Republic of Moldova

CONSTITUTIONAL COURT

JUDGEMENT

on the approval of the Report on the Exercise of Constitutional Jurisdiction in 2020

CHIŞINĂU

11 January 2021

In the name of the Republic of Moldova,
The Constitutional Court composed of:

Ms. Domnica MANOLE, *President,*
Mr. Nicolae ROȘCA,
Ms. Liuba ȘOVA,
Mr. Serghei ȚURCAN,
Mr. Vladimir ȚURCAN, *judges,*
with the participation of Ms. Elena Tentiuc, Head of the Court's Secretariat,

having examined in the plenary sitting the Report on the exercise of constitutional jurisdiction in 2020,

guided by the provisions of Article 26 of Law no. 317-XIII of 13 December 1994 on the Constitutional Court, Article 61 para. (1) and Article 62 f) of the Constitutional Jurisdiction Code no. 502-XIII of 16 June 1995,

based on Article 10 of the Law on the Constitutional Court, Article 5 i) and Article 80 of the Constitutional Jurisdiction Code,

HOLDS:

1. To approve the Report on the Exercise of Constitutional Jurisdiction in 2020, according to the Annex.

2. This Judgement shall be published in the „*Official Gazette of the Republic of Moldova*".

President **Domnica MANOLE**

Chișinău, 11 January 2021,
JCC no. 1

Approved
by Judgement of the Constitutional Court
no. 1 of 11 January 2021

Report
on the Exercise of Constitutional Jurisdiction in 2020

TITLE I. THE AUTHORITY OF CONSTITUTIONAL JURISDICITON IN THE REPUBLIC OF MOLDOVA

A. The status and powers of the Constitutional Court

The status of the Constitutional Court, the only authority of constitutional jurisdiction in the Republic of Moldova, autonomous and independent from the legislative, executive and judicial powers, is enshrined in the Constitution, which establishes, at the same time, the principles and main functional attributions of the Court. The status of the Constitutional Court is determined by its primary role to ensure the observance of the values of the rule of law: guaranteeing the supremacy of the Constitution, ensuring the principle of separation of powers in the State, ensuring the responsibility of the State towards the citizen and of the citizen towards the State. These major functions are performed through the instruments guaranteed by the Constitution.

Within the good organization of the State authority, the role of the Constitutional Court is essential and defining, representing a true pillar of support of the State and democracy, of guaranteeing equality before the law, and the fundamental human rights and freedoms. At the same time, the Constitutional Court contributes to the proper functioning of public authorities within the constitutional relations of separation, balance, collaboration and mutual control of State powers.

The constitutional powers, provided by Article 135 of the Constitution, are further developed in Law no. 317-XIII of 13 December 1994 on the Constitutional Court and the Constitutional Jurisdiction Code no. 502-XIII of 16 June 1995, which regulates, *inter alia*, the procedure for examining applications, the manner of electing the judges of the Constitutional Court and the President of the Court, their powers, rights and responsibilities. Thus, based on the constitutional provisions, the Constitutional Court:

a) exercises, upon application, the constitutional review of laws, rules and decisions of the Parliament, decrees of the President of the Republic of Moldova, decisions and ordinances of the Government, as well as of the international treaties to which the Republic of Moldova is a party;

b) interprets the Constitution;

c) formulates its position on initiatives of revision of the Constitution;

d) confirms the results of the republican referendums;

e) confirms the results of the parliamentary and presidential elections in the Republic of Moldova, and validates the mandates of the members of parliament and the President of the Republic of Moldova;

f) ascertains the circumstances justifying the dissolution of the Parliament, the removal of the President of the Republic of Moldova or the interim office of the President, as well as the impossibility of the President of the Republic of Moldova to fully exercise his/her functional duties for more than 60 days;

g) resolves the exceptions of unconstitutionality of legal acts;

h) decides over matters dealing with the constitutionality of a party.

B. Judges of the Constitutional Court

According to Article 136 of the Constitution, the Constitutional Court is composed of six judges, appointed for a term of six years.

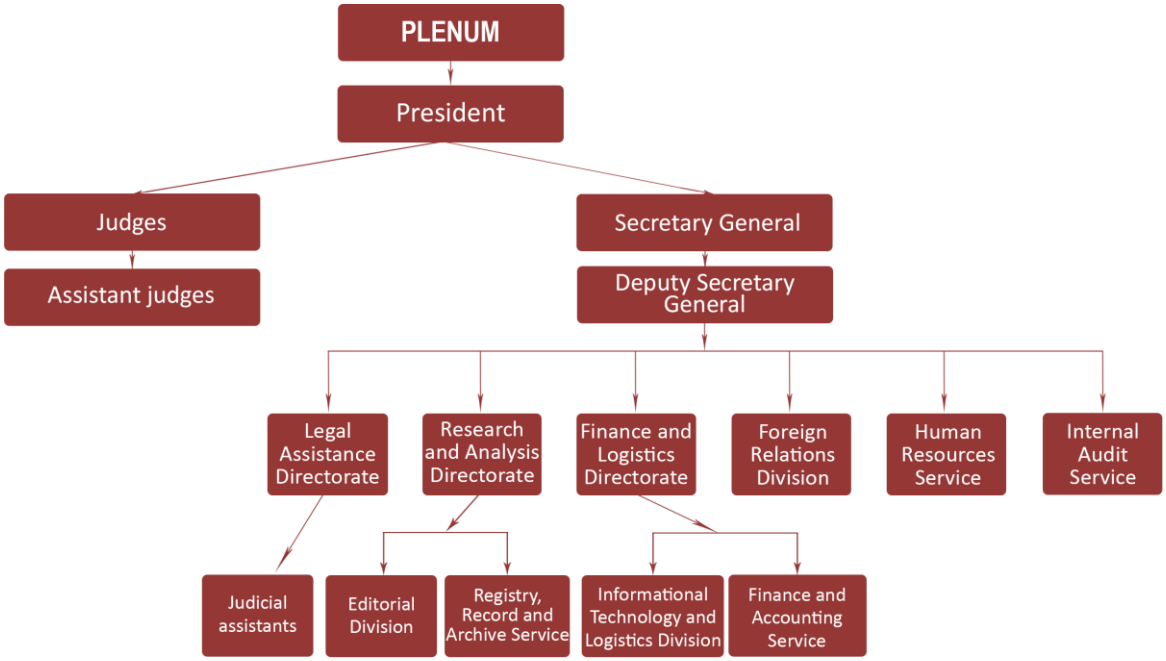
By Decision of the Constitutional Court no. Ag-5 of 23.04.2020, Judge Domnica Manole was elected by secret ballot for the position of President of the Constitutional Court for a three-year term.

Thus, starting with 23 April 2020, the Plenum of the Constitutional Court had the following composition:

Ms. Domnica MANOLE, *President*,
Mr. Eduard ABABEI,
Mr. Nicolae ROȘCA,
Ms. Liuba ȘOVA,
Mr. Serghei ȚURCAN,
Mr. Vladimir ȚURCAN, *judges*.

C. The organizational structure

The Constitutional Court carried out its activity based on the organizational structure approved by Decision no. 9 of 23 March 2018.



D. Lodging an application with the Court

The Constitutional Court exercises its powers upon application by the subjects empowered with this right. The legislation of the Republic of Moldova does not confer the Court the power to exercise constitutional jurisdiction *ex officio*. Thus, according to Article 25 of the Law on the Constitutional Court, including the amendments operated by *Law no. 99 of 11 June 2020*, and Article 38 para. (1) of the Constitutional Jurisdiction Code, the following have the right to lodge an application with the Constitutional Court:

a) the President of the Republic of Moldova;

b) the Government;

c) the Minister of Justice;

d) the judges/panels of the Supreme Court of Justice, the courts of appeal and the courts of law;

d[1]) the Superior Council of Magistracy;

f) the Prosecutor General;

g) Members of Parliament;

h) Parliamentary factions;

i) the Ombudsman;

i[1]) the Ombudsman for children;

j) the councils of the first and second level administrative-territorial units, the People's Assembly of Găgăuzia (Gagauz-Yeri) – in cases of exercising the constitutional review of laws, regulations and decisions of the Parliament, decrees of the President of the Republic of Moldova, decisions, ordinances and provisions of the Government, as well as the international treaties to which the Republic of Moldova is a party, which do not comply with Article 109 and, respectively, Article 111 of the Constitution of the Republic of Moldova.

The applications lodged by the subjects empowered with this right need to be motivated and to meet the formal and substantial requirements established in Article 39 of the Constitutional Jurisdiction Code.

TITLE II. JURISDICTIONAL ACTIVITY

A. The Court's assessment deduced from the judgments delivered

1. THE CONCEPT OF "SERIOUS ERROR" IN THE CRIMINAL PROCEDURE CODE

On 23 January 2020, the Constitutional Court ruled on the exception of unconstitutionality of some provisions of Article 6 para. 11^1) of the Criminal Procedure Code[1].

