017 repealing Government Emergency Ordinance no. 13/2017, legal conflicts of a constitutional nature, as are now submitted before the Constitutional Court, have occurred, and the Court is requested to ascertain such.

9. In this context, the representative of the Superior Council of Magistracy points out that, despite justification in the preamble of the normative act in question concerning an urgency and extraordinary situation whose regulation cannot suffer postponement because of the need to ensure compliance of certain provisions in the Criminal Code and the Criminal Procedure Code with the Constitutional Court decisions, the Romanian Government has actually enacted amendments much beyond the scope of the changes imposed by the Constitutional Court decisions, as is minutely described in the application. Specifically, by issuing the emergency ordinance without having duly met the constitutional requirement concerning the existence of "an extraordinary situation whose legal regulation cannot be postponed", the Government has ignored the requirements set forth in Article 115 (4) of the Basic Law; in that regard, mention should be made of Decision no. 255 of 11 May 2005, holding that the Government may adopt emergency ordinances provided that all the following conditions are fulfilled: there is an extraordinary situation; its legal regulation cannot suffer postponement; the reasons for the urgency must be given in the content of the ordinance. Invoking the Constitutional Court Decisions no. 405/2016, no. 586/2016 and no. 614/2016 does not suffice as justification of the urgency, because these decisions are interpretative in character, and the judicial bodies are able to transpose them directly into their judicial activity without necessitating any urgent legislative intervention.

10. As regards the need for transposition of Directive (EU) 2016/343, it is shown that, according to Article 14 (1) therein, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with its provisions by 1 April 2018. Amending the legislative framework as a matter of urgency has caused serious harm to the legitimate public interest and affected the balance of powers as enshrined in Article 1 (4) of the Basic Law, because it was not based on an objective analysis meant to identify a pressing social need for decriminalization of certain offences. If Parliament has plenary competence to make laws, the Government will acquire such empowerment only under the restrictive conditions provided by the Constitution: the existence of an extraordinary situation and the urgency to put in place regulations, none of which has been met in the present case.

11. On the other hand, the constitutional relations between public authorities are characterized by a reciprocal involvement on the other's sphere of activity, and these implications are meant as a balance for their co-operation and mutual control through the mechanisms established by law. The task to give an opinion on normative acts pursuant to Article 38 (3) of Law no. 317/2004 on the Superior Council of Magistracy, stating that "*The Plenary of the Superior Council of Magistracy gives its opinion on draft normative acts that concern the activity of the judicial authority*" has been devised as a legal mechanism to achieve the balance of state powers, and it cannot be ignored. How the Ministry of Justice chose to tackle the endorsement procedure, while seeking an opinion and then enacting the ordinance on the same day, denotes disregard of the mechanisms that accomplish the balance of powers.

12. In regard to the hereinabove mentioned, the representative of the Superior Council of Magistracy asks the Constitutional Court to grant their request and ascertain there exists a legal conflict of a constitutional nature between the Executive authority and the Legislative authority, also a legal conflict of a constitutional nature between the Executive authority and the Judicial authority, and to impose measures as it may deem necessary and useful in order to re-establish the constitutional order which must exist between the State authorities.

13. Further on, the President of the Constitutional Court gives the floor to the representative of the President of Romania, as author of the application in Case no. 359E/2017, who explains that the points raised to the Constitutional Court concerning the legal conflict of a constitutional nature between Executive authority and Legislative authority amount to a criticism only with regard to the competence to adopt legislation, without challenging the ordinance itself as unconstitutional. Indeed, the Government has plenary competence to enact secondary legislation which is inherent in the executive activity, yet primary legislation may be enacted under delegated authority only under the terms of the Constitution, that is pursuant to a law passed by Parliament or subject to Article 115 (4) of the Constitution, if there is an extraordinary situation, whose regulation may not be postponed. Delegated legislation is passed under parliamentary control, being an expression of exceptional powers conferred thereupon. In regard to the enactment process, the Government Emergency Ordinance no. 13/2017 has breached the provisions of Article 115 (4) in the Constitution, since the Government failed to justify if constitutional requirements concerning its competence to adopt primary legislation have been met.

14. The representative of the President of Romania claims that the Constitutional Court must ascertain

a legal conflict having occurred between the Executive and Legislative authority, and also set the boundaries for the Government's ability to adopt legislation, as long as uncertainty persists with regard to the possible legal effects of Government Emergency Ordinance no. 13/2017 which – alongside its repealing act, i.e. Government Emergency Ordinance no. 14/2017 – is currently undergoing parliamentary procedure for approval.

15. As to the legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand, the representative of the President of Romania considers that in order to ascertain whether or not a conflict exists, it is not the legislative procedure, but the loyal cooperation between the public authorities involved in such procedure that may prove legally relevant. If the recourse to an endorsement procedure is only a formality, then the decision-making authority seeking the opinion can no longer take cognizance of that opinion, and so there is no real dialogue, no loyal cooperation between the public authorities involved in the drafting of normative acts. And precisely that is why a legal conflict occurred in the present case due to the fact that loyal cooperation, a principle that should govern relations between the executive and the judicial authority, has been ignored.

16. The President of the Constitutional Court invites the representative of the Chamber of Deputies, Eugen Nicolicea, MP, to take the floor. In what concerns the alleged legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand, it is argued that neither the law, nor the Constitution has provided for an obligatory assent from the Superior Council of Magistracy as a step in the legislative process. Moreover, since the Constitutional Court, by its Decision no. 3 of 15 January 2014, whose reasoning is entirely applicable in the instant case, has determined the sphere of normative acts which necessitate an opinion from the Council, it appears arbitrary to extend the competence of that authority also to the draft legislation amending the Criminal Code or the Criminal Procedure Code. In conclusion, there has been no legal conflict between these two public authorities in terms of compliance with procedures for the drafting and adoption of Government Emergency Ordinance no. 13/2017.

17. With regard to the alleged conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Legislative authority - Parliament, on the other hand, the representative of the Chamber of Deputies claims there has been no such conflict, as the Government has fulfilled one of the tasks explicitly provided under Article 115 (4) in the Constitution. It is also shown that arguments concerning the unconstitutionality of Government Emergency Ordinance no. 13/2017 cannot be examined as part of the proceedings in the resolution of a legal conflict of constitutional nature, that uncertainties about the legal effects of a normative act do not fall within the Constitutional Court's area of competence, and that loyal cooperation between the state institutions is not necessarily about friendly manners and conduct, but first and foremost about compliance with the law and competencies of each authority.

18. In the end, the President of the Constitutional Court gives the floor to the representative of the Romanian Senate, senator Șerban Nicolae, who argues there is no element whatsoever that might have led to a legal conflict of a constitutional nature involving the Romanian Parliament, and that is why no referral in that respect has been made to the Constitutional Court on their behalf. In fact, the requests filed with the Court on account of an alleged legal conflict are actually intended to raise an inappropriate exception of unconstitutionality, that of Government Emergency Ordinance no. 13/2017. However, as much important as opinions or views expressed in procedures for the drafting and adoption of normative acts may be for the process, still they cannot come against the legislature's powers to make laws. In a similar way, it also concerns decisions of the Constitutional Court, for instance Decision no. 405/2016, declaring the provisions of Article 297 (1) of the Criminal Code as unconstitutional in a specific interpretation thereof, despite favourable viewpoints received from all the authorities entitled to give an opinion in the framework of proceedings before the Constitutional Court.

19. In reality, the aim pursued by the applicants in referring their case to the Constitutional Court is to restrain the Government's powers to enact legislation, to the extent that it should be confined to adopt normative acts only after prior and compulsory consultation with other institutions and only after obtaining approval for whatever regulations have been envisaged, and that, says the representative of the Senate, would be simply unacceptable.

20. As to the claim that the amendment of provisions in the Criminal Code and Criminal Procedure Code by way of an emergency ordinance might have entailed a number of serious consequences for the courts' activity, the representative of the Senate shows that similar effects on the activity carried out by judicial bodies can be seen in the Constitutional Court decisions declaring certain legal provisions as unconstitutional, with generally binding effects as of the date of publication in the Official Gazette of Romania, Part I. A particular instance is Decision no. 405/2016 whose effects in view of the normative content of Article 297 (1) of the Criminal Code have caused blockages at the level of the courts, because of their hesitation to render judgment based on such provisions. That is the reason why the delegated legislature intervened in order to establish, among others, a new content for the criminal offence of abuse of the authority of office [*mifeseance in public office*], while leaving it for Parliament to verify the conditions in which Government Emergency Ordinance no.

13/2017 was enacted. That being the context, the Superior Council of Magistracy and the President of Romania have assumed powers which entirely appertain to Parliament and Government, and setting limits to the law-making is likely to block the Parliament's right to decide on approval of bills that concern the emergency ordinances issued by the Government.

21. As to whether the opinions issued by various institutions in the framework of procedures for the drafting and adoption of legislation are binding or compulsory in character, the representative of the Senate claims that such requirement should have been laid down by no less than a constitutional norm. In other words, any legal entity as may be entitled to initiate a legislative procedure or to intervene by giving its opinions in the course of the legislative process must exercise such powers only within the limits established by the Constitution, without so breaching upon the legislative authority, the sole authority vested with powers to decide as to the appropriateness and content of legislation.

22. Eventually, if one were to admit the idea that having issued a normative act in disregard of constitutional procedures may incur criminal liability of the persons involved in the procedure of issuance, endorsement or adoption, then it would mean that all of the Constitutional Court decisions declaring certain legal provisions as unconstitutional could possibly form a basis for the initiation of criminal proceedings, which is unacceptable in a state governed by the principle of separation of powers and the rule of law.

23. In conclusion, the representative of the Senate considers there has been no legal conflict of a constitutional nature between the Government, on the one hand, and Parliament and the Superior Council of Magistracy, on the other hand.

24. At the end of the hearing session, Mr. Claudiu Teodorescu, Secretary General at the Ministry of Justice, who has also appeared in court, but cannot produce any power of attorney to represent the Government as a party to the legal conflicts pending before the Court, is denied the right to make submissions in defence or submit conclusions to the Constitutional Court.

25. The President of the Constitutional Court, having regard to Article 394 (1) of the Civil Procedure Code in conjunction with Article 14 of Law No.47/1992, declares the hearing closed.

#### THE COURT,

having regard to the deeds and documents in the case file, finds the following:

26. By application no. 2702 of 1 February 2017, **the President of the Superior Council of Magistrates requested the Constitutional Court to adjudicate the legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Legislative authority – the Parliament of Romania, on the other hand, and between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand.**

27. **In the statement of reasons of his application**, the President of the Superior Council of Magistracy sets out the arguments in support of the claim about these two legal conflicts. With regard to the legal conflict of a constitutional nature between the Executive authority - the Romanian Government, and the Legislative authority - the Romanian Parliament, one should note, based on the definition given by the Constitutional Court to a legal conflict of a constitutional nature between public authorities in its Decision no. 53/2005, that such definition has also circumscribed the hypothesis when one authority has assumed powers, tasks or competencies entrusted to another public authority, without an effective constitutional empowerment. It is precisely the assumption which underlies the enactment of Emergency Ordinance no.13/2017 by the Romanian Government in spite of the fact that constitutional requirements with regard to "extraordinary situations whose regulation cannot be postponed" have not been met, and also in disregard of the competence vested in the legislative authority under Article 73 (1) and (3) lit. h) of the Constitution, and in violation of the principle of separation and balance of powers enshrined in Article 1 (4) of the Basic Law. Even though the Romanian Government is empowered by provisions under Article 115 (4) of the Constitution to adopt emergency ordinances, its competencies to issue regulations in the area of an organic law are limited to extraordinary situations alone, as are particularized in the constitutional norm.

28. Furthermore, the President of the Superior Council of Magistracy points out that many of the amendments brought under the ordinance concerned have gone beyond the changes arising from the Constitutional Court decisions, although compliance of the provisions in the Criminal Code and the Criminal Procedure Code with the Constitutional Court decisions has been invoked as a 'must-be' to implement. Relevant examples in that regard are: Article 297 of the Criminal Code that incriminates the *abuse of the authority of office*, being amended and supplemented in a way which oversteps the regulatory approach required in order to bring criminal legislation into accord with the Constitutional Court Decision no. 405/2016; Article 301 of the Criminal Code that incriminates the *conflict of interest*, being amended in a way which is not purported to clarify the phrase "commercial relations" as it should have in accordance with the Constitutional Court Decision no. 603/2015, but instead has removed its wording, along with other normative hypotheses; repeal of Article 298 of the Criminal Code that incriminated the *negligence in office*; and Article 290 (2) of the Criminal Procedure Code on *denouncement*, being supplemented.

29. The applicant deems that all such legislative intervention is unfounded insofar as it has been envisaged to bring unconstitutional provisions into accord with the Constitutional Court decisions; neither was

urgency anyhow justified. Although decriminalization or criminalization is a matter of the State penal policy, its accomplishment must comply with the requirements of the Basic Law. From that perspective, the decriminalization of "*negligence in office*" as was provided under Article 298 of the Criminal Code, or the criminalization of "*consuming alcohol or other substances after traffic crashes*" under Article 336<sup>1</sup> of the Criminal Code by way of an emergency ordinance is not consistent with constitutional requirements set forth in Article 115 (4), and so disregards the competencies of the legislative authority stipulated in Article 73 (1) and (3) lit. h) and in Article 1 (4) of the Basic Law.