The Court held that if the appellate court had committed a serious error of fact as a result of the examination of a criminal case, then the participants in the trial could appeal the decision in question.

Article 6 para. 11^1) sentence I of the Criminal Procedure Code sets out the definition of the concept of "serious error of fact", i.e. the erroneous determination of the facts, in their existence or non-existence, by disregarding the evidence confirming them or by distorting their substance.

However, the same Article states in para. 11^1) sentence II that "the serious error of fact does not constitute a misjudgment of the evidence".

The Court pointed out that the serious error of fact concerns the erroneous determination of the facts and consists in the erroneous confirmation of their existence or non-existence. In essence, the determination of the facts seeks to find out the truth, which is possible by assessing the evidence from the perspective of their veracity. Therefore, the determination of the facts is inextricably linked to the assessment of the evidence.

The legislator provided two ways of committing a serious error of fact: 1) the failure to take into account the evidence; and 2) the distortion of the evidence.

With regard to the failure to take into account the evidence, the Court held that both the first instance and the appellate court could admit or, as the case may be, reject the requests for evidence-gathering. Failure to take the evidence into account may entail, *inter alia*, unjustified rejection of the evidence proposed by the parties. This was sufficient for the Court to find that

[1] Judgement no. 2 of 23.01.2020 on the exception of unconstitutionality of some provisions of Article 6 para. 11^1) of the Criminal Procedure Code

the first way of committing the serious error of fact may be related to the incorrect assessment of the evidence, from the point of view of its relevance.

With regard to the distortion of evidence, the basis of this form of serious misconduct is the intentional change in the meaning, nature or characteristics of factual evidence. Therefore, the distortion of the substance of the evidence, committed by a court, can only take place in the process of assessing them.

In those circumstances, the Court noted that there was an inconsistency between the second sentence of Article 6 para. 11^1) of the Criminal Procedure Code (according to which "the serious error of fact does not constitute a misjudgment of evidence") and the first sentence of the same Article (according to which the serious error of fact means "the erroneous determination of the facts, in their existence or non-existence, by disregarding the evidence confirming them or by distorting their substance"). This normative inconsistency creates legal uncertainty and is likely to affect the person's right to a fair trial.

Therefore, the Court concluded that the text "the serious error of fact does not constitute a misjudgment of the evidence" in Article 6 para. 11^1) of the Criminal Procedure Code is contrary to Article 20 in conjunction with Article 23 of the Constitution.

2. OBLIGATION OF THE TRADE UNION BODIES' CONSENT FOR THE RELEASE OF TRADE UNION OFFICIALS

On 4 February 2020, the Constitutional Court ruled on the exception of unconstitutionality of Article 87 para. (2) and para. (3) of the Labor Code and Article 33 para. (3) of Trade Union Law no. 1129 of 7 July 2000[2].

The Court has established that the trade union's role in terminating the individual employment contract at the initiative of the employer is a guarantee for the employee, who is in a relationship of subordination to the employer and who requires special protection to avoid abusive release. The measure of protection of the mandate exercised by the employees' representatives elected in the management bodies of the trade unions serves as a guarantee against possible coercive or repressive actions, likely to prevent the exercise of the mandate.

At the same time, analyzing Article 87 para. (2) and para. (3) of the Labor Code, the Court noted that the impugned provisions lay down an absolute and general prohibition on the release of trade union leaders without the prior consent of the relevant trade union body. The consent of the trade union body is a mandatory condition in the absence of which the employer is unable to order the release of the trade union official.

The impugned rules shall also apply to all grounds for release provided for in Article 86 para. (1) of the Labor Code, regardless of whether or not these grounds are related to union activity. They are worded in such a way that they do not give any possibility to the employer to release the trade union employee without the consent of the trade union body for reasons not related to union activity.

The Court considered that the complete dependence of the release of the trade union official on the consent of the trade union body restricts the employer's right to organize his/her activity

[2] Judgement no. 3 of 04.02.2020 on the exception of unconstitutionality of Article 87 para. (2) and para. (3) of the Labor Code

internally. Therefore, the impossibility to release trade union employees on the basis of the law constitutes an interference with the exercise of property rights and a restriction on the freedom of business, by restricting the employer's prerogative to decide independently on the organization of his/her business, an obvious limitation, for example, in the case of reduction in staff numbers.

The Court considered that the protection of trade union employees cannot be ensured by totally neglecting the interests of the employer, who, within the limits established by law, must have a certain autonomy in the organization and operation of his/her own company. By maintaining the impugned provisions, the employer could be obliged to keep an employee and pay remuneration to a person whose activity is not an objective necessity for the company.

The exclusive right of the employer to decide on his/her activity depending on the economic or commercial situation in which the profitable activity is carried out is likely to be obstructed. Thus, conditioning the release of the trade union employee by the consent of the trade union body may affect the economic and financial mechanisms of the company, such as the production structure, the budget of revenues and expenditures, the nature and volume of commercial contracts concluded by the unit.

The Court noted that the purpose of the impugned provisions is to protect trade union activity by establishing measures to protect the mandate exercised by elected representatives of trade union managing bodies, but they may not collide with the interests of the employer, who, in accordance with the criticized provisions, is put in the situation of bearing an excessive burden likely to affect his/her right to property. Therefore, the criticized legislative solution provided in Article 87 para. (2) and para. (3) of the Labor Code is not proportional to the aim pursued, as it limits the economic activity of the employer.

Therefore, the impugned provisions of Article 87 para. (2) and para. (3) of the Labor Code, also found in Article 33 para. (3) of the Trade Union Law no. 1129 of 7 July 2000, are not proportionate to the aim pursued because, as the Court has also ruled in JCC no. 34 of 8 December 2017, § 76, they lead to the limitation of the economic activity of the employer.

The Court found that the provisions criticized for prohibiting the release of employees who are members and leaders of trade union bodies without the consent of the trade union bodies, in cases where the release is not related to trade union activity, are contrary to the constitutional provisions of Articles 9, 46 and 126 of the Constitution.

The Court noted that by annulling the criticized norms, the employees who are trade union officials are still left with **sufficient legal safeguards**, which will ensure the protection of their rights and interests. In this regard, the Labor Code stipulates that “the release of employees who are trade union members is allowed with prior consultation of the trade union body (organizer) of the unit” (Article 87 para. (1)); the activities of trade union officials who fulfill their obligations and exercise their rights provided in Article 387 paras. (1) to (5) may not serve for the employer as a ground for their release or the application of other sanctions which would affect their rights and interests arising from employment relationships (Article 387 para. (6)); trade union officials enjoy the right of access to justice, in order to defend their rights in the event of abuses which gave rise to their release (Article 355), and when the court examines the individual labor dispute, the employer is required to demonstrate the legality and to indicate the grounds for the employee’s release (Article 89 para. (2)). Therefore, the legislator instituted

safeguards against abusive release by the employer which may be used by employees who are trade union officials.

The Court noted that declaring the provisions of Article 87 para. (2) and para. (3) of the Labor Code and Article 33 para. (3) of the Trade Union Law unconstitutional does not prevent the Parliament from regulating the procedure of prior consultation of the corresponding trade union body in case of release of the persons elected in the trade union body and of the trade union leaders who are not released from their basic job.

3. NUMERICAL CRITERION AND TERRITORIAL REPRESENTATION FOR THE REGISTRATION OF POLITICAL PARTIES

On 25 February 2020, the Constitutional Court ruled on the exception of unconstitutionality of some provisions of Article 8 para. (1) d) of Law no. 294 of 21 December 2007 on Political Parties[3].

In this case, on 8 February 2018, a group of people submitted an application for the registration of a political party to the Ministry of Justice, which was returned with no decision adopted. After a repeated request, the Ministry of Justice refused to register the party because it did not meet the numerical criteria and territorial representation requirements for the registration of political parties.

During the examination of the case in court, the applicants raised the exception of unconstitutionality of some provisions of Article 8 para. (1) d) of Law no. 294 of 21 December 2007 on Political Parties.

At the admissibility stage, the Court observed that in its previous acts on this matter, it limited itself to **noting that the power to lay down rules for the registration of political parties belongs to the Parliament who enjoys a margin of discretion**. As a result, the Court did not resort to **the proportionality test** of the measures instituted in this regard by the Legislature.

Aware of this fact, the Court decided to examine the proportionality of the impugned rule in the light of Article 41 of the Constitution, which guarantees the freedom of parties and other socio-political organizations.

Thus, the Court considered that it had to analyze whether the three cumulative conditions imposed on the registration of a political party: 1) the requirement of four thousand citizens with the right to vote; 2) the requirement that the party members be domiciled in at least half of the second level administrative-territorial units; 3) the requirement to gather at least 120 members in each of the mentioned administrative-territorial units, constitutes a necessary measure in a democratic society, in accordance with the provisions of Article 54 of the Constitution.

As to whether the impugned rule is clear, the Court noted that the law sets out accessible, clear and foreseeable criteria that a citizens' association must meet in order to acquire the legal status of a political party.

[3] Judgement no. 5 of 25.02.2020 on the exception of unconstitutionality of some provisions of Article 8 para. (1) d) of Law no. 294 of 21 December 2007 on Political Parties

As to whether the impugned rule pursued a legitimate aim, the Court found that the information note to the draft law on political parties did not set out any arguments which would justify the institution of conditions for the registration of a political party.

From the general context of that measure, the Court inferred that the **pursued aim** was to **ensure the representativeness of political parties and to avoid excessive fragmentation of the political spectrum**, thereby **promoting the stability of the political system and the protection of public confidence in political parties**. These objectives may be subsumed under the general legitimate aims of defending **the national security, territorial integrity and public order**, provided by Article 54 para. (2) of the Constitution.

As to whether there is a rational link between the representation requirement and the legitimate aims pursued by it, the Court held that, from an abstract point of view, the numerical criterion and territorial representation requirements can contribute to the achievement of the above objectives.

As to whether the representation requirement is necessary to achieve the proposed aims, the Court noted that in the area covered by the impugned rule, the Parliament enjoys a certain margin of discretion. It is for the Court to determine whether the legislature did not manifestly exceed the limits of its discretion.

The Court noted that although it is clear that the measure under review is excessive, compared to the alternatives that the legislature allegedly had available, i.e. reducing the numerical criterion and representativeness conditions for the registration of a political party below the currently regulated limits, the specificity of the numerical criterion and representativeness conditions is that they **leave room for discussion on the best solution in the case of registration of a political party**.

When comparing the regulation of the national representation requirement with the regulation of this requirement in other states, the Court found that there is no European consensus on the formula for calculating the minimum number of members required for the registration of a political party. **In view of these facts, the Court noted that it was not within its power to establish a specific number** which at the same time would constitute an appropriate solution. The power to determine this number **belongs to the legislator**.

At the same time, the Court noted that in order to achieve the intended purpose of ensuring the representation of political parties, of avoiding excessive fragmentation of the political spectrum, of promoting the stability of the political system and protecting the public trust in political parties, certain conditions may be established **not for the formation of political parties, but for their participation in elections.**

There is also an additional measure to ensure the achievement of the intended legitimate aim, namely the minimum representation threshold, laid down by Article 94 of the Electoral Code for parliamentary elections. Thus, political parties, electoral blocs and independent candidates who received a smaller number of votes than the one specified in the law are excluded from the mandate assignment process by a decision of the Central Electoral Commission.

As to whether there is a fair balance between the competing principles, the Court held that at this stage it must weigh, on the one hand, the stability of the political system and the protection

of the public confidence in political parties, which is a protected principle, and, on the other hand, the freedom of association into political parties, which is an affected principle.

In its case-law, the European Court established that **the numerical criterion and representativeness condition for political parties under registration would be justified only if it allowed the unhindered establishment and functioning in optimal conditions of a plurality of political parties representing the interests of various population groups**. It is important to ensure access to the political arena for different parties on terms which allow them to represent their electorate, draw attention to their preoccupations and defend their interests (*Republican Party of Russia v. Russia*, 12 April 2011, § 119; see, *mutatis mutandis*, the case of *Christian Democratic People's Party v. Moldova*, 14 February 2006, § 67). Moreover, the European Court held that any interference with the freedom of association must correspond to a "pressing social need" (*Gorzelik and others v. Poland* [GC], 17 February 2004, § 95).

The Court noted that the numerical criterion and territorial representation condition is a difficult obstacle to overcome when registering a political party. This obviously implies a **high threshold** that **unduly limits the benefit of freedom of association into political parties**.

The condition in question lays down **disproportionate restrictive requirements** for the registration of a political party, **the cumulative fulfillment of three quantitative and territorial-representative conditions** being necessary.

The Court also found that there was **no proper balance between the collective and individual interests** in the application of the impugned rule.

The Venice Commission, in its Opinion CDL-AD(2007)025 on the draft law on political parties of Moldova, also mentioned that the regulation of the requirement of five thousand members with domicile in at least half of the territorial administrative units of the second level of the country, but no less than 150 members in each of the aforementioned units seems to be a "**formidably high threshold**", "**almost impossible to fulfil for any group of common interest related to a limited part of the country**", they "**put a burden on citizens** trying to exercise their rights under Article 11 of the ECHR" is "**potentially restrictive**" and as such "**would be disproportionate and not necessary in a democratic society**".

Finally, the Court noted that the numerical criterion of 4000 persons and the requirement of territorial representation of at least 120 members in at least half of the second level territorial administrative units in the Republic of Moldova, for the party under registration, is **an excessive and disproportionate measure in relation to the legitimate aim pursued**.

The Court noted that such a restriction is not justified, **goes beyond the scope of an acceptable margin of discretion of the Parliament** and is therefore incompatible with the provisions of Articles 41 and 54 of the Constitution.

In order to give the Parliament the opportunity to devise a reasonable legislative solution, the Court has ruled that the effects of this Judgment were to be applied from 31 July 2020.

At the same time, the Court took into account the fact that an exception of unconstitutionality was brought before it. The Court held that the exception of unconstitutionality "expresses an organic and logical link between the problem of constitutionality and the merits of the main

proceedings" and that access to justice (including constitutional justice) must be understood as a **concrete and effective right of access**. As a result, in order to give effect to the present Judgement in the case in which the exception of unconstitutionality was raised, the Court decided that it would have **immediate effect for the authors of the application**. When adopting this solution, the Court also took into account the opinion of the Venice Commission *Amicus curiae* for the Constitutional Court of Georgia on the effects of the Constitutional Court decisions on final judgments in civil and administrative cases (Venice, 22-23 June 2018, CDL-AD (2018) 012, §§ 53-56), and the case-law of the European Court of Human Rights (see *Frantzeskaki and Others v. Greece* (Dec.), 12 February 2019, § 42).

In the event the Parliament does not revise Law no. 294 of 21 December 2007 on Political Parties in accordance with the reasoning set out in this judgement until 31 July 2020, the competent authority shall ensure the registration of political parties in accordance with the conditions established by law, except for the provisions that were declared unconstitutional.

4. WAGE GUARANTEES IN THE EVENT OF SUSPENSION OF EMPLOYMENT

On 10 March 2020, the Constitutional Court adopted a Judgement on the exception of unconstitutionality of some provisions of Article 27 para. (5) of Law no. 270 of 23 November 2018 on the Unitary Salary System in the Budgetary Sector and of paragraph 8 of Annex no. 6 to the Government Decision no. 1231 of 12 December 2018 for the implementation of the provisions of Law no. 270/2018 on the Unitary Salary System in the Budgetary Sector[4].

The Court noted that the adoption of Law no. 270/2018 was aimed at introducing a new salary system for the budgetary sector staff. This new system could have led to the reduction of the wage of certain categories of budgetary employees compared to the one previously received. The legislator provided guarantees to compensate for the wage difference (Article 27 paras. (1)-(3) of the Law). These guarantees refer to the payment of the wage difference and the granting of compensation, if under the new law a wage lower than the one received until the suspension of employment relations is calculated or if the wage is lower than 2000 MDL.

The Court noted that the employees who had their employment suspended on the date of entry into force of the law were excluded from the guarantees granted (Article 27 para. (5) of the Law). Therefore, the payment of the difference in wage or the granting of compensation does not benefit only people who had their employment suspended, including due to maternity or childcare leave.

The Court found that the legal norm, which fails to pay the difference in wage or compensatory payments to budget employees whose employment was suspended on the date of entry into force of this law, constitutes an interference with the right to work, guaranteed by Article 43 of the Constitution. In order to examine the constitutionality of that interference, the Court examined: (i) whether the interference is "prescribed by law" and (ii) whether the interference pursues a legitimate aim.

With regard to the "prescribed by law" requirement, the Court held that the impugned rule clearly states that persons who had their employment suspended will not receive the difference

[4] Judgement no. 6 of 10.03.2020 on the exception of unconstitutionality of some provisions of Article 27 para. (5) of Law no. 270 of 23 November 2018 on the Unitary Salary System in the Budgetary Sector and of paragraph 8 of Annex no. 6 to the Government Decision no. 1231 of 12 December 2018 for the implementation of the provisions of Law no. 270/2018 on the Unitary Salary System in the Budgetary Sector

in wage or compensatory payments, thus, this rule meets the "prescribed by law" requirement, as well as that the requirement of accessibility and predictability.