30. In view of said considerations, the President of the Superior Council of Magistracy argues that conditions have been created for a legal conflict of a constitutional nature between the Executive authority, represented by the Romanian Government, on the one hand, and the Legislative authority, represented by the Romanian Parliament, on the other hand, that because of the Government having assumed the power to enact legislation in the area of an organic law in situations other than those allowed by provisions of Article 115 (4) of the Romanian Constitution.

31. With regard to the legal conflict of a constitutional nature between the Executive authority - the Romanian Government, and the Judicial authority, represented by the Supreme Council of Magistracy, the applicant invokes provisions of Article 1 (3) of the Constitution setting forth the fundamental aims of the Romanian State; as the Constitutional Court has stated in its case-law, one of the conditions to achieve these objectives is the "proper functioning of public authorities, while respecting the principles of separation and balance of powers, without institutional blockages." The same Article further provides, in its paragraph (4), that the State is organized based on the principle of separation and balance of powers, whereas constitutional relations between public authorities are characterized by reciprocal involvement on the other's sphere of activity, and these implications are meant as a balance for their co-operation and mutual control through the mechanisms established by law. One of these mechanisms is instituted by Article 38 (3) of Law no. 317/2004 on the Superior Council of Magistracy, which reads: "The Plenary of the Superior Council of Magistracy gives its opinion on draft legislation that concerns the activity of the judicial authority". No doubt that both the Criminal Code and the Criminal Procedure Code are laws than concern the work of the judiciary, so that amendments will necessarily require endorsement by the Council. After all, in the afternoon of 31 January 2017, the Ministry of Justice had sent the drafts for said amendments to the Criminal Code and the Criminal Procedure Code for endorsement, one in the form of an emergency ordinance, another one prepared as a bill.

32. In carrying out the competencies entrusted to them, the institutions that discharge the powers provided for in Article 1 (4) of the Basic Law must comply with the law and calibrate their tasks in a manner commensurate with their specific powers and activities to be deployed. One must not ignore that the Council's task to give opinions on normative acts that concern work of the judicial authority has been devised by law as a mechanism to achieve the balance of state powers. If so, the way in which the Ministry of Justice chose to tackle the endorsement procedure, practically making it impossible for the opinion-making body to examine the drafts presented for endorsement, which altogether consisted of no less than four pieces of legislation (apart from the aforesaid two drafts, there were two more bills), all being of particular importance, the fact that the Government meeting was held at a time and under circumstances that hardly allowed an analysis, all this simply means disregard for the mechanisms that accomplish the balance of powers.

33. The President of the Superior Council of Magistracy stresses that the Court, in the adjudication of legal conflicts of a constitutional nature between public authorities, also undertakes the analysis of conduct by the parties involved in terms of their due fulfilment of the tasks bestowed upon by constitutional provisions. In the instance, the attitude of the Ministry of Justice, as part of the executive, just like the Government as a whole, which adopted the normative act without even taking note that it lacked the necessary opinions and without having allowed the opinion-making bodies a reasonable time in order to examine the draft, such conduct cannot remain unsanctioned by the Constitutional Court. Unlike in other cases analysed by the Court, the way in which the representatives of the executive had been hiding their real intention, and submitted to the Council two types of normative acts dealing with the same subject, on the very day the Government meeting was scheduled and the emergency ordinance was adopted, these are arguments that every legal mechanism which ensures the separation and balance of powers has been misused, and constitutes a threat to the rule of law in a democracy, as provided for in Article 1 (3) of the Constitution.

34. Moreover, the applicant claims that amending provisions in the Criminal Code and Criminal Procedure Code by way of an emergency ordinance should be expected to entail some other consequences in the courts' activity, in particular on account of their effectiveness. According to Article III (2) of said normative act, such shall enter into force as of the date of publication in the Official Gazette of Romania, Part I, save for provisions of Article I, which shall take effect ten days after publication in the Official Gazette of Romania, Part I. Provisions of this kind are likely to create serious difficulties in the administration of justice because of the extremely short interval during which judges would have to consider the applicability of provisions of said normative act in cases finally adjudicated, and make them legally effective. All the more so because the normative act, apart from full decriminalization of certain offences (such as negligence in office provided under Article 298 of the Criminal Code) also undertook some "partial" decriminalization of other offences, to the effect that certain incriminating hypothesis were removed from their normative content. Pursuant to provisions

in the emergency ordinance, the penitentiary judge would have to consider, in a very short while, whether or not he is to refer cases which are finally adjudicated to the competent court in order to establish applicability of Article 4 of the Criminal Code concerning application of decriminalization law, or of Article 6 concerning application of the more favourable provision of criminal law after final judgment in the case.

35. In that regard, the applicant argues that insofar as such amendments to the Criminal Code had been introduced by the ordinary legislative procedure or even the urgent procedure mentioned in Article 76 (3) of the Constitution, it would no longer hinder the judicial authority from exercising their constitutional task to render justice, as demanded by the rule of law.

36. For all these reasons, the President of the Superior Council of Magistracy asks that their application is granted and a decision is made to ascertain there has existed a legal conflict of a constitutional nature between the Executive authority and the Judicial authority, and that the Court imposes measures as it may deem necessary and useful in order to re-establish the constitutional order which must exist between the State authorities.

37. From this perspective, an effective remedy for restoring the constitutional order in respect of the legislative competencies of public authorities is to declare the normative act adopted by the Romanian Government in excess of its powers provided under the Basic Law, to be legally ineffective, being an act that cannot create, modify or extinguish legal relations as it had been intended.

38. By application no. CP1/213 of 2 February 2017, **the President of Romania requested the Constitutional Court to ascertain the existence of a legal conflict of a constitutional nature between the Government, on the one hand, and Parliament and the Superior Council of Magistracy, on the other hand.**

39. **In the statement of reasons**, the President of Romania shows that, on 31 January 2017, the Government adopted the Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, no. 92 of 1 February 2017, thus making use of its powers of enactment, yet in breach of the constitutional framework concerning legislative delegation. According to Article 61 (1) of the Constitution, Parliament is the sole legislative authority of the country. Also, according to Article 115 (1) and (4) of the Constitution, the Government may issue ordinances on the basis of enabling laws passed by Parliament and may adopt emergency ordinances in exceptional cases which call for regulations without delay, and must give the reasons for the urgency in their content.

40. When analysing the aforementioned constitutional provisions, it follows that in the Romanian constitutional system, Parliament has plenary law-making competencies, while the Government may exercise such delegated authority under strict conditions as laid down by the Constitution. *A contrario*, affirms the President of Romania, whenever the Government issues ordinances in violation of the constitutional norms, it will amount to abuse of legislative powers.

41. In the constitutional jurisprudence, the conditions to be fulfilled in order to issue emergency ordinances have been analysed in relation to material criteria, i.e. the content of the normative act enacted as delegated legislation, but also formal criteria, i.e. requirements as to decision-making powers and procedure for delegation of powers. From a formal standpoint, the delegated legislature cannot intervene unless there is an extraordinary situation that has to be regulated without delay and such urgency must be motivated in the content of the respective emergency ordinance. These are, primarily, matters pertaining to the scope of legislative powers and to the manner of exercise of delegated authority by the Government. Whether limitations imposed on the Government competence to issue an emergency ordinance have been complied with, that should be gauged in function of these three elements, namely an extraordinary situation, the urgency of regulation and motivation of such urgency, with due reference to the concrete reality which generated the enactment of delegated legislation, as has been stated in the relevant case-law of the Constitutional Court.

42. The President of Romania indicates that the analysis of the preamble of Government Emergency Ordinance no. 13/2017 does not reveal any elements of fact and law for an extraordinary situation whose regulation suffers no delay, this aspect being actually signalled by Opinion no. 61 of 31 January 2017 issued by the Legislative Council. Bringing the provisions in the Criminal Code or the Criminal Procedure Code that were found unconstitutional into accord with the Constitutional Court decisions has been the chief justification for issuing the emergency ordinance. That undeniably is a necessity, but not also an unpredictable situation that requires departure from the rules or normal expectations, such as to jeopardize the public interest and justify the Government's being coerced to enact urgency legislation, and thus substitute itself for the general law-making competence vested in Parliament. But even if implementation of the Constitutional Court decisions into the Criminal Code and Criminal Procedure Code were to be regarded as an extraordinary situation whose regulation can no longer suffer delay, to exceed the subject-matter of such regulation remains outside the constitutional rationale.

43. Moreover, since the two Houses of Parliament had been convened in extraordinary session during the period 9 to 31 January 2017, Parliament was in activity at the time of initiation of public consultation on the draft ordinance. Because of that, the reasoning given in the preamble to the emergency ordinance was unfounded, inasmuch as it stated that other ways to have such legislation enacted, even by a regular

legislative procedure, were unlikely to remove negative consequences without delay, but actually it was quite possible to have a bill passed by Parliament in this very short time, under an urgency procedure. There were several other instances in the past when the Parliament, while understanding the necessity to put in place essential regulations with the utmost expediency, had passed laws in a very short time, as for instance Law no. 1/2017 eliminating certain taxes and non-tax charges, also amending and supplementing certain normative acts, which was promoted as a parliamentary initiative and took in all, from submission of the draft to its adoption in Parliament, only 15 days.

44. Furthermore, it is argued that, according to Article III (2) of Government Emergency Ordinance no. 13/2017, such takes effect as of publication in the Official Gazette of Romania, Part I, except for provisions of Article I, which are to enter into force 10 days later. The very fact of having set a deadline for entry into force unequivocally demonstrates the existence of a legal conflict of a constitutional nature, whereas legislative delegation has been arbitrarily used in order to regulate a situation which is neither extraordinary, nor urgent.

45. For all those reasons, the President of Romania considers that the Government, by adoption of said emergency ordinance, whose content has bluntly departed from the necessity of a prompt response for the protection of the public interest, just like from the arguments presented in the preamble, has acted abusively, in assuming powers that the Constitution does not establish, since legislative delegation cannot bestow upon the Government a plenary power to make laws, that one being vested only in Parliament.

46. On the other hand, as an expression of the constitutional principle of the separation and balance of powers, certain acts, such as emergency ordinances, must have their draft endorsed by certain public authorities and institutions. Thus, depending on the subject-matter under regulation, bills and legislative proposals, and also ordinances are subjected to endorsement by the Competition Council, the Court of Auditors, the Supreme Council of National Defence, the Economic and Social Council, the Permanent Electoral Authority etc., as the case may be. According to Article 133 of the Constitution, the Superior Council of Magistracy shall guarantee the independence of justice. In accomplishing this role, Article 134 (4) establishes that the Superior Council of Magistracy fulfils other duties stipulated by its organic law. Therefore, in the case of legislative initiatives which concern the activity of judicial authorities, the Superior Council of Magistracy, pursuant to Article 38 of Law no. 317/2004, is competent to give its opinion, a competence originated in the constitutional text.

47. On 31 January 2017, the Ministry of Justice sent to the Superior Council of Magistracy, for endorsement, the draft of an emergency ordinance amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code. Later in the evening, the Government adopted the emergency ordinance, which was immediately published in the Official Gazette of Romania, Part I, in spite of the fact that the Superior Council of Magistracy had already made it public that its Plenary meeting was to convene on the following day. The task of public institutions to give their opinion on draft legislation, the more so when originated in the Constitution, is not just a formality, nor should it be understood that merely seeking an opinion would suffice to consider that constitutional requirements have been met. No one questions the initiator's entitlement to promote legislation, but in doing so, the Government hindered the Superior Council of Magistracy from carrying out a constitutional task.

48. In conclusion, the applicant considers that the Government's decision to adopt the Emergency Ordinance no. 13/2017 without the opinion of the Superior Council of Magistracy denotes disloyal conduct towards the Constitution, which affected the smooth functioning of another constitutional authority.

49. From another perspective, the President of Romania notes that the Government's intention to promote amendments to the Criminal Code and Criminal Procedure Code by way of an emergency ordinance has given rise to strong critical reactions from civil society, from the very moment it was learned. These views converge to the idea that legislative interventions so envisaged were inappropriate and against the democratic principles of the rule of law. Considering that some of these proposed amendments directly concern Romania's efforts in the fight against corruption, on 24 January 2017 the President of Romania initiated the procedure for the organisation of a referendum of national interest on the subject of continuing the fight against corruption and ensuring the integrity of public office and required consultation with Parliament on the matter, and that, according to Law no. 3/2000, must be given within 20 days. In the context of an imminent recourse to the direct exercise of national sovereignty through a referendum, and since the public authorities, Government included, are bound to take into account and identify the ways and means for implementing the will of the people, the Government's decision to adopt its Emergency Ordinance no. 13/2017 counts to misconduct, purported to obtain more favourable effects of the penal law at a moment when the people has not yet had the opportunity to express their voice, so that the viewpoint which Parliament is due to give under Article 90 of the Constitution will have become superfluous by then.

50. For all the above arguments, the President of Romania requests the Constitutional Court to declare the existence of a legal conflict of a constitutional nature between the Government, on the one hand, and Parliament and the Superior Council of Magistracy, on the other hand, which was caused by the Government's decision to adopt the Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code, in excess of its powers established by the Basic Law. Furthermore, he also asks the Court to hold that the Government Emergency Ordinance no. 13/2017 was adopted in violation of constitutional provisions and, accordingly, to take the necessary steps

in order to restore constitutional order by rendering the normative act ineffective.

51. Subject to Article 35 (1) of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, the application was communicated to the Government, the Superior Council of Magistracy, the Chamber of Deputies and the Senate, to present their **viewpoint** on the content of the legal conflict of a constitutional nature and also possible ways for a settlement.