With regard to the achievement of a legitimate aim by this rule, the Court noted that the stated aim of the law is to ensure a transparent, fair, attractive, easy-to-manage staff remuneration system capable of reflecting and remunerating performance, where the basic wage is the main element of staff remuneration. Also, the principles of non-discrimination, equity and coherence, in the sense of ensuring equal treatment and equal remuneration for work of equal value (Article 3 para. (1) b) of the same Law) were passed in between the principles of the unitary remuneration system. In this context, the Court found that the reduction of wage payments for persons with suspended employment does not fall within the aims stated by the legislator in the adoption of the Law on the Unitary Salary System in the Budgetary Sector and is contrary to its principles.

The Court noted that, in its opinion, the Parliament acknowledged that the adoption of measures to reduce wage had taken place under the conditions of social and staff policy which was to be included in the level of budgetary expenditure. The Court considered that the declared insufficiency of budgetary resources was not an objective and reasonable reasoning for the restriction of constitutional rights.

In these circumstances, the Court noted that the aims stated by the legislator for not applying guarantees to employees whose employment was suspended upon the entry into force of the Law on the Unitary Salary System in the Budgetary Sector do not fall within any of the purposes of Article 54 para. (2) of the Constitution.

Therefore, the Court concluded that the impugned provisions were contrary to Articles 16 and 43 of the Constitution.

5. MECHANISM FOR SELECTING AND DETERMINING INVESTIGATING JUDGES IN THE EVENT THERE ARE NO CANDIDATES

On 24 March 2020, the Constitutional Court ruled on the constitutionality of Article 15^1 para. (5) of Law no. 514 of 6 July 1995 on the Organization of the Judiciary[5].

In this case, on the basis of a request by the President of the Chișinău Court, the Superior Council of Magistracy decided, by a decision of March 2019, to transfer the judge, who is the applicant of the exception of unconstitutionality, from the Centru District to the Ciocana District of the Chișinău Court.

The applicant claimed before the Court that the impugned norm of Article 15^1 para. (5) of Law no. 514 of 6 July 1995 on the Organization of the Judiciary contravenes the principles of independence and irremovability of the judge, safeguarded by Article 116 paras. (1) and (5) of the Constitution.

The Court examined the constitutionality of the contested provision in the light of the following issues:

[5] Judgement no. 7 of 24.03.2020 on the exception of unconstitutionality of Article 15^1 para. (5) of Law no. 514 of 6 July 1995 on the Organization of the Judiciary

(i) whether the mechanism for selecting and determining the investigating judge complies with the judge's consent to the transfer requirement, and

(ii) whether the mechanism for selecting and determining the investigating judge by the president of the court is clear and able to ensure a fair balance between, on the one hand, the need to ensure the independence of the judge and, on the other hand, the need to administer justice efficiently.

As regards the first issue, the Court noted that the constituent used rigid wording in the text of Article 116 para. (5) of the Constitution, emphasizing that the irremovability of the judge is a fundamental principle. As this principle is not absolute, the Court noted that the judge may be transferred without his/her consent, if it occurs:

(a) in connection with the application of a disciplinary sanction;

(b) in connection with judicial reorganization; or

(c) in connection with the supporting of a neighboring court.

The provisions of Article 15^1 para. (2) of the Law on the Organization of the Judiciary establish the fact that the investigating judge is appointed by the Superior Council of Magistracy with his/her consent, at the proposal of the president of the court. At the same time, the Law establishes in Article 15^1 para. (5) a derogation from the consent rule if no judge expresses his/her agreement to exercise the powers of the investigating judge or if several judges express their agreement. In this situation, the judge's candidacy is determined by the president of the court. The Court noted that a judge may be appointed as investigating judge even if he/she does not consent to this. This situation represents a derogation from the general rule established by Article 116 para. (5) of the Constitution, which provides that the transfer of judges is made only with their consent.

Thus, the Court observed that the impugned rule falls within the third exception to the general principle of irremovability of the judge, because "the transfer is temporary and aims to support a neighboring court". The Court held that the contested rule is constitutional, in terms of Article 116 para. (5) of the Constitution.

As regards the second issue, the Court had to examine whether the mechanism for selecting and determining the investigating judge by the president of the court is capable of striking the right balance between, on the one hand, the need to ensure the independence of the judge and, on the other hand, the need to administer justice efficiently.

The Court noted that the text "the judge's candidacy will be determined by the president of the court" of the contested rule does not expressly provide in what manner and according to which criteria the president of the court determines the investigating judge's candidacy. *Prima facie*, the legislator granted the president of the court a margin of discretion regarding the choice of the method for determining the candidacy of the investigating judge. However, given that the applicant challenges only the proportionality of the measure, the Court acknowledged that the contested rule is clear.

On the proportionality of the impugned measure, the Court held that both the need to ensure the independence of the judge and the need to administer justice effectively are values protected by Article 116 of the Constitution. None of them is an absolute value and, therefore, both may

be limited by optimizing them. Also, there is no hierarchy between the independence of the judge and the administration of justice effectively, but rather a collaboration between these two values to achieve a common goal, such as ensuring the participants' right to a fair trial.

First, the Court has found that neither the law nor the provisions of the Rules of Procedure on the conditions for the appointment of investigating judges establish the obligation of the president of the court to take into account, during the procedure for selecting and determining the candidacy, the particular situation of a judge, a situation that could exclude the transfer (e.g. pregnancy; raising a minor alone; caring for a family member, etc.). The impugned rule is insensitive to the objective situations in which some judges may find themselves.

Second, the Court observed that the law does not oblige the president of the court to provide reasons for his/her proposal made to the Superior Council of Magistracy on the appointment of a judge as investigating judge. In this situation the selected judge may be left without an answer to the question of why he/she was selected and not another judge. Moreover, this situation may give the selected judge suspicion of ill-intention on the part of the court president.

Third, the Court noted that if no judge wishes to exercise the powers of investigating judge, the selection and discretionary determination by the president of the court of the candidacy is problematic. Thus, in its original wording, the contested Law provided that, if no judge expresses his/her consent to exercise the powers of investigating judge, the candidacy of the judge will be determined by the president of the court by *drawing lots*, in the presence of all judges working in the court, with the reflection of this fact in a record.

Fourth, the Court noted that, although the law limits the *term* of office to three years, it does not limit the *number* of terms. In its original wording, the Law provided that the investigating judge is appointed for a term of three years, without the possibility of serving two consecutive terms. Thus, the contested rule allows the repeated selection and determination without consent of the same judge to exercise the powers of investigating judge.

Fifth, the Court found that the law requires the president of the court to select only one candidate for the position of investigating judge. For the selected judge, this fact represents an uncertainty as to the reason for his/her selection by the president of the court. From the president of the court's point of view, this fact allows him/her to select and determine a candidate he/she prefers for subjective reasons. From the role of the Superior Council of Magistracy's point of view, the selection and determination of a single candidate by the president of the court limits the Council's margin of discretion in this process. Moreover, the law does not regulate the cases in which the Superior Council of Magistracy may reject the candidacy proposed by the president of the court. In this situation, the role of the president of the court becomes dominant.

The Court noted that the legislator regulated a mechanism for selecting and appointing investigating judges in a way that favors the *efficient* administration of justice. The mechanism in question can ensure a quick selection and appointment of investigating judges. At the same time, **this speed sets a lower weight for the independence of judges, which is also an equally important value in a law-governed State.**

The Court recalled that the efficient administration of justice is not an end in itself. Both the administration of justice and the independence of judges aim to ensure the right to a fair trial. In this respect, **the legislator had to optimize the two values, ensuring a correct balance**

between, on the one hand, the need to ensure the independence of the judge and, on the other hand, the need to administer justice efficiently, as the existence of guarantees against arbitrariness would achieve.

Therefore, the provisions of Article 15^1 para. (5) of the Law on the Organization of the Judiciary are likely to affect the principle of independence of the judge established by Article 116 para. (1) of the Constitution.

Thus, based on its case-law, the Court held that until the amendment of the Law by the Parliament, the mechanism for selecting and determining the investigating judges will take place on the basis of the drawing lots procedure, as regulated by Article 15^1 para. (5) of the Law on the Organization of the Judiciary in its previous wording.

6. CRIMINAL LIABILITY OF CONSTITUTIONAL JUDGES

On 26 March 2019, the Constitutional Court delivered a judgement on the interpretation of Article 137 of the Constitution[6], which provides that the judges of the Constitutional Court are irremovable for the tenure of their mandate, independent and abide only by the Constitution. The questions asked by the author of the application concerned:

(1) can constitutional judges be held legally liable for the votes and opinions expressed in the exercise of their functions;

(2) can constitutional judges be held criminally liable for committing offences not related to the exercise of their functions;

(3) what is the procedure for holding constitutional judges criminally liable;

(4) can constitutional judges benefit from functional immunity for the votes and opinions expressed in the exercise of their functions following the end of their term of office.

The Court noted that an important component of the State is constitutional justice, administered by the Constitutional Court, a public political and jurisdictional authority that falls outside the scope of legislative, executive or judicial power, its role being to ensure the supremacy of the Constitution as a fundamental law of a law-governed State. Within the good organization of the State authority**, the role of the constitutional courts is an essential and defining one**, representing a true pillar of support for the State and democracy, guaranteeing equality before the law, fundamental freedoms and human rights.

The Court reiterated **that the exercise of any kind of pressure upon Constitutional Court judges, before the adoption of a decision, as well as an act of revenge for the solutions adopted, is inadmissible, being incompatible with the respect for the rule of law, the authority of the Court and the supremacy of the Constitution.**

Failure to respect the principle of independence of the Constitutional Court is not only a source of internal political and legal instability. It can lead to the international condemnations of the State. In this respect, the European Court of Human Rights does not hesitate to suggest that judicial proceedings may fall within the scope of Article 6 § 1 of the European Convention on

[6] Judgement no. 9 of 26.03.2020 on the interpretation of Article 137 of the Constitution

Human Rights, Article that requires independence of the tribunal adjudicating a dispute, even when the dispute takes place before a Constitutional Court.

The Court emphasized that, aside from the task of protecting the fundamental rights guaranteed by the Constitution, it must ensure that public authorities in various branches of State power remain within the limits prescribed by the Constitution and it is, sometimes, required to resolve conflicts that arise between them. The Court's task was, in this respect, a special one for maintaining the democratic regime. The Venice Commission recalls the importance of the constitutional courts in the practical implementation of democracy, the rule of law and the protection of human rights. Therefore, **Constitutional Court judges need strong guarantees for their independence.**

The Court noted that the independence of the Constitutional Court is one of the core values of the democratic system, and its existence is essential for the realization of all other values of the system. The foundation of its independence consists in objectivity and neutrality, which are the first principles of the ruling of the Constitutional Court. Constitutional judges resolve cases before the Court according to the Constitution, they must be free in their thinking and conscience, without fear and without prejudice, they must act impartially, with a sense of justice and conscience, without any pressure or incentive.

The independence of constitutional judges is strengthened by granting immunity from criminal liability for their opinions and votes in the exercise of their term of office. The concept of judicial immunity is of particular importance, especially where constitutional justice and justice in general may face the effects of political and social change.

Immunity should always be connected to the role and activities carried out by the institution in which the individual is working, is a member of or represents. This type of immunity is functional, not general. There must be no exemption from liability not connected to the person's role and professional activity.

Therefore, functional immunity intends to protect a judge from the criminalization of his or her legal opinion. The beneficiary is not the person him or herself, but the independence of the court. It is an important requirement that derives from the very nature and quality of judicial independence, impartiality and transparency. **Functional immunity does not provide a judge with impunity for a crime he or she has committed. Immunity protects independent judicial decision-making, which means that a judge cannot be punished for a legal opinion or the conclusion reached in the decision-making process**. However, a judge may be punished if it is proven that he or she committed an offence, e.g. by ruling in favor of a person from whom he or she had taken a bribe (this is the crime of bribery).

It is important to separate a judge’s criminal activity resulting in a court decision from the court decision itself, **as a judge’s criminal activity may consist only in an act other than the expression of a legal opinion**. A judge should be punished for corruption if he or she accepts a bribe to decide a case in a certain way (i.e. receiving something of value in exchange for an official act, be it a judgment or judicial decision or other). **In this situation, the judge is not punished for his or her legal opinion expressed in the form of a judicial decision, but for having accepted a bribe and then made a judicial decision in compliance with that bribe.**

As for any other person – a criminal accusation can lead to permanent damage to the reputation of a judge and an arrest can completely ruin the reputation. A criminal accusation or even the

simple threat of it could be used to by the prosecutor's office to exert pressure on a judge. Given that in Eastern Europe the position of judges is often weak as compared to that of prosecutors, false charges or even the threat of charges of passive corruption or trafficking of influence could be used as a tool to make judges compliant with the wishes of other authorities.

The protection of Constitutional Court judges against the criminalization of the judicial decision-making process is particularly important because these judges often render decisions in politically sensitive cases. If this type of protection were not available to them and, for example, a political change was to occur in a given country, Constitutional Court judges in that country could easily find themselves criminally liable for their decisions if the newly established government were to disagree with them or if a legislative measure of importance for the new government were to be challenged before the Constitutional Court. **If this type of liability for Constitutional Court judges is admitted, it could easily be used to pressurize them in their decision-making process by threatening to criminalize it.**

With regard to the matters referred to in the application, the Court held that:

(1) Within the meaning of Article 137 of the Constitution, **constitutional judges must be protected by functional immunity**. Constitutional judges shall not be held liable for the votes and opinions expressed and for the legal actions taken in the exercise of their function. This solution is, in the socio-political conditions of the Republic of Moldova, a balanced approach on the tension between the principle of independence of constitutional judges and the principle of their liability. Legal liability may be incidental only in respect of violations not related to the exercise of the function of constitutional judge.

From the perspective of Article 137 of the Constitution, which excludes the liability of constitutional judges for the votes or opinions expressed in the exercise of their duties, the Court reiterates the conclusions of Judgement no. 12 of 28 March 2017, where it was retained that Article 307 of the Criminal Code is applicable only in the case of ordinary judges: judges of tribunals, judges of the Courts of Appeal and judges of the Supreme Court of Justice. The status of constitutional judges differs from the status of ordinary judges by the specific nature of constitutional jurisdiction. **The acts of the Constitutional Court cannot be subject to any control carried out by a hierarchically superior court that could verify their constitutional character**, given the fact that **there is no such authority in the constitutional order**.

If a public authority were to be given the power to review the constitutionality or legality of an act of the Constitutional Court, especially regarding the investigation of Constitutional Court judges for offences carried out in their functions (not for ordinary crimes), **the independence of the Constitutional Court would be compromised.**

(2) **Constitutional judges remain, of course, liable for any offence committed outside the decision-making process.** For example, they can be held liable for bribery (material or political) in order to resolve a case in a certain way. However, in such situations, constitutional judges may only be punished for the actual crime of bribery. **Functional immunity does not exclude criminal prosecution in cases not related to adjudication,** because criminal offences may be committed by anyone, including Constitutional Court judges. **Functional immunity does not cover ordinary offences** and that the constitutional judge can, therefore, be criminally liable for committing them.

(3) Just as the Constitution does not establish an authority to express its consent for the initiation of criminal proceedings against constitutional judges and given the constitutional status of the Constitutional Court as an authority independent of any other public authority, that abides only by the Constitution, it is necessary that the consent to initiate criminal proceedings against a constitutional judge be expressed by the plenum of the Constitutional Court. The Court noted that the prior approval procedure is an instrument that ensures the prevention of possible abuses of constitutional judges and their independence. In this sense**, in order to start a criminal proceeding, the prior approval of the plenary of the Court at the request of the General Prosecutor is necessary.** Court noted that constitutional judges may be searched, in case of flagrant offence, without the prior approval of the Constitutional Court, however detention, arrest and referral to contraventional or criminal trial may be done only with the prior approval of the plenum of the Constitutional Court.

(4) The Constitution, as well as the Law on the Constitutional Court regulates important principles and guarantees of independence and neutrality of Constitutional Court judges, capable to allow them to adjudicate objectively. In this respect, Constitutional Court judges cannot be held liable for the votes and opinions expressed in the exercise of their functions, including after the **end of their term of office.** The Court emphasized that his solution stems from the need to allow the judge to make his or her reasoned decision without fear of prosecution after the end of his or her term of office. **The beneficiary is not the person him or herself, but the independence of the court.** This is an important requirement that derives from the very nature and quality of judicial independence, impartiality and transparency.

In the light of its interpretation, the Court held that:

1. Under Article 137 of the Constitution, Constitutional Court judges enjoy functional immunity, which means that constitutional judges cannot be legally liable for the votes and opinions expressed in the exercise of their functions.

2. Under Article 137 of the Constitution, Constitutional Court judges cannot be criminally liable for offences committed in cases not related to the realization of constitutional justice.

3. Under Article 137 of the Constitution, for the initiation of criminal proceedings against a Constitutional Court judge, the prior consent of the plenum of the Constitutional Court is necessary.

4. Under Article 137 of the Constitution, the Constitutional Court judge cannot not be searched, with the exception of flagrant offences, detained, arrested, referred to criminal or contraventional trial without the prior consent of the plenum of the Constitutional Court.

5. Under Article 137 of the Constitution, Constitutional Court judges also benefit from functional immunity for the votes and opinions expressed after the end of their term of office.

7. PROCEDURE FOR RESPONSABILITY ASSUMPTION BY THE GOVERNMENT

On 13 April 2020, the Constitutional Court delivered a Judgement to review the constitutionality of some provisions of Law no. 56 of 2 April 2020 on the establishment of measures to support citizens and entrepreneurial activity during the state of emergency and on the amendment of some normative acts[7].