52. **The Superior Council of Magistracy** has conveyed its viewpoint by document no. 2702/2017 registered at the Constitutional Court under no. 1343 of 7 February 2017, that maintains all of the arguments set out in the application for resolving the legal conflict of constitutional nature between the Executive authority - the Romanian Government and the Legislative authority - Romanian Parliament, and between the Executive authority - the Romanian Government and the Judicial authority represented by the Superior Council of Magistracy, as is filed with the Constitutional Court by the President of the Council, and also acquiesces to the request made by the President of Romania.

53. In that context, it reaffirms that even if the preamble to the normative act in question motivated there was urgency and extraordinary situation whose regulation must not suffer delay while invoking a necessity to ensure compliance of the provisions of the Criminal Code and Criminal Procedure Code with the Constitutional Court decisions, the amendments introduced have altogether exceeded the changes required by the Constitutional Court decisions. The Superior Council of Magistracy also makes reference to previous case-law of the Constitutional Court, in that "the criminalization / decriminalization of actions or reconfiguration of elements of a criminal offence lies within the margin of appreciation of the legislature, but that degree of discretion is not absolute, it is limited by constitutional principles, values and requirements" (Decision no. 683 of 19 November 2014, published in the Official Gazette of Romania, Part I, no. 47 of 20 January 2015, and Decision no. 54 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 257 of 17 April 2015). Similarly, the Constitutional Court has emphasized that the margin of appreciation enjoyed by the legislature, where it would question and set limitations to a constitutional right or leave unsanctioned a breach of social relations which would pose a threat to the institutions of the rule of law, democracy, human rights, fairness and social justice, is a limited one, and falls under narrow review by the Constitutional Court (Decision no. 603 of 6 October 2015, published in the Official Gazette of Romania, Part I, no. 845 of 13 November 2015, and Decision no. 2 of 15 January 2014, published in the Official Gazette of Romania, Part I, no. 71 of 29 January 2014).

54. Having regard of the above mentioned, the Council considers that conditions have been met for a legal conflict of a constitutional nature between the Executive authority, represented by the Romanian Government, on the one hand, and the Legislative authority, represented by the Romanian Parliament, on the other hand, that is generated by the Government having assumed powers to enact legislation in the area of an organic law in situations other than those permitted by provisions of Article 115 (4) of the Constitution.

55. Furthermore, it is argued that constitutional relations between public authorities are characterized by a reciprocal involvement on the other's sphere of activity, and the Council's task to endorse normative acts which concern the activity of the judicial authority has been established by law as a mechanism to achieve the balance of state powers, which cannot be ignored.

56. The Superior Council of Magistracy reiterates that the provisions of Government Emergency Ordinance no. 13/2017 had been likely to create serious difficulties in the administration of justice because of the extremely short interval in which judges should have had to consider the applicability of the said provisions in finally adjudicated cases and give them legal efficiency.

57. Even if the Romanian Government, in this instance, has taken steps and repealed its Emergency Ordinance no. 13/2017, the Constitutional Court must decide measures so as to ensure that the Romanian Government will change its conduct from now on and refrain from assuming duties which belong to another authority. From now on, it is necessary that the Romanian Government should carefully examine and justify whether requirements under Article 115 (4) of the Constitution are met, namely the extraordinary situation and urgency to enact regulations without delay, and also obtain opinions and viewpoints from all the authorities as provided by law.

58. **The President of the Senate of Romania** conveyed a viewpoint by documents no. 1572 and no. 1573 of 7 February 2017 registered at the Constitutional Court under no. 1334 and no. 1336 of 7 February 2017, respectively. It is argued that, in the instances where the President of Romania has approached the Constitutional Court under Article 146 lit. e) of the Constitution, he should do so in accordance with his function to guard the observance of the Constitution and the proper functioning of public authorities provided under Title III of the Basic Law. This task involves, first of all, that the President be highly concerned to serve national interests, and to ensure the proper functioning of public authorities. As social life is always changing, the configuration of a legal conflict of a constitutional nature may be evolving due to the new realities of social life, and in particular in respect of a dispute between political actors. It is even possible that a conflict deferred to the Constitutional Court takes the form of a legal conflict of a constitutional nature, but essentially it remains a political dispute in its substance. In that regard, the President of the Senate mentions the fact, which is now public knowledge following declassification of minutes of the Government meeting when an emergency ordinance was adopted whose subject matter is similar to that of Government Emergency Ordinance no. 13/2017, that the President of Romania failed to acknowledge at that time the legal conflict of a constitutional

nature having occurred between the Government, on the one hand, and Parliament and the Superior Council of Magistracy, on the other hand, by the adoption of an emergency ordinance. "If the President, in two similar situations, chooses one to convert into a legal conflict of a constitutional nature, but forgets about the other one, then which are the selection criteria for the President of the Republic? The answer to this question has explanatory value for the content of the term *conflicting legal situations that are rooted directly in the Constitution*". The circumstances in each of these two situations may be useful to the Constitutional Court in resolving the alleged legal conflict of a constitutional nature between the public authorities specified in the application, its content being, in reality, pure politics.

59. As regards the criticism that the Government adopted its Emergency Ordinance no. 13/2017 without endorsement by the Superior Council of Magistracy, the President of the Senate contends that penal policy, in any democratic State, is an exclusive prerogative of Parliament and Government, without either of these two authorities having more power than the other one. The President of Romania also makes a contribution in completing measures of penal policies, *via* the procedure of promulgation of the laws adopted by the legislature. However, Article 38 (3) of Law no. 317/2004 has not provided for a specific character of the opinion given by the Superior Council of Magistracy. Moreover, Article 32 (1) of the same law reads: "*where the law provides for a consultation or opinion of the Superior Council of Magistracy, its viewpoint is not binding.*" No constitutional text whatsoever has made a requirement that the Superior Council of Magistracy gives its opinions in the framework of the legislative procedure, as it has, for instance, in Article 79 of the Constitution, in respect of the Legislative Council.

60. The President of the Senate sees further inconsistencies in the reasoning made in support of the existence of a legal conflict of a constitutional nature, in that "the Government's intention to promote amendments to the Criminal Code and Criminal Procedure Code by way of an emergency ordinance has given rise to strong critical reactions from civil society, from the very moment it was learned." Apart from the fact "the critical reaction of civil society" was induced and maintained by the President of Romania, it is pointed out that, by invoking this argument, the President of Romania has erroneously extended the sphere of legal conflicts of a constitutional nature between public authorities, to that of State-society relations. Such may come under mediation by the President of Romania and may have a social, economic, and even political character, but cannot be derived from constitutional texts. In addition to that, the application submitted under the President's signature has been made in terms which are meant to amplify the alleged legal conflict of a constitutional nature between the Government, on the one hand, and Parliament and the Superior Council of Magistracy, on the other hand, whereas it invokes *the people* who has had no opportunity to express their voice on the content of Government Emergency Ordinance no. 13/2017 prior to its publication in the Official Gazette of Romania, Part I, and claims that the Government action would make superfluous "the viewpoint which Parliament is due to give under Article 90 of the Constitution" at the request of the President of Romania to initiate a referendum on questions of national interest.

61. Having regard of the above mentioned, the President of the Senate deems that "the request submitted to the Constitutional Court is wholly unfounded, as it lacks any constitutional and legal basis, and therefore calls the Court to ascertain there has been no legal conflict of a constitutional nature between the Government, on the one hand, and Parliament and the Superior Council of Magistracy, on the other hand".

62. **The President of the Chamber of Deputies**, by document no. 2/1415 of 7 February 2017, registered at the Constitutional Court under no. 1345 of 7 February 2017, and document no. 2/1416 of 7 February 2017, registered at the Constitutional Court under no. 1344 of 7 February 2017, conveyed a viewpoint stating that the Superior Council of Magistracy has no competence in respect of a legal conflict of a constitutional nature between the Government and the judicial authority, and according to the Constitutional Court Decision no. 3 of 15 January 2014 it may not issue an opinion on normative acts amending the Criminal Code or the Criminal Procedure Code. In that regard, the Court has held that "the bills which involve seeking the Council's opinion are normative acts such as those concerning the tenure of judges and prosecutors (...) currently regulated under Law no. 303/2004, judicial organisation (...) regulated under Law no. 304/2004, or the organisation and functioning of the Superior Council of Magistracy, whose legal basis is Law no. 317/2004". Any other interpretation of the wording legislation concerning activity of the judicial authority would lead to "an extension of competencies in the Superior Council of Magistracy that is not based on clear, predictable criteria, and is thus arbitrary." The Court also noted that to seek the Council's opinion as a mandatory requirement in the drafting of all legislation lacks the logical and legal basis, because it would mean the Superior Council of Magistracy ought to carry out similar tasks as those bestowed on the Legislative Council, "which is unacceptable".

63. As regards the legal conflict of a constitutional nature between the Government and the Legislative authority, the President of the Chamber of Deputies shows that an emergency ordinance has the force of law, therefore may contain norms ranking as primary legislation, as the Constitutional Court has acknowledged in several decisions (Decision no. 5/2001, published in the Official Gazette of Romania, Part I, no. 94 of 23 February 2001, Decision no. 173/2001, published in the Official Gazette of Romania, Part I, no. 500 of 24 August 2001; Decision no. 260/2001, published in the Official Gazette of Romania, Part I, no. 3 of 7 January 2002; Decision no. 46/2002, published in the Official Gazette of Romania, Part I, no. 218 of 1 April 2002; Decision no. 258/2006, published in the Official Gazette of Romania, Part I, no. 341 of 17 April 2006).

Consequently, the issuance of the said Government Emergency Ordinance also implies the possibility to amend or repeal laws, as is stated in Decision no. 27/2008, published in the Official Gazette of Romania, Part I, no. 65 of 28 January 2008. Also, the Government is entitled to enact regulations at the level of primary legislation, and to amend or repeal existing regulations by means of emergency ordinances (Decision no. 102/1995, published in the Official Gazette of Romania, Part I, no. 287 of 11 December 1995).

64. The Constitutional Court, in its recent case-law, has introduced a new requirement for the adoption of emergency ordinances, in addition to those derived from Article 115 of the Constitution, namely that the Government must not counteract legislative measures adopted by Parliament, in other words it must not deprive a law, once adopted, of its legal effects (Decision no. 1221/2008, published in the Official Gazette of Romania, Part I, no. 804 of 2 December 2008; Decision no. 842/2009, published in the Official Gazette of Romania, Part I, no. 464 of 6 July 2009; Decision no. 984/2009, published in the Official Gazette of Romania, Part I, no. 542 of 4 August 2009; Decision no. 989/2009, published in the Official Gazette of Romania, Part I, no. 531 of 31 July 2009). By its Emergency Ordinance no.13/2017, the Government has not counteracted any legislative measure or a law already passed by Parliament or other legislative policy, so as to have violated the provisions of Article 1 (3) - (5), Article 73 (1) and (3) lit. h), and of Article 115 (4) of the Constitution. In other words, by adopting the emergency ordinance, the Government did not oppose to a law passed by Parliament, thus it also complied with the requirement set under the Constitutional Court case-law.

65. Having regard to the reasons given in the preamble to Government Emergency Ordinance no. 13/2017, that legislative amendments are aimed at bringing certain provisions of the Criminal Code and Criminal Procedure Code into accord with the Constitution, pursuant to decisions of the Court (Decisions no. 586/2016, no. 614/2016, no. 603/2015, no. 732/2014, no. 405/2016), also to the fact that the emergency ordinance in question has been submitted to Parliament accompanied by an explanatory memorandum, and was registered at the Senate under no. L13/2017, the applicant's claim is not to be accepted. Under the Constitution and Standing Orders of Parliament, Government Emergency Ordinance no.13/2017 is due to be approved, or rejected, by a law, that is by an act of Parliament. That is why the alleged lack of control by Parliament over the emergency ordinance or the "substitution" of the Parliament's legislative powers by the Government cannot be taken into account.

66. In view of the fact the applicants have requested the Court to declare that the Government Emergency Ordinance no. 13/2017 was adopted in violation of constitutional provisions, the President of the Chamber of Deputies challenges the claim that it would be possible to scrutinize into the constitutionality (or unconstitutionality) of a normative act within proceedings based on a request for resolving a legal conflict of a constitutional nature.

67. As to the statements made by the President of Romania, in that the Government Emergency Ordinance no. 13/2017 "gave rise to strong critical reactions from civil society," "the legislative interventions were inappropriate" and "against the democratic principles of the rule of law", the President of the Chamber of Deputies argues that it is a task for the issuing body to analyse the opportunity for issuing a normative act as against the purpose envisaged by the said legislation. According to the preamble to the emergency ordinance, it was aimed to bring the Criminal Code and the Criminal Procedure Code, respectively, into accord with the Constitution, by enforcing the decisions of the Constitutional Court. Consequently, the alleged lack of appropriateness is not to be accepted, as long as the Court's decisions are opposable *erga omnes*, final and generally binding; it means that the legislature, even the delegated legislature, is under an obligation to adjust the provisions declared unconstitutional so as to make them compatible with the Constitution. That is the only way in which the democratic principles of the rule of law are fully respected.

68. Having regard of the aforesaid considerations, the President of the Chamber of Deputies states that both applications for the resolution of legal conflicts of a constitutional nature between public authorities, namely between the Executive authority - the Romanian Government and the Legislative authority - the Romanian Parliament, and between the Executive authority - the Government and the Judicial authority represented by the Superior Council of Magistracy, respectively, are unfounded, and proposes that the Court should take note there are no such conflicts.

69. **The Government**, with document no. 5/868/2017 registered at the Constitutional Court under no. 1383 of 8 February 2017, conveyed its viewpoint regarding the content of legal conflicts of a constitutional nature in which the Government appears a party. As to the existence of a legal conflict of a constitutional nature between the Government and the legislative authority, represented by the Romanian Parliament, reference is made to Government Emergency Ordinance no. 14/2017 repealing the Emergency Ordinance Government no. 13/ 2017, adopted after the matter was referred to the Constitutional Court, that is published in the Official Gazette of Romania, Part I, no. 101 of 5 February 2017. Accordingly, since the alleged legal conflict of a constitutional nature has been generated by the very existence of Government Emergency Ordinance no. 13/2017, it is now devoid of purpose through abrogation of the normative act. Furthermore, as to the admissibility of requests for the resolution of such conflict, it is argued that only the persons in leading positions / representatives of the authorities in conflict are entitled to lodge such requests, not individuals who have no connection whatsoever with either of the two authorities.

70. With regard to the existence of legal conflict of a constitutional nature between the Executive authority, represented by the Romanian Government, on the one hand, and the Judicial authority, represented

by the Superior Council of Magistracy, on the other hand, the Government contends that such conflict is also devoid of purpose, for similar reasons as hereinabove presented concerning repeal of Emergency Ordinance no.13/2017. At the same time, reference is made to the case-law of the Constitutional Court (Decision no. 901/2009), according to which the Superior Council of Magistracy lacks competencies to endorse other normative acts than those governing the activity of judicial authorities.

71. In conclusion, the Government sees no legal conflict of a constitutional nature between Government, on the one hand, and Parliament and the Superior Council of Magistracy, on the other hand.

#### THE COURT,

having examined the applications requesting the resolution of legal conflicts of a constitutional nature between the Executive authority – the Government of Romania, on the one hand, and the Legislative authority – the Parliament of Romania, on the other hand, as well as between the Executive authority – the Government of Romania, on the one hand, and the Judicial authority – the Superior Council of Magistracy, on the other hand, as have been submitted by the President of the Superior Council of Magistracy, and the President of Romania, respectively, the viewpoints from the Government, the Superior Council of Magistracy, the Chamber of Deputies and the Senate, the reports by the judge-rapporteur, the submissions made by the representatives of the Superior Council of Magistracy, the Chamber of Deputies and the Senate, the provisions of the Constitution and Law no.47/1992 on the organisation and functioning of the Constitutional Court, holds as follows:

72. As to **the admissibility of requests**, the Constitutional Court, in accordance with Article 146 lit. e) of the Constitution "shall decide on legal disputes of a constitutional nature between public authorities". In that regard, the public authorities which may be involved in a legal conflict of a constitutional nature are only those included under Title III of the Constitution, namely: Parliament, composed of the Chamber of Deputies and the Senate, the President of Romania, as a unipersonal public authority, the Government, bodies of the central public administration and local government, and the judicial authority bodies. In order to exert its constitutional jurisdiction, the Constitutional Court must be referred to "at the request of the President of Romania, the President of either of the Chambers, the Prime Minister, or the President of the Superior Council of Magistracy." The applicants entitled to bring a case before the Court are limitatively listed under the Constitution, which does not specify whether also the applicant authority should be one involved in the conflict being referred to the Court.

73. The Court observes that both the President of Superior Council of Magistracy and the President of Romania are entitled to submit a request concerning the resolution of legal conflicts of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Legislative authority - the Romanian Parliament, on the other hand, as well as between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand, all of them being public authorities which may qualify as a party to a legal conflict of a constitutional nature.

74. The Court therefore finds that it has been legally vested and is competent, under the provisions of Article 146 lit. e) of the Constitution as well as Articles 1, 10, 34 and 35 of Law No.47/1992, to adjudicate the legal conflicts of a constitutional nature between public authorities.

75. Having examined the timeline of events, the Court observes that on 18 January 2017, the Justice Ministry had put into public debate a draft emergency ordinance amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code, which was also submitted to the Superior Council of Magistracy for endorsement. The Plenary of the Superior Council of Magistracy gave its negative opinion, by Decision no. 65 of 25 January 2017, and essentially stated that such regulations should not be adopted by way of a Government Emergency Ordinance, as long as requirements set by Article 115 (4) of the Constitution had not been met with.

76. On 31 January 2017, the Ministry of Justice sent a new draft emergency ordinance amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code, to be endorsed by the Superior Council of Magistracy. Later in that day, without having received the Council's opinion, the Romanian Government adopted the Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code, the act being submitted for approval to Parliament and published in the Official Gazette of Romania, Part I, no. 92 of 1 February 2017.

77. Following the adoption of this normative act, the President of the Superior Council of Magistracy and the President of Romania have approached the Constitutional Court to request that legal conflicts of a constitutional nature be resolved as they occurred between the Executive authority - the Romanian Government, on the one hand, and the Legislative authority - the Romanian Parliament, on the other hand, as well as between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand.

78. In their requests submitted to the Constitutional Court, the applicants have invoked a breach, by the Romanian Government, of provisions of Article 1 (3) – 5), Article 2, Article 73 (1) and (3) lit. h), Article 115 (4), Article 133 (1) and Article 134 (4) of the Constitution, which read as follows:

— Article 1 (3) – (5): “(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 organized 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.”;

— Article 2: “(1) National sovereignty belongs to the Romanian people, who shall exercise it through their representative bodies established as a result of free, periodic and fair elections, as well as by means of a referendum.

(2) No group or individual may exercise sovereignty in their own name.”;

— Article 73 (1) and (3) lit. h): “(1) Parliament enacts constitutional, organic, and ordinary laws.

(3) By organic laws it shall be regulated: (...)

h) criminal offences, punishments and execution of the punishments;”;

— Article 115 (4): “The Government may adopt urgency ordinances solely in exceptional cases which call for regulations without delay, and must set forth the reasons for that urgency in their very content.”;

— Article 133 (1): “The Superior Council of Magistracy shall guarantee the independence of the judiciary.”;

— Article 134 (4): “The Superior Council of Magistracy shall also discharge other powers as determined under its own organic law, in accomplishing its role as a guarantor for the independence of the judiciary.”

79. Likewise, the provisions of Article 38 (3) of Law no. 317/2004 on the Superior Council of Magistracy, according to which “The Plenary of the Superior Council of Magistracy endorses draft legislation regarding the activity of the judicial authority” are invoked in support of the requests.

80. As to the concept of **legal conflict of a constitutional nature between public authorities**, as construed by the Constitutional Court in its Decision no. 53 of 28 January 2005, published in the Official Gazette of Romania, Part I, no. 144 of 17 February 2005, such must entail “acts or concrete actions whereby one or more than one authority have assumed powers, tasks or competencies entrusted to another public authority under the Constitution, or an omission consisting in denial of competence or refusal to fulfil certain measures which fall under their respective obligations.” Likewise, by Decision no. 97 of 7 February 2008, published in the Official Gazette of Romania, Part I, no. 169 of 5 March 2008, the Court held that: “A legal conflict of a constitutional nature occurs between two or more authorities, and may envisage the content or scope of their duties arising from the Constitution, that means they are conflicts of competence, whether positive or negative, which may lead to an institutional blockage.” Furthermore, the Court held that Article 146 lit. e) of the Constitution “establishes the Court's jurisdiction to resolve any legal conflict of a constitutional nature as may occur between public authorities, not just the conflicts of competence arising between them.” Therefore, the concept of legal conflict of a constitutional nature “shall envisage any conflicting legal situation whose occurrence is directly rooted in the Constitution” (see Constitutional Court Decision no. 901 of 17 June 2009, published in the Official Gazette of Romania, Part I, no. 503 of 21 July 2009).

81. For the consideration of requests submitted in the present case, the Constitutional Court must rely on relevant texts of the Basic Law and, by means of interpretation thereof, discern the true intent of the constituent legislature so as to ultimately resolve the institutional conflicts herewith invoked.

82. Based on clarifications brought under aforesaid case-law in respect of the powers entrusted to the Constitutional Court in Article 146 lit. e) of the Constitution, it follows that the Court will have to decide whether the points made in the request submitted by the President of the Superior Council of Magistracy, and that by the President of Romania, respectively, satisfy constituent elements that should qualify as legal conflicts of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Legislative authority - the Romanian Parliament, on the other hand, as well as between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand, thereafter scrutinize into whether enactment of the Government Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code amounts to an action whereby the Romanian Government assumed a competence to legislate in the area of organic laws in situations other than those allowed in the Constitution, which means in breach of the competence vested in Parliament, and also whether it disregarded the law-making process in respect of the legal opinions as may be needed for the adoption of normative acts, which means preventing the judicial authority, represented by the Superior Council of Magistracy, to fulfil its constitutional powers.

83. With regard to the **subject matter of said conflict**, note has been taken that at a later point in time, after referral was made to the Constitutional Court, the Romanian Government, in its meeting of 5 February 2017, adopted the Emergency Ordinance no. 14/2017, whose first Article provides that the Government Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code shall be repealed.

84. In what concerns a later event which is directly related to the subject matter of a legal conflict of constitutional nature, still after submission of referral to the Court, the Constitutional Court has held, in its constant case-law, that such occurrences cannot influence the procedural framework applicable for the

Court's discharge of powers, specifically because such **procedure has all the characteristics of jurisdictional proceedings governed by public law**. Thus, by Decision no. 158 of 19 March 2014, published in the Official Gazette of Romania, Part I, no. 292 of 22 April 2014, the Court observed that "the Prime Minister of Romania, Mr. Victor-Viorel Ponta, after making a referral to the Court in accordance with Article 146 lit. e) of the Constitution by his letter no.5/1225 of 5 March 2014, registered at the Constitutional Court under no. 931 of 5 March 2014, has submitted another document, no. 5/1235 of 6 March 2014, registered at the Constitutional Court under no. 958 of 6 March 2014, asking the Court to take note of his request to withdraw the referral, as being devoid of purpose, in regard to the publication, in the Official Gazette of Romania, Part I, no. 162 of 5 March 2014, of *Decree no. 261/2014 on the revocation and appointment of certain members of the Romanian Government*." In that regard the Court held that, pursuant to Article 14 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, "jurisdictional procedure under this law shall be supplemented by the rules of civil procedure, insofar as they are compatible with the nature of the proceedings before the Constitutional Court. Compatibility is decided exclusively by the Court." And the nature of the proceedings before the Constitutional Court is determined by the nature of the Court's powers accomplished by virtue of its role, that of a guarantor for supremacy of the Constitution. The Constitutional Court is the sole body of constitutional jurisdiction in Romania whose competencies are enshrined in the Basic Law, and whose powers pertain to constitutional law which is a branch of public law, so that the proceedings before the Constitutional Court have acquired all the characteristics of jurisdictional proceedings governed by public law (paragraph 43). Therefore, given the nature of the Constitutional Court powers and in the absence of any explicit provision regarding the parties' right to waive proceedings before the Court, the request that the Court ought to take note of the applicant's withdrawal of his referral as devoid of purpose was deemed, despite the reference to civil procedure rules, as incompatible with the procedure for resolution of legal conflicts of a constitutional nature between public authorities (paragraph 45). That being so, *the Court continued its scrutiny into the merits of the case* subject to Article 14 in conjunction with Article 55 of Law no. 47/1992, and concluded in the operative part of the decision that "*no legal conflict of a constitutional nature has occurred between the President of Romania and the Government of Romania, on account of public statements made by the President of Romania as to the appointment of members of the Government.*"

85. The Court resorted to the same rationale in its Decision no. 356 of 5 April 2007, published in the Official Gazette of Romania, Part I, no. 322 of 14 May 2007, upon examination of a request for resolution of a legal conflict of constitutional nature, holding in the operative part of the decision "*that refusal by the President of Romania to appoint a member of the Government at the Prime Minister's proposal has caused a legal conflict of a constitutional nature, which has ceased to subsist as a result of having issued presidential Decrees no. 193/12 March 2007, 237/22 March 2007 and 379/4 April 2007. [...]*"

86. Having regard of its settled practice, the Court finds that *repeal of Government Emergency Ordinance no.13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code is not an impediment to examine the merits of the request* for resolution of legal conflicts of a constitutional nature between public authorities.

87. **On examination of applications concerning the legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Legislative authority - the Romanian Parliament, on the other hand**, the Court observes that Article 1 (4) of the Constitution has established the principle of separation and balance of powers in the framework of a constitutional democracy, which requires, on the one hand, that none of these three powers may interfere in the activities of another power and, on the other hand, requires checks as provided by law in respect of the acts issued by each of them.

88. Under provisions of Article 61 (1) second sentence of the Constitution, Parliament is conferred the capacity as the country's one and only legislative authority; by virtue of its legislative monopoly, Parliament is the only public authority to make laws. The concept of "law" is defined by two criteria: the formal or organic, and the material one. According to the first criterion, the law is characterized as an act of the legislative authority, and is identified after the body vested with powers of enactment and the procedure to be followed for that purpose. This conclusion stems from the provisions of Article 61 (1) second sentence of the Constitution, according to which "*Parliament is [...] the sole legislative authority of the country*" in conjunction with the provisions of Articles 67, 76, 77 and 78, according to which the Chamber of Deputies and the Senate shall pass laws that are subject to promulgation by the President of Romania, and enter into force three days after publication in the Official Gazette of Romania, Part I, unless otherwise, at a later date specified therein. The substantive criterion envisages content of the regulations, and is defined in consideration of the normative subject matter, namely in respect of the nature of social relations regulated by the norm, for which Parliament has plenary law-making competence.