The authors of the application, MPs of the Republic of Moldova, claimed that the procedure for responsibility assumption by the Government from 2 April 2020 was flawed, because the parliamentary session did not take place due to lack of quorum and the Government did not present the draft law to the Parliament. They also mentioned that the impugned provisions of Law no. 56 of 2 April 2020, for which the Government has assumed responsibility, do not meet the requirements established by the Decision of the Constitutional Court no. 5 of 2 March 2016. Therefore, the authors invoked the unconstitutionality of the impugned rules in relation to the provisions of Articles 60 and 106[1] of the Constitution.

Regarding the partial challenging of Law no. 56 of 2 April 2020, the Court held that the authors' arguments refer to the violation of the procedure for responsibility assumption by the government for the Law in question. These arguments are valid not only for the impugned provisions, but also for the entire Law no. 56 of 2 April 2020, because **an alleged violation of the procedure for responsibility assumption by the Government has effects on the entire Law**. Therefore, the Court considered it necessary to examine the constitutionality of Law no. 56 of 2 April 2020 in full.

Regarding the adoption of Law no. 56 of 2 April 2020 in accordance with the procedure for responsibility assumption by the Government, as provided by Article 106[1] of the Constitution, and regarding the conformity of the procedure for adopting the Law in question with the principle of separation and cooperation of powers in the State, as required by Article 6 of the Constitution, the Court noted the following.

The Court held that the provisions of Article 106[1] of the Constitution highlight **four stages of the procedure for responsibility assumption by the Government**.

In the first stage, **the Government must adopt a decision to assume responsibility for a program, a general policy statement or a draft law**. In this context, the Court noted that the Government must publish in the Official Gazette both the decision to assume responsibility and the full text of the draft laws that are the subject of this procedure (JCC no. 28 of 22 December 2011, § 66; DCC no. 77 of 12 October 2016, § 29).

In the second stage, **the Government representative must present the program, the general policy statement or the draft law before the Parliament**. The text "before the Parliament" from Article 106[1] para. (1) of the Constitution presupposes the presentation of the document for which the Government has assumed responsibility, in the plenary session of the Parliament. **The stage of presenting the Government's initiative before the Parliament is central and indispensable to the procedure for responsibility assumption**, because from the end of the presentation the term of three days for filing a motion of censure against the Government begins

[7] Judgement no. 10 of 13.04.2020 on the constitutional review of some provisions of Law no. 56 of 2 April 2020 on the establishment of measures to support citizens and entrepreneurship during the state of emergency and on the amendment of some normative acts

to run, and in the absence of the motion, the term for acquiring the nature of "adopted" in the case of draft laws or "mandatory" in the case of the general policy program or statement.

The third stage is reserved for the **possibility to file a motion of censure**. The Court noted that the motion of censure is the main instrument for exercising parliamentary control in the context of responsibility assumption by the Government. The Constitution allows the Government to assume responsibility before the Parliament, provided that after the presentation of the decision to assume responsibility in the plenary of the Parliament, the MPs have the possibility to file a motion of censure. It results from Article 106^1 para. (2) of the Constitution that the motion of censure may be filed within three days after the presentation to the Parliament of the program, the general policy statement or the draft law by the Government representative. **The three-day time limit for filing the motion begins to run from the moment of presentation in the plenary of the draft law for which the Government assumes responsibility** (JCC no. 25 of 29 October 2019, § 62; HCC no. 28 of 22 December 2011, § 57). Therefore, **if the Government has not presented, de facto, the decision by which it assumes responsibility before the Parliament, the motion of censure cannot be filed**. Therefore, this stage depends entirely on the completion of the previous stage.

For the fourth stage, the Constitution provides for two scenarios. The first case concerns the situation in which **the parliamentarians filed a motion of censure which was voted by the majority of the elected MPs**. In this case, Article 106^1 para. (2) of the Constitution provides that the Government is dismissed. The second case concerns the situation in which **no motion of censure was filed or in which the motion failed for various reasons**. In this case, Article 106^1 para. (3) of the Constitution stipulates that the presented draft law is considered adopted, and the program or general policy statement becomes mandatory for the Government.

The Court noted that **compliance with the constitutional procedures for responsibility assumption by the Government presupposes the gradual fulfillment of the above-mentioned steps**.

The Court noted that the authors of the applications invoked the fact that when the Government assumed responsibility for Law no. 56 of 2 April 2020, the second stage was not observed, which provides the obligation to present the draft law before the Parliament.

On the one hand, the Court found that by Decision no. 213 of 1 April 2020, the Government initiated the procedure to assume responsibility for the draft law. It was registered in the Secretariat of the Parliament and on the day the Parliament was convened, the Prime Minister of the Republic of Moldova was in the meeting room of the legislature, prepared to present the draft law to the MPs. Thus, the Court considered that the Government had taken all the necessary actions to be able to present the draft law before the Parliament, as required by Article 106^1 para. (1) of the Constitution.

On the other hand, the Court noted that the Parliament was convened in a plenary session, but the presentation of the draft law by the Government representative before the Parliament was not possible, because the session was not deliberative.

First, the Court held that Law no. 56 of 2 April 2020 was considered adopted by the Parliament even though the plenary sitting of the Parliament of 2 April 2020 failed. The Court reiterated that **the three-day time limit** in Article 106^1 para. (2) of the Constitution **runs from the date of presentation of the draft law before the Parliament** and this term is established for filing

a motion of censure and, implicitly, for acquiring the nature of "adopted text" of draft laws in the event no motion was filed within this term. **This time limit does not start to run until the de facto presentation of the draft law in the Parliament's plenary session**. Therefore, the Parliament could convene a new plenary session so that the Government could present the draft law in the context of responsibility assumption. In this case, the Court noted that the procedure in question had not taken place. The Court noted that, in the present case, **the failure to meet the required quorum was a failed attempt at responsibility assumption by the Government for a draft law before Parliament**.

Second, the text "before the Parliament" in Article 106^1 para. (1) of the Constitution presupposes that the draft law for which the Government has assumed responsibility must be presented in the plenary session of the Parliament. In the present case, **the draft law for which the Government has assumed responsibility was not presented in the plenary session of the Parliament**. In this regard, the Court reiterated its case-law, noting that the failure to present the political act of responsibility assumption in a plenary session does not meet the constitutional requirements for assuming responsibility "before" the Parliament (JCC No. 25 of 29 October 2019, § 62; JCC No. 28 of 22 December 2011, § 56).

The Court noted that **the Constitution does not establish any exception to the obligation to present the assumption of responsibility for a draft law in the plenary session**. The holding of the plenary session is also mandatory if the Parliament is not in ordinary session, outside the parliamentary sessions the procedure for responsibility assumption by the Government is conditioned by the convening of an extraordinary or special session (JCC no. 25 of 29 October 2019, § 62; HCC no. 28 of 22 December 2011, § 57). A fortiori, the presentation of the draft law is mandatory when the Parliament is in ordinary session. **This also applies if the state of emergency is declared.** The Court notes that the Fundamental Law expressly prohibits, in Article 85 para. (4), the dissolution of the Parliament during the state of emergency, this being **one of the constitutional guarantees of parliamentary control over the executive in exceptional situations**. In the view of the Venice Commission, the Parliament exercises a very important control over the implementation of the state of emergency, which would cease if the Parliament were dissolved (Opinion no. 838/2016, CDL-AD(2016)006, § 64).

Third, the Court held that **given the fact that the plenary session had not taken place and that the Government had not been given the opportunity to present the draft law before the Parliament, the legislative made it impossible to file a motion of censure within such an exceptional procedure**. As a result, the Parliament has made it impossible to exercise a parliamentary control over the procedure for responsibility assumption. The Court reiterated that the procedure for responsibility assumption by the Government does not exclude and cannot be used to exclude parliamentary control by initiating a motion of censure (JCC no. 28 of 22 December 2011, § 58). The Court noted that **the possibility to file a motion of censure is the main instrument for exercising parliamentary control in the context of responsibility assumption by the Government, which the Parliament cannot waive by not granting the Government the opportunity to assume responsibility in a plenary session.**

In the light of its previous case-law, the Court reiterated that the assumption of responsibility by the Government cannot prevent the Parliament from exercising its role as the sole legislative authority, because the procedure for responsibility assumption by the Government takes place before the Parliament and is carried out under its supervision and control (JCC no. 25 of 29

October 2019, § 63; HCC no. 5 of 2 March 2016, § 29; HCC no. 11 of 13 May 2015, § 56). **Accepting the idea that the Government can assume responsibility for a draft law at its discretion, at any time and under any conditions, would be equivalent to transforming this authority into a public legislative authority, competing with the Parliament** (JCC no. 25 of October 29, 2019, § 58; JCC No. 11 of 13 May 2015, § 57).