89. The original competence of the Government, as an executive authority, is provided in Article 108 (2) of the Constitution, and concerns regulatory measures in the organization of the enforcement of laws, i.e. of the primary legislation, by enactment of decisions, which are normative acts of secondary purport. Government decisions are normative or individual administrative acts issued with a view to the proper administration in the enforcement of primary legislation which requires subsequent arrangements and rules to ensure its correct application. Decisions are always based on a law, *secundum legem*, and ensure the

application or enforcement of laws. In other words, the rule underlying the Romanian constitutional system is that the Government is not entitled to create primary legislation that regulates social relations, but only to adopt secondary legislation.

90. However, the Constitution has also established, in Article 108 (3) and in Article 115 (1) to (3), a task enabling the Government to issue ordinances, which is a legislative competence derived from a law adopted by Parliament, whereby the sole legislative authority of Romania has delegated, for a limited time, the power of legislation in areas strictly delineated by the Constitution and the enabling law. The exercise of such powers is likewise included in the sphere of the executive, because the Government, by issuing ordinances, accomplishes the enabling law, and the specific aspects involved by such a law in respect of the assessment of limitations on the powers thus granted. Despite the fact that the Government, as the effect of empowerment, issues an act which, by content, is of legislative character, on account of a legislative delegation, the ordinance remains an administrative act by the executive authority.

91. Furthermore, as regards the law-making competence, the Court holds that the relationship between the legislative and the executive power is completed by the competence conferred to the Government to adopt emergency ordinances under the conditions provided by Article 115 (4) to (6) of the Constitution. An emergency ordinance, as a normative act that allows the Government to deal, under control by Parliament, with an extraordinary situation is justified by the necessity and urgency to lay down regulations in a situation which, because of its circumstances, calls for an immediate solution in order to avoid severe harm to the public interest.

92. **The legal regime of emergency ordinances is established in Article 115 (4) to (6) of the Constitution and refers to cases where such may be issued:** extraordinary situations whose regulation cannot be postponed, the Government having an obligation to give the reasons for the emergency within their content; *entry into force*: only after submission for debate in an urgency procedure to the Chamber that has initial competence and with a mandatory convocation of Parliament if not in session; *scope of regulation*: it can also be that of an organic law, but in that case approval must be given by a law which is adopted with the majority required by Article 76 (1) of the Constitution; emergency ordinances may not be adopted in the field of constitutional laws, or affect the status of fundamental institutions of the State; likewise, emergency ordinances may not be detrimental to the rights, freedoms and duties provided in the Constitution, or electoral rights, and cannot establish measures of forcible transfer of assets into public property.

93. In view of these considerations, the Court holds that the Constitution, in addition to the legislative monopoly vested in Parliament, has established a legislative delegation in Article 115 by virtue of which the Government may issue ordinances, be they simple [Article 115 (1) to (3)] or emergency [Article 115 (4) to (6)]. Thus, the transfer of certain legislative tasks onto the executive authority is accomplished by an act of Parliament or, in exceptional cases and only under parliamentary control, by a constitutional route.

94. **The Court is to decide whether Government Emergency Ordinance no. 13/2017 has in itself generated a legal conflict of a constitutional nature between Parliament and Government**, with regard to the criticism directed at the Government enactment as against the constitutional provisions invoked, the applicants having requested that the normative act should be constitutionally reviewed in terms of both legislative solution and its adoption procedure.

95. **In its case-law, the Constitutional Court has not yet been approached to rule on the existence of legal conflicts of a constitutional nature stemming from the very content of normative acts**, distinctly from enforcement or application thereof, or independently of any action or omission by the public authorities provided in the Constitution.

96. As regards the procedure for the adoption of normative acts, precedents exist in the Court's case-law where applications for the resolution of a legal conflict of a constitutional nature also involved criticism held by the Court as having been targeted against the normative acts concerned and deemed to be unconstitutional. Thus, in its **Decision no. 97 of 7 February 2008**, published in the Official Gazette of Romania, Part I, no. 169 of 5 March 2008, the Court, while ruling on a claim regarding the adoption of government emergency ordinances without seeking an opinion from the Supreme Council of National Defence, held that "the present case is not about a conflict [Ed. – *of a constitutional nature*], but about failure by the Romanian Government to fulfil a legal obligation within the legislative procedure". As a further development of these considerations, the Court held, in its **Decision no. 901 of 17 June 2009**, published in the Official Gazette of Romania, Part I, no. 503 of 21 July 2009, where the analysis had concerned *the absence of an opinion from the Superior Council of Magistracy*, that "*issues raised by the President of the Superior Council of Magistracy could possibly envisage the unconstitutionality of certain normative acts, not a legal conflict of a constitutional nature*". That being so, "the unconstitutionality of a law or ordinance can be established only subject to Article 146 lit. a) and lit. d) of the Constitution, and cannot be grounded on the constitutional text under Article 146 lit. e)."

97. The same solution is maintained in **Decision no. 231 of 9 May 2013**, published in the Official Gazette of Romania, Part I, no. 347 of 12 June 2013, where the Court stated that "*the only purpose of the application to resolve the legal conflict of a constitutional nature in the instant case, distinctly from any action or omission by the authorities involved or from other situations as may be categorized under a legal conflict of a constitutional nature, is that of finding Government Emergency Ordinance no. 21/2013 as*

*unconstitutional, and its being declared ineffective.* However, the unconstitutionality of an ordinance, as is circumstantiated above, can be established only under the terms of Article 146 lit. d) of the Constitution [but also, by way of its approving law, pursuant to Article 146 lit. a) of the Constitution], not on the grounds of another constitutional text, that is Article 146 lit. e), as long as such alleged unconstitutionality identifies itself with the very claim for resolving the legal conflict of a constitutional nature. *The Constitutional Court's task to resolve legal conflicts of a constitutional nature between public authorities has not been devised by the constituent legislator as a third, distinct path, to review the constitutionality of normative acts."*

98. ***These arguments are valid in respect of the analysis of the adoption procedure for Government Emergency Ordinance no. 13/2017***, and its legislative solutions, respectively, in that ***the Court cannot rule on the constitutionality of provisions in the normative act concerned through proceedings for resolving a legal conflict of a constitutional nature.*** The Romanian constitutional literature has also acknowledged an essential differentiation between the powers of the Constitutional Court to review constitutionality as against other tasks which also involve the checking into constitutional actions and facts. No doubt that its powers to ascertain a legal conflict of a constitutional nature will obviously fall under the latter. In order to find out whether a legal conflict of a constitutional nature has occurred, it is necessary first to examine conflicting acts, actions or omissions by one or more public authorities. However, it is not possible to categorize any conflict arising between primary legislative provisions and the Constitution, as a legal conflict of a constitutional nature. The former "conflict" is of course subjected to a constitutional review which verifies compatibility of norms with the Basic Law. All the same, *such competence may be exercised following referrals made under Article 146 lit. a) or d) of the Constitution* (see also Decision no. 259 of 8 April 2015, published in the Official Gazette Romania, Part I, no. 334 of 15 May 2015, paragraph 50).

99. Having regard to considerations in the aforesaid case-law, on the one hand, and to the constitutional provisions invoked, on the other hand, the Court finds that ***the Government's decision to adopt Emergency Ordinance no. 13/2017*** amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code cannot be regarded as an action of assuming powers, tasks or competencies which the Constitution has vested in Parliament. ***It is obvious that the Government has discharged its own competence, expressly provided for in Article 115 of the Basic Law.***

100. As to the claim made by the President of Romania that, in the context of an imminent recourse to the direct exercise of national sovereignty through a referendum of national interest on the subject of *continuing the fight against corruption and ensuring the integrity of public office*, whose procedure was initiated on 24 January 2017, the Government's decision to adopt Emergency Ordinance no.13/2017 counts to a misconduct purported to obtain more favourable effects of the penal law at a moment when the people has not yet had the opportunity to express their voice, thus making superfluous the viewpoint that Parliament is due to give under Article 90 of the Constitution, the Court finds that such issues overpass the procedural framework taken for analysing into the existence of a legal conflict of a constitutional nature between Romanian Government and Parliament.

101. In conclusion, ***the Court finds there has been no legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Legislative authority - the Romanian Parliament, on the other hand.***

102. ***On examination of the requests as to a legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand***, concerning the competence of the Superior Council of Magistracy in matters relating to legislative procedures, the Constitutional Court held, in its *Decision no. 3 of 15 January 2014*, published in the Official Gazette of Romania, Part I, no. 71 of 29 January 2014, that such is derived from the legal provisions in force. Thus, according to Article 9 of the Law no. 24/2000 on norms of legislative technique for the drafting of normative acts, republished in the Official Gazette of Romania, Part I, no. 260 of 21 April 2010, "(1) *In cases provided by law, the initiator must, during the drafting stage of a normative act, seek the opinion of the authorities concerned in implementation thereof, depending on the scope of regulations.*" Such is the case provided by Article 38 (3) of Law no. 317/2004 on the Superior Council of Magistracy, republished in the Official Gazette of Romania, Part I, no. 628 of 1 September 2012, reading that: "*The Superior Council of Magistracy shall endorse draft normative acts which concern the activity of the judicial authority*", while according to Article 32 (1) of the said law, "(1) *Where the law provides for the Superior Council of Magistracy to give its assent, approval or consent, such viewpoint shall be mandatory. If the law provides for a consultation or endorsement by the Superior Council of Magistracy, its opinion shall not be binding.*"

103. The Court observes it goes about a competence of the Superior Council of Magistracy which is derived from the law, being afforded to the Council by means of an act of Parliament on the basis of constitutional provisions under Article 134 (4), that "*the Superior Council of Magistracy shall also perform other duties stipulated by its organic law to accomplish its role of guarantor of judicial independence*". Although the constitutional norm, while affirming the role of the Superior Council of Magistracy as a guarantor for the independence of the judiciary, does not make an explicit point about an obligation placed on the initiator of a draft normative act to seek its opinion, the endorsement of draft legislation concerning the activity of the judicial authority is stipulated in the Law on the organisation and functioning of the Superior Council of

Magistracy, that one being mentioned in the Constitution.

104. Nevertheless, *the Court has circumscribed the term "normative acts which concern the activity of judicial authority" in providing guide marks for the competent authorities if they have a legal and constitutional obligation to seek the opinion of the Superior Council of Magistracy. In its reasons to Decision no. 901 of 17 June 2009, published in the Official Gazette of Romania, Part I, no. 503 of 21 July 2009, the Constitutional Court held that such wording refers "only to normative acts that directly concern the organisation and functioning of the judicial authority, such as the functioning of courts, the magistrates' career, rights and obligations etc., all that in order not to distort the role of the Superior Council of Magistracy". Accordingly, the Superior Council of Magistracy, as a guarantor for independence as termed in Article 133 (1) of the Constitution, shall accomplish, under its organic Law no. 317/2004, specific tasks relative to the defence of judges and prosecutors against any action that might affect their independence or impartiality, or would arouse suspicion about that (Article 30), the career of judges and prosecutors (Article 35), admission to magistracy, evaluation, training and examinations for judges and prosecutors (Article 36), the organisation and functioning of courts and prosecution units attached therewith (Article 37). Consequently, the Court found, by Decision no. 3 of 15 January 2014, that draft legislation which requires an opinion from the Council are normative acts concerning the tenure of judges and prosecutors (also comprising regulations as to their rights and duties, incompatibilities and interdictions, appointment, promotion, suspension and termination of the office as a judge or prosecutor, delegation, secondment and transfer of judges and prosecutors, liability etc.) currently regulated under Law no. 303/2004, judicial organisation (the organisation, competencies, management of the courts and of the Public Ministry, respectively; organisation and functioning of the National Institute of Magistracy; the auxiliary departments in courts and prosecution units attached therewith; budget of the courts and prosecution units etc.) regulated under Law no. 304/2004, or the organisation and functioning of the Superior Council of Magistracy, whose legal basis is Law no. 317/2004.*

105. The Court held that *"any other interpretation of the wording normative acts which concern the activity of the judicial authority would lead to an expansion of competencies in the Superior Council of Magistracy that is not based on clear, predictable criteria, and is thus arbitrary. To take the view articulated by the authors of the objection of unconstitutionality, that failure to submit to the Council a normative act amending the Criminal Code contravened its constitutional role to guarantee judicial independence, would implicitly mean to accept the idea that seeking opinions from the Superior Council of Magistracy were compulsory for the drafting of all legislation. Inasmuch as any kind of law is likely to generate conflicts or disputes that could ultimately reach before a court of law, one might also conclude that all legislative acts actually do concern the activity of the judiciary. Nonetheless, apart from the fact there is no logic or legal basis in such interpretation, it would lead to a situation when the Supreme Council of Magistracy were due to discharge powers similar to those of the Legislative Council, and that one, according to Article 79 (1) of the Constitution, "is an advisory expert organ of Parliament that advises draft normative acts with a view to a systematic unification and co-ordination of the whole body of laws", which is unacceptable. **The Superior Council of Magistracy, as part of the judicial authority, in accordance with the Basic Law, whose role is to guarantee judicial independence, cannot be transformed into an advisory body to Parliament, the primary legislative authority [Ed. or to the Government, as a delegated legislative authority] without so affecting constitutional values such as the rule of law or the principle of separation and balance of powers within the framework of a constitutional democracy.**"*

106. *An identical rationale has been applied by the Constitutional Court in matters related to normative acts concerning the budgeting of the judiciary. By Decision no. 901 of 17 June 2009, the Court declared that criticism of a failure to seek assent from the Superior Council of Magistracy for the normative acts concerning the budgeting of the judiciary, was unfounded. Thus, "since the budgets of courts of appeal and courts within their venue are subjected to an assent by the Superior Council of Magistracy, it is not the draft law on the State budget that should be submitted for endorsement to the Superior Council of Magistracy. The Council will have to give its assent only to budgetary proposals made by the courts, while the Government shall be exclusively competent to decide on the final form of the draft law on State budget. If the argument raised by the Superior Council of Magistracy were accepted, then it would mean that an institution whose role is to ensure independence of the judiciary should come to establish and curtail questions appertaining to the budget management at a national level, in other words it should conduct a review of budgetary appropriateness, which is unacceptable."*

107. Having regard to its settled case-law, the Constitutional Court holds that **the Government has no constitutional or legal obligation to seek the opinion of the Superior Council of Magistracy on other questions than those which concern the activity of the judicial authority, and that the Superior Council of Magistracy has no legal empowerment to issue such an opinion.**

108. In the present case, apart from the fact that, according to aforecited case-law (Decision no. 97 of 7 February 2008 and Decision no. 901 of 17 June 2009) the criticism regarding lack of a request or opinion in the process of drafting normative acts was qualified by the Court as a matter of compliance with legal obligations on the authorities involved in this procedure, and implicitly as one which is directed against a possible case of unconstitutionality of such legislation that ought to be reviewed only under Article 146 lit. a) or d) of the Constitution, but not after the standards of the constitutional text under Article 146 lit. e), the Court

observes that ***the applicants, throughout their criticism, have not taken into account the legal and constitutional provisions concerning competence of the Superior Council of Magistracy, or the Constitutional Court case-law about the kind of opinions that the Council is empowered to adopt.***

109. Traditionally, the constitutional doctrine has acknowledged three powers of the State, that the legislative makes and amends laws, the executive implements and enforces laws, and the judiciary interprets and applies the law. The rule of law requires that these powers exercise their tasks and responsibilities independently of another, since their functions should be distinct. In other words, those who make the law should not be involved in its implementation, those who implement the law must not be involved in its creation or interpretation, and those who interpret and apply the law should not be involved in creation and modification of such law.

110. That being so, by virtue of the principle of separation of powers enshrined in Article 1 (4) of the Constitution and provisions of Article 61 (1), ***Parliament and, by legislative delegation under Article 115 of Constitution, the Government have powers to establish, amend and repeal legal norms of general application. The courts, the Public Ministry and the Superior Council of Magistracy, as components of the judicial authority under Chapter VI in Title III – Public authorities of the Romanian Constitution, each have a constitutional assignment, that is to deliver justice, subject to Article 126 (1) of the Basic Law, which means to resolve, by applying the law, disputes between the various parties over the existence, extent and exercise of their rights, to represent the general interest of society and defend the legal order within judicial activity, subject to Article 131 (1) of the Constitution, and to achieve the role of a guarantor of judicial independence, pursuant to the constitutional norm under Article 134 (4), respectively, but in no way a role in the drafting of normative acts, by partaking in the legislative procedure.***

111. Thus, in the light of the aforesaid in what concerns the judicial authority, a conduct that conforms with the Constitution means to exercise powers as established by law, in accordance with constitutional provisions relative to the separation of powers and, therefore, *to refrain from any action that may result in subrogation into the powers of another public authority.* The more so because the magistrates are under an *obligation to act in a reserved manner*, as a synthetic expression of the general principles of professional ethics (independence, impartiality, integrity). Moreover, as the Court held in its Decision no. 629 of 4 November 2014, published in the Official Gazette of Romania, Part I, no. 923 of 21 December 2014, "to defend judicial independence can only be achieved within the framework of the Constitution, that is while upholding all fundamental human rights and individual freedoms. To protect these constitutional values must not affect the existence of others' rights and freedoms, exercised in good faith and within limitations established by constitutional norms" (paragraph 44).

112. As regards the impugned provisions under Article III (2) of Government Emergency Ordinance no. 13/2017, stating that the normative act takes effect as of publication in the Official Gazette of Romania, Part I, save for its provisions in Article I, which enter into force ten days after publication in the Official Gazette of Romania, Part I, the Court holds that such criticism is directed against the normative content of the emergency ordinance that is alleged to have generated a legal conflict of a constitutional nature, on account of a time limit which is considered too short, such an analysis is not possible within present proceedings but, according to the Court's settled case-law, only by means of a constitutional review conducted under Article 146 lit. a) or d) of the Constitution.

113. Finally, as regards the claim that no issue about too short a time limit of only ten days would have arisen if the amendments to the Criminal Code had been dealt with in an ordinary legislative procedure or even as an urgency procedure, but anyway at a length above too narrow limits, so as not to impede "the judicial authority from exercising their constitutional task in the administration of justice", the Court finds it is unfounded since the time limit made available to the competent courts for cases that had been finally adjudicated in order to establish the applicability of provisions in Article 4 of the Criminal Code regarding application of decriminalization law, or of those in Article 6 concerning application of the more favourable provision of criminal law after final judgment in the case, that time limit can be calculated only from the date of publication in the Official Gazette of Romania, which is not the same as the initiation of legislative proceedings, but a time when the normative act does not yet exist, except for a draft, bill or legislative proposal.

114. In view of all these considerations, the Court finds that the adoption of Government Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code **has not generated a legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand**, whereas the Government did not prevent the judicial authority, represented by the Superior Council of Magistracy, to accomplish one of its constitutional tasks, but acted *intra vires*, in exercising its own competence bestowed under the provisions of Article 115 of the Basic Law.

115. For the reasons stated above, subject to Article 146 lit. e) of the Constitution, and in conformity with Article 11 (1) lit. A.e), and Articles 34 and 35 of Law no. 47/1992, by a majority vote,

## THE CONSTITUTIONAL COURT

In the name of the law

HAS DECIDED:

1. There has been no legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Legislative authority - the Romanian Parliament, on the other hand, whereas the Government Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no.135/2010 on the Criminal Procedure Code was adopted in the exercise of the Government's own powers as explicitly provided by Article 115 of the Basic Law.

2. There has been no legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand, whereas the Government, by the adoption of Emergency Ordinance no. 13/2017, has not impeded the judicial authority, represented by the Superior Council of Magistracy, to carry out a constitutional task concerning endorsement of a normative act.

Final and generally binding.

The decision shall be communicated to the President of Romania, the President of the Superior Council of Magistracy, the Chamber of Deputies, the Senate, and the Government, and shall be published in the Official Gazette of Romania, Part I.

Delivered in its meeting on 8 February 2017.

## DISSENTING OPINION

In disagreement with the decision rendered in the majority, we have considered and are of the opinion that **the Constitutional Court should have declared that a legal conflict of a constitutional nature exists between:**

— **the executive authority - the Romanian Government, on the one hand, and the legislative authority - the Romanian Parliament, on the other hand, which is caused by the Government's having overstepped the limits of legislative delegation;**

— **the executive authority - the Romanian Government, on the one hand, and the judicial authority - the Supreme Council of Magistracy, on the other hand, which is caused by a breach of the principle of loyal co-operation between authorities<sup>1</sup>,**

for the following reasons:

**I. The existence of a legal conflict of a constitutional nature between the executive authority - the Romanian Government, on the one hand, and the legislative authority - the Romanian Parliament, on the other hand, caused by the Government's having overstepped the limits of legislative delegation**

**1. Reasoning by the applicants concerning the existence of a legal conflict of a constitutional nature between the Government and Parliament**

In essence, the President of Romania and the Superior Council of Magistracy, respectively, contended that a legal conflict of a constitutional nature has been created as a result of the Government's decision to adopt Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no.135/2010 on the Criminal Procedure Code. That because, by adoption of the emergency ordinance, **the Government has exercised the power to adopt acts in breach of the constitutional framework regarding legislative delegation.** It is also invoked that the analysis of the preamble to Government Emergency Ordinance no. 13/2017 has not revealed any elements of fact or law for an extraordinary situation, an aspect signalled by Opinion no. 61 of 31 January 2017 issued by the Legislative Council. Parliament has plenary legislative competence, while the Government exercises such as a delegated authority, under the strict conditions laid down by the Constitution. Therefore, whenever the Government issues ordinances in breach of constitutional provisions, it is by abuse of legislative powers.

**2. Interpretation of the term 'legal conflict of a constitutional nature' in the case-law of the Constitutional Court of Romania and its applicability in the present case**

As to the concept of legal conflict of a constitutional nature between public authorities, the Constitutional Court, in its Decision no. 53 of 28 January 2005, published in the Official Gazette of Romania, Part I, no. 144 of 17 February 2005, established that such involves **"acts or concrete actions whereby one or more authorities have assumed powers, tasks or competencies entrusted to another public authority under the Constitution, or an omission consisting in denial of competence or refusal to fulfil certain measures which fall under their respective obligations."** Likewise, by Decision no. 97 of 7 February 2008, published in the Official Gazette of Romania, Part I, no.169 of 5 March 2008, the Court held that: **"A legal conflict of constitutional nature occurs between two or more authorities, and may envisage the content or scope of their duties arising from the Constitution, which means they are conflicts of competence, whether positive or negative, which may lead to an institutional blockage."** Furthermore,

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<sup>1</sup> Dissenting Opinion as recorded in the minutes to the Constitutional Court Decision of 8 February 2017.

the Court held that Article 146 lit. e) of the Constitution **"establishes the Court's jurisdiction to resolve any legal conflict of a constitutional nature as may occur between public authorities, not just the conflicts of competence arising between them."** Therefore, the concept of legal conflict of a constitutional nature **"shall envisage any conflicting legal situation whose occurrence is directly rooted in the Constitution"** (see Constitutional Court Decision no. 901 of 17 June 2009, published in the Official Gazette of Romania, Part I, no. 503 of 21 July 2009).

The Court also noted that **"the Constitutional Court's task to resolve legal conflicts of a constitutional nature between public authorities has not been devised by the constituent legislature as a third, distinct path, to review the constitutionality of normative acts."** (See Constitutional Court Decision no.231 of 9 May 2013, published in the Official Gazette of Romania, Part I, no. 347 of 12 June 2013, which also makes reference to the precedents set by Decision no. 97 of 7 February 2008, published in the Official Gazette of Romania, Part I, no. 169 of 5 March 2008, and Decision no. 901 of 17 June 2009, published in the Official Gazette of Romania, Part I, no. 503 of 21 July 2009 and, more recently, Decision no. 261 of 8 April 2015, published in the Official Gazette of Romania, Part I, no. 260 of 17 April 2015).

The latter circumstantiation of the Constitutional Court's competence inside the task discharged under Article 146 lit. e) of the Constitution (which is exclusively established by its case-law) has been taken regard of in the case at stake, whereas the Court has embraced the view there is no legal conflict of a constitutional nature between Parliament and the Government as long as the emergency ordinance was issued based on the Government's own powers and that the constitutionality of the normative act thus adopted cannot be examined within proceedings for resolving a legal conflict of a constitutional nature, but only through avenues specific of other tasks vested in the Constitutional Court.

However, as it will be shown below, **the present case is not originated in the same legal situation as that underlying the decisions invoked as a precedent by the Constitutional Court**, therefore there is no legal argument whatsoever (in a constitutional or statutory text or in the case-law) to prevent the Court from examining the applicants' requests on their merits.

**3. The existence, in the present case, of a specific procedural framework for the analysis of a legal conflict of a constitutional nature. The essential distinction as against previous cases decided by the Court where such had been aimed at declaring certain normative acts (laws, Government Emergency Ordinance, resolutions of Parliament) as unconstitutional**

When examining submissions made by the applicants, one can see they are actually focused on the "content or scope of the tasks [N/A by the Government] arising from the Constitution" as regards the adoption of legislation by way of a legislative delegation, that against the competence of Parliament having plenary functions to make laws, **a situation which falls under the definition of legal conflict of a constitutional nature** as developed in the Constitutional Court's case-law. **The question therefore, unlike in previous cases decided by the Court, is not just to handle an application whose "only purpose" is to "declare unconstitutional" a certain normative act, i.e. Government Emergency Ordinance no. 13/2017.**

**The applicants' requests are aimed at delineating the Government's competence established by Article 115 of the Constitution in relation to that of Parliament as established by Article 61 of the Constitution, in the context of the Government's having adopted its Emergency Ordinance no. 13/2017 in excess of powers, thus in breach of the powers vested in Parliament.**

Undoubtedly, **a breach of the constitutional limits of competence by a public authority may lead, where applicable, to:**

— **the finding of a legal conflict of a constitutional nature** [where in violation of the constitutional competence of another public authority and if the Constitutional Court has been referred to in that regard, under Article 146 lit. e) of the Constitution];

— **the finding of the act concerned** (a normative act, in the instant case) **as unconstitutional**, being adopted in breach of these limits of competence, where the Constitutional Court has been referred to under Article 146 lit. a) or d) of the Constitution.