Therefore, the Court found **Law no. 56 of 2 April 2020** on the establishment of measures to support citizens and entrepreneurial activity during the state of emergency and on the amendment of some normative acts unconstitutional, as it was **adopted in violation of the constitutional procedures** and **contrary to Articles 6 and 106[1] of the Constitution**.

8. IMPLEMENTATION OF THE ELECTORAL SYSTEM IN EARLY ELECTIONS

On 7 May 2020, the Constitutional Court ruled on the interpretation of the provisions of Article 72 para. (3) a) of the Constitution[8].

The choice of an electoral system is an important decision for any democracy and should not only be adopted as a political compromise by political groups, but also through broad consensus achieved through a process of public consultation. It should result from an open, inclusive and transparent process that involves a wide array of election stakeholders, including both parliamentary and non-parliamentary parties, as well as civil society representatives. Building consensus on the choice of an electoral system contributes to the acceptance, legitimacy and stability of the governing system (see the Joint Opinion of the Venice Commission and OSCE CDL-AD(2017)012 of 15, 16-17 June 2017 on the electoral system for the election of the Parliament of the Republic of Moldova, § 36).

According to paragraph 12 of the Joint Opinion of the Venice Commission and the Council for Democratic Elections of OSCE CDL-AD(2017)012 of 15, 16-17 June 2017 (the electoral system for the election of the Parliament), if any amendments are made to fundamental elements of electoral law, including the electoral system proper, they should take place well in advance of the next elections and at any rate at the latest one year beforehand. Should early elections be called after the introduction of changes to an electoral system, this system should be applied only at least one year after the adoption of the amendments.

The Court noted that it should reevaluate its previous solution of Judgement no. 11 of 26 April 2019 regarding the impossibility of the eventual implementation of another electoral system in the early parliamentary elections than the one applied in the ordinary parliamentary elections.

The Court considered that in order to ensure the stability of the electoral legislation and to avoid its frequent amendment, the rule should be observed that, in the event that Parliament adopts a new electoral system, it can only be implemented if the legislative amendment has been published in the Official Gazette of the Republic of Moldova at least one year before the date of the elections, regardless of their type.

In the sense of Article 72 para. (3) a) of the Constitution and taking into account the good international practices in electoral matters, the time frame for the implementation and application of the rules in electoral matters cannot depend on the type of elections - parliamentary, presidential or local, ordinary or early, general or partial. The legal provisions

[8] Judgement no. 11 of 07.05.2020 on the interpretation of Article 72 para. (3) a) of the Constitution

on electoral matters must be clear and foreseeable, and there must be a broad social consensus regarding them. Changes in this area must take place early enough to be successfully implemented in the electoral process, in order to avoid violations of the right to vote and the right to stand for election.

In the sense of Article 72 para. (3) a) of the Constitution, taking into account the exclusive power of the Parliament regarding the regulation, by organic law, of the way of organizing and conducting elections and taking into account the good international practices in electoral matters, the amendments of the fundamental elements of electoral law become applicable only if they were published in the Official Gazette of the Republic of Moldova at least one year before the election date.

The reasoning of Article 72 para. (3) a) of the Constitution does not prohibit the conduct of early parliamentary elections according to the rules of another electoral system than the one applied to ordinary parliamentary elections, if the rule on publishing the norms on the applicable electoral system in the Official Gazette of the Republic of Moldova at least one year before the election date is observed.

9. PROCEDURE FOR CONCLUDING AN INTERNATIONAL TREATY REGARDING A STATE FINANCIAL LOAN

On 7 may 2020, the Constitutional Court delivered Judgement no. 12 on the constitutional review of the Agreement between the Government of the Republic of Moldova and the Government of the Russian Federation regarding the granting of a state financial loan to the Government of the Republic of Moldova, Government Decisions no. 169 of 13 March 2020 and no. 252 of 21 April 2020 and Law no. 57 of 23 April 2020[9].

The Court found that the procedure for concluding the impugned Agreement was affected by the following vices: (i) the Government had not appointed or empowered any official delegation to negotiate the draft Accord; (ii) the negotiation was initiated in the absence of the opinion of the Parliament's Foreign Policy and European Integration Committee and of the opinion of the Ministry of Justice on the compatibility of the draft Agreement with the provisions of the Constitution of the Republic of Moldova and of the national law; (iii) the signing of the Agreement was approved in the absence of the opinion of the Parliament's Committee on Foreign Policy and European Integration; and (iv) the Parliament ratified the Agreement in the absence of a decision by the Constitutional Court on its constitutionality.

In order **to maintain the balance of power in the State and to respect the rule of law principle**, the Court considered that **the Parliament should have exercised effective control over the negotiation and signing of the contested Agreement, provided for in Article 66 i) of the Constitution**. As **this condition was not observed**, the Court noted that **the impugned Agreement was concluded in breach of the provisions of Articles 1 para. (3) and 66 i) of the Constitution**.

At the same time, the Court emphasized that as the power to legislate of the Parliament and the power to govern of the Government is exercised in the interest of the people – these being

[9] Judgement no. 12 of 07.05.2020 on the constitutional review of the Agreement between the Government of the Republic of Moldova and the Government of the Russia Federation regarding the granting of a state financial loan to the Government of the Republic of Moldova, signed on 17 April 2020, Government Decisions no. 169 of 13 March 2020 and no. 252 of 21 April 2020 and Law no. 57 of 23 April 2020

delegated by election and swearing into office – **the margin of discretion of these authorities is not absolute.** Thus, the Court noted that some provisions of the Agreement are unclear and unforeseeable, they generate legal uncertainty and are contrary to the national interests of the Republic of Moldova in the field of economic activity, guaranteed by Articles 1 para. (3), 9, 126 para. (2) b) and c) and 129 of the Constitution.

The Court ruled that the acts that were subject to the constitutional review are unconstitutional.

10. APPOINTMENT OF THE PROSECUTOR GENERAL AND THE INTERIM PROSECUTOR GENERAL

On 21 May 2020, the Constitutional Court ruled on the constitutionality of some provisions of Law no. 3 of 25 February 2016 on the Prosecutor's Office, of Parliament Decision no. 101 of 30 July 2019 regarding the candidacy submission for the position of interim Prosecutor General of the Republic of Moldova and of Decree of the President of the Republic of Moldova no. 1232-VIII of 31 July 2019 regarding the appointment of the interim Prosecutor General.[10]

From the perspective of affecting the constitutional mandate of the Superior Council of Prosecutors, as established by Articles 125 and 125^1 of the Constitution, the Court identified three categories of issues, which it analyzed. They refer to the appointment of the interim Prosecutor General, the pre-selection of the candidates for the position of Prosecutor General and the dismissal of the Prosecutor General.

As regards the appointment of the interim Prosecutor General, the Court reiterated that the interim is a temporary solution, which ensures the exercise of the functions for a period of time by a person other than the incumbent. In its case-law, the Court held that the reason for the interim lies in overcoming the situation created by the impossibility of the mandate holder to exercise his/her powers and in avoiding disruptions in the activity of this institution (JCC no. 9 of 21 May 2013, § 69).

The Court noted that the Constitution does not operate with the notion of "interim Prosecutor General", nor does it contain provisions regarding the intervention of the vacancy of this position. Thus, as regards the aspects related to the organization and internal functioning of the Prosecutor's Office in respect of which the Constitution has no provisions, the Parliament has the power to regulate them by law, while respecting the constitutional principles.

On the one hand, the Court noted that the Superior Council of Prosecutors is required by the Law on the Prosecutor's Office to propose in a short time an interim Prosecutor General, and on the other hand, if it is not accepted, the proposal may be rejected by the President of the Republic of Moldova. Subsequently, the role of the Superior Council of Prosecutors becomes secondary, the second proposal being made by the Parliament of the Republic of Moldova.

In the event of rejection by the President of the Republic of Moldova of the candidacy proposed by the Superior Council of Prosecutors, the constitutional role of the Council is significantly diminished, considering the fact that, according to para. (2^2) of Article 11 of the Law on the

[10] Judgement no. 13 of 21.05.2020 on the constitutional review of some provisions of Law no. 3 of 25 February 2016 on the Prosecutor's Office, of Parliament Decision no. 101 of 30 July 2019 regarding the candidacy submission for the position of interim Prosecutor General of the Republic of Moldova and of Decree of the President of the Republic of Moldova no. 1232-VIII of 31 July 2019 regarding the appointment of Mr. Dumitru Robu as interim Prosecutor General

Prosecutor's Office, the Parliament, a purely political body, takes over the prerogative of proposing a candidate for the position of interim Prosecutor General, and the Council becomes an approval body.

The Court concluded that the establishment of a time limit and the redistribution of powers regarding the proposal of the interim Prosecutor General, as provided for in Article 11 paras. (2^1) and (2^2) of the Law on the Prosecutor's Office, are likely to affect the role of the Superior Council of Prosecutors provided for by Articles 125 and 125^1 of the Constitution.