**However, the fact there is also a distinct way for establishing that a normative act adopted in violation of a constitutional competence is unconstitutional cannot be an impediment to examine the legal conflict of a constitutional nature caused by a breach against that competence.**

Each procedural framework (corresponding to the applicable tasks of the Constitutional Court) has a set of specific proceedings, and the Court's solutions are matched up to these specific tasks. Accordingly, **while accomplishing the task provided by Article 146 lit. e) of the Constitution, the Court may determine the existence of a legal conflict of a constitutional nature, thus being able to proceed to identify remedies for resolving the conflict, and establish the conduct to be followed by parties. In discharging the tasks laid down by Article 146 lit. a) or d) of the Constitution, the Court may find that a normative act adopted in violation of the limits of competence is unconstitutional.**

**Indisputably, the question posed by the application** (and, we must repeat, which is not similar to previous cases adjudicated by the Court in respect of a legal conflict of a constitutional nature) **is about the competence of Government in relation to that of Parliament, of critical significance for the rule of law**

**in Romania.** Abuse of regulations being enacted by way of government emergency ordinances<sup>2</sup> and the appeal made in documents from international bodies to identify appropriate remedies have become notorious. For example, the **Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, adopted by the Venice Commission at its 93<sup>rd</sup> Plenary Session (Venice, 14-15 December 2012)**<sup>3</sup> has concluded that **excessive use of government emergency ordinances amounts to an abuse** (paragraph 36), hence it formulated a number of recommendations in paragraph 79, that **"the issue of government emergency ordinances should be addressed. [...] By streamlining the legislative procedure, [...] the need for government emergency ordinances should nearly disappear; paragraphs (4) to (8) of Article 115 of the Constitution on government emergency ordinances could become redundant. At the very least, the incentive to use these ordinances so frequently, i.e. the continued validity of the ordinances if Parliament does not contradict them explicitly, should be removed by introducing a fixed deadline for approval of Parliament"**.

The danger of a Parliament being "substituted" by the Government, also in regard to its law-making function, is further highlighted in a document entitled **Rule of Law Checklist**, adopted by the Venice Commission at its 106<sup>th</sup> Plenary Session<sup>4</sup>, where paragraph 49 draws attention that **"unlimited powers of the executive are, de jure or de facto, a central feature of absolutist and dictatorial systems. Modern constitutionalism has been built against such systems and therefore ensures supremacy of the legislature."**

As a guarantor of the Constitution, **the Constitutional Court has the obligation to resolve, where duly approached, any legal conflict of a constitutional nature as may be caused through breach against the legislative supremacy of Parliament and to clearly establish constitutional limits for the Government to keep in respect of that function.**

For all these reasons, we believe that **the Court has had jurisdiction of the matter and should have proceeded to examining the issues raised in the applications lodged by the President of Romania and the President of the Supreme Council of Magistracy, that is whether, in this case, the Government has encroached upon competence of Parliament.**

It is obvious that, by adopting an emergency ordinance, the Government exercises its own competence provided by Article 115 of the Constitution - as is held in the operative part of the Court's decision - **but such power is a limited one, as has been awarded, and it is precisely its being kept within limits that should have been analysed in the application referred to the Court, in order to determine whether it has been complied with** (with the consequence of finding there has been no legal conflict of a constitutional nature) **or not** (with the consequence of finding the existence of a legal conflict of a constitutional nature).

**4. Exceeding the limits of legislative delegation by the Government's adoption of Emergency Ordinance no. 13/2017 with the consequence of having breached against the legislative power of Parliament**

**4.1. Constitutional texts of reference and their interpretation in the case-law of the Constitutional Court**

According to Article 61 (1) of the Constitution: *"Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country"*.

According to Article 115 (4) of the Constitution, *"the Government can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for urgency within their contents."*

**The institution of legislative delegation** is governed by provisions in Article 115 of the Constitution, and has been essentially characterized as a **transfer of legislative powers to the executive authorities** by an act of Parliament or, in exceptional cases, by a constitutional route. In terms of its origins and current regulation, **legislative delegation is identified by an exceptional status in the law-making process.** Parliament has plenary powers to make laws, as shown above, while the Government's primary role is that, *"in accordance with its governing programme accepted by Parliament"* to ensure *"the implementation of the domestic and foreign policy of country"* and exercise *"the general management of public administration"* [Article 102 (1) of the Constitution]. By the legislative delegation under the terms of Article 115 of the Constitution, **"The Government** shall receive competencies that are apparently equal to the parliamentary legislative power, however **without so becoming equal to, or replacing Parliament**, since it does not have the Parliament's capacity to represent the nation, a capacity which cannot be transferred by any delegation

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<sup>2</sup> See, for example, Apostol Tofan/Tănăsescu, in *Constituția României, comentariu pe articole*, C.H. Beck Publishing House, p. 1096.

<sup>3</sup> [www.ccr.ro](http://www.ccr.ro)

<sup>4</sup> <http://www.venice.coe.int>

whatsoever".<sup>5</sup>

The Constitutional Court has ruled upon the constitutional limits for enactment by emergency ordinances, and concluded that "*the possibility that the Government is allowed, in exceptional cases, to adopt emergency ordinances, in a delimited manner, even in areas reserved for the organic law, cannot amount to a discretionary right of the Government and, all the more, this constitutional empowerment cannot justify abuse in issuing emergency ordinances*".<sup>6</sup>

In one of its recent decisions<sup>7</sup>, the Constitutional Court observed that "an extensive case-law has been developed in relation to the adoption of emergency ordinances and conditions to be met so as to satisfy the requirements prescribed under Article 115 (4) of the Basic Law", and recognized, from this perspective, the following as relevant: "Decision no. 255 of 11 May 2005, published in the Official Gazette of Romania, Part I, no. 511 of 16 June 2005, Decision no. 761 of 17 December 2014, published in Journal of Romania, Part I, no. 46 of 20 January 2015, and Decision no. 859 of 10 December 2015, published in the Official Gazette of Romania, Part I, no.103 of 10 February 2016, **in which the Court has held that the Government may adopt emergency ordinances provided that all the following conditions are fulfilled: there is an extraordinary situation; its legal regulation cannot suffer postponement; the reasons for the urgency must be given in the content of the ordinance.**"

At a more targeted examination of these three conditions, the Court has noted that an extraordinary situation shows high degree of deviation from the ordinary or common routine and has an objective character, which means its existence does not depend on the will of the Government, which under the circumstances is compelled to promptly react for the sake of public interest, by way of an emergency ordinance (see, *mutatis mutandis*, Decision no. 83 of 19 May 1998, published in the Official Gazette of Romania, Part I, no. 211 of 8 June 1998).

As to **the urgency of regulations**, the other requirement laid down in Article 115 (4) of the Constitution, it is established in the Court's case-law that "urgency of regulations is not equivalent to the existence of an exceptional situation, whereas an operative regulatory framework can also be achieved by ordinary ways under the law-making procedure" (see Decision no. 421 of 9 May 2007, published in the Official Gazette of Romania, Part I, no. 367 of 30 May 2007, Decision no.109 of 9 February 2010, published in Official Gazette of Romania, Part I, no.175 of 18 March 2010).

In order that requirements of Article 115 (4) of the Constitution may be fully complied with, **the Government must further demonstrate that the measures concerned did not suffer postponement, that practically there was no other legal instrument available that might have been used instead so as to rapidly avoid negative consequences** (Decision no. 919 of 6 July 2011, published in the Official Gazette of Romania, Part I, no. 504 of 15 July 2011).

#### **4.2. Exceeding the limits of legislative delegation by the adoption of Government Emergency Ordinance no. 13/2017**

Having examined the explanatory memorandum and the preamble to Government Emergency Ordinance no. 13/2017 in relation to provisions of Article 115 (4) of the Constitution, as was interpreted by the Constitutional Court, we have found that in essence, the Government has invoked the following reasons:

— a number of decisions rendered by the Constitutional Court in the course of 2016, which require implementation by specific regulations so as to ensure uniform and coherent application of certain legal texts (explicit indication being made of two decisions delivered in 2016);

— a few older decisions of the same Court "that have not been so far implemented and require regulatory compliance" (with explicit indication of a decision from 2015 and another one from 2014);

— the need to harmonize the Criminal Procedure Code with the provisions of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings.

The Romanian Government, considering all that as an extraordinary situation whose regulation can no longer be postponed, in the sense of Article 115 (4) of the Constitution, "*because of the negative effects that could arise from a non-unitary interpretation*", took the view that "*regulations by other means than legislative delegation, even in urgency procedure, would not be able to remove such negative consequences without delay.*"

First of all, we have to observe that **provisions of Government Emergency Ordinance no. 13/2017 are not confined to the measures invoked as justification in its preamble**, and some of these provisions have obviously no reason whatsoever (bearing in mind, e. g. provisions of Article I.1 and I.2 of the emergency ordinance, according to which "*1. Paragraph (3) of Article 269 shall be amended to read as follows:*

*'(3) Aiding or abetting committed by a family member or by in-law up to the second degree shall not be punishable.'*

*2. After paragraph (3) of Article 269 a new paragraph, paragraph (4), is introduced as follows:*

<sup>5</sup> I. Muraru, M. Constantinescu, *Ordonanța Guvernamentală. Doctrină și jurisprudență*, Lumina Lex Publishing House, 2000, p. 52.

<sup>6</sup> Decision no. 15 of 25 January 2000, published in the Official Gazette of Romania, Part I, no. 267 of 14 June 2000.

<sup>7</sup> Decision no. 361 of 26 May 2016, published in the Official Gazette of Romania, Part I, no. 419 of 3 June 2016.

'(4) Provisions of paragraph (1) shall not apply in the case of issuance, approval or adoption of normative acts'."

As for the argument concerning a necessity to bring legislation in line with the Constitutional Court decisions, that itself is a contradiction to provisions of Article 147 (1) of the Constitution, as interpreted by the Constitutional Court in its case-law.

Thus, in accordance with Article 147 (1) of the Constitution, "*The provisions of laws and ordinances in force, [...] declared unconstitutional, shall cease their legal effects within 45 days of publication of the decision rendered by the Constitutional Court if in the meantime Parliament or Government, as may be applicable, have failed to bring these unconstitutional provisions into accord with those of the Constitution. For this limited length of time, the provisions declared unconstitutional are suspended as of right.*" As regards the kind of enactment which is needed in order to carry out that formal accord, due mention should be made of the reasons stated in the Constitutional Court Decision no. 415 of 14 April 2010, published in the Official Gazette of Romania, Part I, no. 294 of 5 May 2010, which stated that "**provisions of Article 147 (1) of the Constitution have distinguished – in terms of the obligation to bring unconstitutional provisions in line with the Constitution - between competence of Parliament, for the provisions in a law, on the one hand, and that of the Government, for the provisions in its ordinances, on the other hand**". Given this distinction, the Court, in its statement of reasons for the said decision, has explicitly denied that the provisions of Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency should be reconciled by way of a government emergency ordinance, on account that "**the Government cannot adopt an emergency ordinance in order to bring the provisions of Law no. 144/2007 declared unconstitutional in line with those of the Constitution, but it has the choice to initiate a bill in accord with what has been established hereunder.**" In its decision, and also as a constant practice, the Court has held that "subject to Decision no. 1/1995 of the Plenary Constitutional Court on the obligatory force of decisions rendered in the framework of constitutional review, the authority of *res judicata* which accompanies jurisdictional decisions, and also the Constitutional Court decisions, extends not only to their operative part, but also to their underlying reasons. Accordingly, the Court holds that **both the statement of reasons and the operative part of its decisions are generally binding, pursuant to provisions of Article 147 (4) of the Constitution, and require compliance by everyone, with equal force.**"

In the light of these binding considerations, **to bring a law into accord with a decision of the Constitutional Court must be only by means of another law, not an emergency ordinance.** That being so, the recourse to an emergency ordinance for implementing the Constitutional Court decisions with regard to Law no. 286/2009 on the Criminal Code appears as a circumvention of Article 147 (1) of the Constitution, as construed by the Court, merely because of Parliament's passivity. But even if it were to overcome such "passivity", **the Government was bound by an obligation to draft a bill (not an emergency ordinance) and take it through a parliamentary urgent procedure for adoption or, in extremis, via another path, that of assuming responsibility before Parliament**<sup>8</sup>. In that regard, it is not possible to accept the reasoning which is contained in the preamble to Government Emergency Ordinance no. 13/2017. It is certainly not the way to justify an extraordinary situation, as defined by the Constitutional Court, with this kind of reasoning.

Nor could the argument be accepted, as justification of the "exceptional circumstances", of a necessity to harmonize the Criminal Procedure Code with the provisions of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016. This because, according to Article 14 – **Transposition** – paragraph 1 "*Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 April 2018. They shall immediately inform the Commission thereof.*" In addition, as the Constitutional Court has constantly held, the need of transposition and implementation of a Directive in national legislation cannot justify in itself that requirements of Article 115 (4) concerning the existence of an extraordinary situation<sup>9</sup> have been met. With regard to transposition of EU law into domestic enactments, **the Court held the principle that "national measures as may be necessary to implement the Directive must be adopted by Parliament, in its capacity as the ordinary legislature"**<sup>10</sup>.

We therefore believe that the reasoning stated in the preamble to the emergency ordinance, whether considered individually or in their entirety, has rather envisaged the appropriateness of issuing such ordinance. In that regard, the Constitutional Court has stated that "**to invoke an element of opportunity, which by definition is a subjective one, while bestowing thereon a contribution as a determinant of effectiveness for the urgency, having it implicitly converted into an extraordinary situation, takes one to the conclusion it might not necessarily and unambiguously be of an objective nature, but an expression of subjective factors as well, such as opportunity (...). These factors, however, are not quantifiable, and to affirm the existence of an extraordinary situation on their grounds alone or on**

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<sup>8</sup> The People's Advocate actually refers to a number of bills in parliamentary procedure which are meant to put in accord provisions in the Criminal Code with the Constitutional Court Decisions no. 732/2014 and no. 603/2015.

<sup>9</sup> Decision no. 1059 of 11 December 2012, published in the Official Gazette of Romania, Part I, no. 73 of 4 February 2013.

<sup>10</sup> Decision no. 1599 of 9 December 2010, published in the Official Gazette of Romania, Part I, no. 67 of 26 January 2011.

account of their conversion into such a situation, confers an arbitrary character, which is likely to create insurmountable difficulties as far as legitimacy of the legislative delegation is concerned. And so, a criterion of constitutionality - the extraordinary situation - whose observance is by definition subjected to the Court's review, would practically escape such control, which is inadmissible" (see thereto Decision no. 1008 of 7 July 2009, published in the Official Gazette of Romania, Part I, no. 507 of 23 July 2009).

But even further than that, the very content of Government Emergency Ordinance no. 13/2017 is a manifest proof **there is no urgency** at all, as long as the ordinance, subject to its Article III (2), came into force on its publication in the Official Gazette of Romania, Part I, save for the provisions of Article I (those amending the Criminal Code) which **were due to take effect ten days from the date of publication**.

#### **4.3. Legal consequences of the Government's non-compliance with provisions of Article 115 (4) of the Constitution in the adoption of Government Emergency Ordinance no. 13/2017**

Having regard to the fact that legislative delegation is established under the Constitution as **an exception to the law-making process** or as a "way of co-operation between Parliament and Government, in which the Government is vested with the exercise of part of the legislative functions under certain conditions"<sup>11</sup>, the breach of any of these conditions, as set forth in constitutional provisions, means a violation of **"the content or extent of the tasks [A/N of the Government] arising from the Constitution"** in respect of the legislative delegation, in relation to Parliament which has plenary competence as to the law-making (and a legal conflict of a constitutional between these two authorities).

In the instant case, the Government has made use of its own powers under Article 115 of the Constitution concerning *Legislative delegation*, but it did so in violation of the constitutional limits of such competencies, because it has adopted an emergency ordinance in the absence of any extraordinary situations and urgency, which thus violated the Parliament's legislative powers. That being so, there is a legal conflict of a constitutional nature between the executive authority - the Romanian Government, on the one hand, and the legislative authority - the Romanian Parliament, on the other hand, caused by the Government's overstepping of the limits of legislative delegation.

At the same time note should be taken that the Government ultimately chose to rectify the conduct that was in conflict with Article 115 of the Constitution, and adopted another emergency ordinance repealing the former – at this point we refer only to provisions of Article I of the Government Emergency Ordinance no. 14/2017<sup>12</sup>, reading that *"the Government Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, 92 of 1 February 2017, is repealed."* In our opinion, however, a true extinction of the legal conflict of a constitutional nature is only by the adoption in Parliament of a law approving the repealing provisions in Government Emergency Ordinance no. 14/2017, as up to that point, such repeal is not "final" in character [it is also possible that Government Emergency Ordinance no. 14/2017 is rejected by law, and that would lead, in terms of Article 64 (3) of Law no. 24/2000 on norms of legislative technique for the drafting of normative acts, to a reinvigoration of Government Emergency Ordinance no. 13/2017]<sup>13</sup>.

**II. The existence of a legal conflict of a constitutional nature between the executive authority - the Romanian Government, on the one hand, and the judicial authority - the Supreme Council of Magistracy, on the other hand, caused by a breach of the principle of loyal co-operation between authorities**

##### **1. Reasoning by the applicants of a legal conflict of a constitutional nature between the Government and the Superior Council of Magistracy**

Essentially, it is argued that, on the one hand, the Government has disregarded a negative opinion given by the Superior Council of Magistracy to an earlier draft of Government Emergency Ordinance no. 13/2017, and that its new draft was submitted for endorsement to the Superior Council of Magistracy in the afternoon of 31 January 2017, only to be adopted later that evening, and immediately published in the Official Gazette of Romania, although the Superior Council of Magistracy made public that the Plenary was to convene in session the following morning, in order to consider their opinion in respect of the enactment. The Government's decision to adopt its Emergency Ordinance no. 13/2017 without having an opinion from the Superior Council of Magistracy (which was practically unable to give an opinion) has created a legal conflict of constitutional nature, caused by a breach of the competence of the Superior Council of Magistracy and that

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<sup>11</sup> M. Constantinescu, I. Deleanu, A. Iorgovan, I. Muraru, F. Vasilescu, I. Vida, *Constituția României, comentată și adnotată*, p. 254; *Constituția României. Comentariu pe articole*, coordinated by I. Muraru, E.S. Tănăsescu, Ch. Beck Publishing House, p. 1086.

<sup>12</sup> published in the Official Gazette of Romania, Part I, no. 101 of 5 February 2017.

<sup>13</sup> The rule established by Article 64 (3) of Law no. 24/2000 is that *"Abrogation of provisions, or all of a normative act, shall be of final character. It shall not be allowed that, by repealing a previous act of abrogation, the initial normative act be brought again into force."* The second thesis of the same paragraph provides an exception from the rule, as follows: *"Provisions of Government ordinances which had included repealing norms but were rejected by Parliament through a law shall be exempted"*. Hence it follows that, where Parliament has passed a law rejecting government emergency ordinances which comprise repealing norms, the effect shall be a reinvigoration of the act formerly abrogated.

of a loyal constitutional conduct.

**2. The existence, in the present case, of a specific procedural framework for the analysis of a legal conflict of a constitutional nature**

By applying, *mutatis mutandis*, the line of arguments brought up regarding the existence of a specific procedural framework for the analysis of a legal conflict of a constitutional nature between Government and Parliament, **we consider that here, too, the elements of a legal conflict of a constitutional nature have been met** (and not just a question of unconstitutionality of a normative act, that would be due for discussion in a different constitutional and legal framework).

In this case, the hypothesis is set by the Constitutional Court's definition of the legal conflict of a constitutional nature: namely, the text of Article 146 lit. e) of the Constitution "**establishes the Court's jurisdiction to resolve any legal conflict of a constitutional nature arising between public authorities, not only conflicts of competencies arising between them.**" Therefore, the concept of legal conflict of a constitutional nature "**shall mean any conflicting legal situations whose occurrence is directly originated in the Constitution**" (see Decision no. 901 of 17 June 2009, published in the Official Gazette of Romania, Part I, no. 503 of 21 July 2009). **The Government's disregard of the constitutional framework devised to allow the Superior Council of Magistracy to exercise, in terms of a loyal cooperation, its competence in respect of the endorsement of normative acts has created a legal conflict of a constitutional nature**, and the Constitutional Court was called to ascertain that conflict and to establish a future conduct for the public authorities concerned, which should be in line with the Constitution and applicable in the procedure for the endorsement of normative acts.

**3. The legal conflict between the Government and the Superior Council of Magistracy caused by the former's disregard of the constitutional framework which allows the Superior Council of Magistracy to exercise its competence in respect of the endorsement of normative acts**

Article 1 (3) of the Constitution establishes that Romania is a State governed by **the rule of law**, and that phrase has a profound, complex significance. A fundamental dimension of the rule of law is **legality**, and one of the possible means to ensure legality is, among others, to set requirements as to the law-making procedures. The regulation and implementation of the law-making process is, according to the Venice Commission, a benchmark for the assessment of the rule of law<sup>14</sup>.

**The requirements for the law-making process**, meant to give expression to **the principle of separation and balance of powers**, as enshrined by Article 1 (4) of the Constitution, also include **the endorsement procedure of draft legislation**. In this regard, **Article 9 (1) and (2) of Law no. 24/2000** on norms of legislative technique for the drafting of normative acts provides that "*(1) In cases provided by law, the initiator must, during the drafting stage of a normative act, seek the opinion of the authorities concerned in implementation thereof, depending on the scope of regulations. (2) After the drafting stage and completion of the endorsement procedure as laid down under paragraph (1), bills, legislative proposals and draft ordinances and normative decisions of the Government shall be subjected to the Legislative Council to receive advisory opinion.*"

In order to achieve this constitutional goal, the request of opinions as provided by law must not be a mere formal, but a useful approach in the process of adoption of normative acts. In other words, **the exercise of the initiator's duties to seek the opinion from the authorities concerned in the application of a particular normative act must lie within the constitutional framework for realization, in terms of a loyal co-operation, of their responsibility**. The authorities concerned should not be simply asked to give an "opinion", they should also be afforded the reasonable possibility to do so, with the aim of drafting a normative act that equally satisfies requirements as to its appropriateness / legality / constitutionality.

**Whereas a formal exercise of constitutional or legal obligations, in contempt of the spirit of the relevant norms, may ultimately lead to an institutional blockage or to actions contrary to the Constitution, the Constitutional Court of Romania, just like other constitutional courts, has resorted to interpretation of the Constitution in a spirit of constitutional loyalty, establishing that the "norms of constitutional loyalty" are derived from a principle which is explicitly enshrined in the Constitution: that of separation and balance of powers.**

For example, in a case concerning parliamentary proceedings, the Court held that "*the interpretation and application of these norms instituting procedural rules must always be made in good faith, in a spirit of loyal behaviour towards the Basic Law. In a contrary case, the result would be the blockage of the activity of the institution in terms of fulfilling its constitutional tasks, with negative consequences for the democratic structures at the foundation of the State*".<sup>15</sup> In another case, as part of the considerations underpinning the determination of a legal conflict of a constitutional nature, Court also established the significance of co-operation between the State powers, as having an import on the proper functioning of the rule of law, and that such co-operation "*should be manifested in the spirit of constitutional loyalty, since loyal conduct is a*

<sup>14</sup> See Rule of Law Checklist, adopted by the Venice Commission at its 106<sup>th</sup> Plenary Session, <http://www.venice.coe.int>.

<sup>15</sup> Decision no. 209 of 7 March 2012 with regard to the application concerning the unconstitutionality of Parliament Resolution no. 1 of 9 February 2012 on the vote of confidence in the Government, published in the Official Gazette of Romania, Part I, no. 188 of 22 March 2012.

*guarantee to the principle of separation and balance of powers."*<sup>16</sup>

**The obligatory force of the Constitutional Court decisions in their entirety, as a unity of their reasons and operative part, which includes the existence of "unwritten" constitutional principles, under the terms of Article 147 (4) of the Constitution.** Moreover, constitutional loyalty can be characterized as a value-principle which is intrinsic to all constitutions, as is noted by the Venice Commission in one of its opinions – hereinabove cited<sup>17</sup> (concerning the situation of Romania) – where reference is made to the loyal co-operation between state institutions, which "has a functional link to the implementation of the Constitution."

In the present case, the institution called upon to endorse Government Emergency Ordinance no. 13/2017 was the Superior Council of Magistracy, one of the applicants to the Constitutional Court because of the breach against its competence in that regard. None of the conflicting parties has disputed the competence arising from Articles 133-134 of the Constitution, concerning the role and powers of the Superior Council of Magistracy, in conjunction with Article 9 of Law no. 24/2000, *aforecited*, and Article 38 (3) of Law no. 317/2004 on the Superior Council of Magistracy, according to which "*The Superior Council of Magistracy shall endorse draft normative acts which concern the activity of the judicial authority*".

Since the Government Emergency Ordinance no. 13/2017 is aimed at amending the Criminal Code and the Criminal Procedure Code, **the competence of the Superior Council of Magistracy within the framework of the endorsement procedure, as an "authority concerned"** in the application of Government Emergency Ordinance no. 13/2017, subject to provisions of Article 9 (1) of the Law no. 24/2000 on norms of legislative technique for the drafting of normative acts, **is unquestionable.** That, as a matter of fact, was also the stance taken by the Ministry of Justice, in view of the fact that the draft ordinance had been submitted to the Superior Council of Magistracy in the afternoon of 31 January 2017, in order to give its opinion.

It has been invoked – and is an indubitable fact – that **the request for an opinion was purely formal, since the draft normative act was adopted and sent for publication to the Official Gazette of Romania on the same day when the opinion had been requested.**

However, as highlighted in the applications submitted in this case, **the task of giving an opinion on normative acts by the public institutions concerned, the more so when such is originated in the Constitution, is not one which is purely formal, nor should it be understood that merely seeking an opinion (followed by the instant adoption of the normative act in question) is also sufficient as regards the constitutional requirement to be met.**

**Such conduct, which is contrary to the norms of constitutional loyalty, has created a legal conflict of constitutional nature between the initiator of Government Emergency Ordinance no. 13/2017 and the authority called upon to endorse the draft emergency ordinance.**

The reluctance to impose sanctions against such behaviour, and the finding there has been no legal conflict of constitutional nature means to accept that the procedure for the endorsement of normative acts is derisory, and that in reality normative acts may be promoted (under the pretext of an urgency) in the absence of any of the opinions as provided by law.

**For all these reasons, we believe that the Constitutional Court should have found that a legal conflict of a constitutional nature exists between:**

— **the executive authority - the Romanian Government, on the one hand, and the legislative authority - the Romanian Parliament, on the other hand, caused by the Government's breach against limits of legislative delegation;**

— **the executive authority - the Romanian Government, on the one hand, and the judicial authority - the Supreme Council of Magistracy, on the other hand, caused by a breach against the principle of loyal co-operation between authorities.**

Judge,  
Livia Doina Stanciu

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<sup>16</sup> Decision no. 972 of 21 November 2012, published in the Official Gazette of Romania, Part I, no. 800 of 28 November 2012.

<sup>17</sup> Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, adopted by the Venice Commission at its 93<sup>rd</sup> Plenary Session (Venice, 14-15 December 2012) — *Romanian translation is available on the Constitutional Court website* — [www.ccr.ro](http://www.ccr.ro)