As regards the pre-selection of the candidates for the position of Prosecutor General, the Court noted that stipulating the procedure for appointing the Prosecutor General in the Constitution is a guarantee of his/her independence and the impartial exercise of his/her duties under the Law on the Prosecutor's Office (JCC no. 8 of 20 May 2013, § 53).

The Court underlined that Article 125 para. (1) of the Constitution provides explicitly the subjects with decision-making powers in the process of appointing the Prosecutor General, i.e. the Superior Council of Prosecutors and the President of the Republic of Moldova. The Court mentioned the Opinion of the Venice Commission, according to which the domestic constitutional framework appears to impose a rather strict rule regulating the powers of the Superior Council of Prosecutors in the process of appointment of the Prosecutor General. Any redistribution of decision-making powers which substantially affects the constitutional mandate of a given body requires a constitutional amendment. Otherwise the purpose of creating such a body at the constitutional level would be compromised *(*Amicus curiae Opinion no. 972/2019 on the amendments to the Law on the Prosecutor's Office (CDL-AD(2019)034), §§ 22, 26).

Substantial changes to the Law on the Prosecutor's Office in terms of pre-selection and proposal of the Prosecutor General have led the Court to conclude that the Commission set up by the Ministry of Justice has more than an advisory role. The Superior Council of Prosecutors is obliged to select a candidate from the list drawn up by the Commission. As long as the Council may not select a candidate from outside the list of candidates pre-selected by the Commission, it can be said that the latter intervenes substantially in the constitutional mandate of the Superior Council of Prosecutors.

In this regard, the Court noted the view of the Venice Commission, according to which the Constitution entitles Parliament to define, in a law, general procedures to be followed by the Superior Council of Prosecutors. On the other hand, the Superior Council of Prosecutors has a role under the Constitution which should not be usurped by the Parliament – this is the role of composing a list and selecting one candidate, to be proposed to the President of the Republic for appointment. The Superior Council of Prosecutors should follow the law, and the legislator should not exceed its law-making power to prevent the Superior Council of Prosecutors from exercising its constitutional mandate (Amicus curiae Opinion no. 972/2019 on the amendments to the Law on the Prosecutor's Office (CDL-AD(2019)034), §§ 39).

Based on the above, the Court considered that the involvement of the Commission set up by the Ministry of Justice in the process of appointing the Prosecutor General in the manner established by Article 17 of the Law on the Prosecutor's Office is contrary to Article 125 of the Constitution.

At the same time, the Court noted that, according to the provisions of Article 140 para. (1) of the Constitution, the laws or some parts thereof become null and void from the moment of adoption of the corresponding decision of the Constitutional Court. In its case-law, the Court observed that the text "from the moment of adoption of the decision" of the cited constitutional norm refers to the *ex nunc* effect of the decisions of the Constitutional Court, which presupposes that they produce effects for the future (JCC no. 5 of 25 February 2020, § 141; JCC no. 21 of 1 October 2018, §§ 33 and 41).

Based on the above, the Court noted that the finding of the unconstitutionality of some provisions of Article 17 of the Law on the Prosecutor's Office does not affect the procedures for the appointment of the Prosecutor General already carried out, and does not apply to the *ex ante* relations at the time of entry into force of the Judgement.

As regards the dismissal of the Prosecutor General, the Court mentioned that Article 125 para. (2) of the Constitution stipulates the authorities with decision-making powers in the process of dismissing the Prosecutor General, i.e. the Superior Council of Prosecutors and the President of the Republic of Moldova.

The Court reiterated, as in the case of the pre-selection of the candidates for the position of Prosecutor General, that the constitutional role of the Superior Council of Prosecutors is affected by the power given to the Commission to evaluate the activity of the Prosecutor General by the introduction of a mechanism capable of endangering the aim pursued by the constituent through Article 125^1 of the Constitution: to guarantee the independence and impartiality of prosecutors.

Stemming from the above, the Court declared Article 11 paras. (2^1) and (2^2), Article 17 paras. (2), (3), (5), (6), (7), (8), (9), (9^1) and (11^1) and Article 58 paras. (7), (8) and (9) of Law no. 3 of 25 February 2016 on the Prosecutor's Office.

11. PROVISIONAL RELEASE UNDER JUDICIAL CONTROL

On 28 May 2020, the Constitutional Court delivered a Judgement on the exception of unconstitutionality of Article 191 para. (2) of the Criminal Procedure Code[11].

The Court mentioned that preventive measures are institutions of procedural law of a coercive nature aiming to ensure the proper conduct of criminal proceedings. They concern the freedom of the accused and have the effect of either deprivation of liberty or restriction of the freedom of movement.

The Court noted that, according to Article 175 para. (5) of the Criminal Procedure Code, provisional release under judicial control and provisional release on bail are preventive measures alternative to arrest and can be applied only to the person in respect of whom an arrest warrant has been filed or to the accused who is already arrested.

After analyzing Article 176 para. (1) of the Criminal Procedure Code, the Court noted that preventive measures may be applied by the prosecutor, *ex officio* or at the proposal of the prosecuting authority, or, as the case may be, by the Court, only when there are sufficient reasonable grounds to assume that the accused may hide from the prosecuting authority or the

[11] Judgement no. 15 of 28.05.2020 on the exception of unconstitutionality of Article 191 para. (2) of the Criminal Procedure Code

court, put pressure on witnesses, destroy or damage evidence or otherwise prevent the establishment of the truth in criminal proceedings, or commit other crimes or that his release will cause public disorder.

At the same time, the Court held that, under Article 191 para. (2) of the Criminal Procedure Code, provisional release under judicial control does not apply to the accused if there are data that he will commit another crime, try to influence witnesses or destroy evidence, hide from the prosecuting authority, from the prosecutor or, as the case may be, from the court.

Thus, the Court considered that the grounds for applying provisional release under judicial control are divergently regulated by two provisions of the same normative act, and this normative inconsistency creates legal uncertainty and it is likely to affect the right to individual liberty and security of the person.

The Court emphasized that, in the absence of clarity in the criteria and conditions for the application of the preventive measure of provisional release under judicial control, the law does not provide sufficient protection against arbitrary interference and does not allow the person to establish his/her conduct and foresee with sufficient certainty the application of this preventive measure.

The Court noted that the provisions of Article 191 para. (2) of the Criminal Procedure Code do not pass the test of the quality of the law. They are in breach of Article 25 in conjunction with Article 23 para. (2) of the Constitution and are, therefore, unconstitutional.

The Court also noted that, although the author in the application did not invoke the provisions of Article 192 para. (2) of the Criminal Procedure Code, they are directly connected to the impugned provisions.

The Court being the master of in matters of constitutional review and taking into account the need for the uniform application of the framework regarding preventive measures in the entirety of the national legislation, pursuant to Article 6 para. (3) of the Constitutional Jurisdiction Code, the Court found that the provisions of Article 192 para. (2) of the Criminal Procedure Code, which establish a legislative solution similar to the criticized provisions, are unconstitutional.

The Court found Articles 191 para. (2) and 192 para. (2) of the Criminal Procedure Code *unconstitutional*.

12. PAYMENT OF THE FIXED FEE TO THE ADMINISTRATOR/LIQUIDATOR AND REIMBURSEMENT OF THE RELATED EXPENSES JOINTLY TRANSFERRED UNDER THE OBLIGATION OF THE GOVERNING BODIES OF THE DEBTOR

On 9 June 2020, the Court delivered a Judgment on the exception of unconstitutionality of the texts "shall be borne jointly by the members of the governing bodies and the associates, the shareholders or the members of the debtor" of Article 32 para. (2) and "under the obligation of the governing bodies" of Article 70 para. (13)[12].

[12] Judgement no. 16 of 09.06.2020 on the exception of unconstitutionality of Article 70 paras. (3) and (13) of Insolvency Law no. 149 of 29 June 2012

The Court held that the expressions “shall be jointly transferred by court order under the obligation of the governing bodies” of Article 70 para. (13) and “shall be borne jointly by the members of the governing bodies and the associates, the shareholders or the members of the debtor” of Article 32 para. (2) lead to the conclusion that the obligation to pay the fixed fee and the actual expenses is incurred by natural persons. The obligation to pay does not imply the existence of prejudicial acts from the persons to whom the payment is imposed, nor their subsequent compensation. The persons referred to will be compelled to pay the insolvency administrator's fee and to reimburse the expenses incurred by him/her whenever the insolvent debtor does not have sufficient goods. The only reason why these persons bear the patrimonial burden is that they have held a position in the governing bodies of the insolvent debtor in the last 24 months prior to the insolvency proceedings or that they hold the status of associates, shareholders or members of the insolvent legal entity.

It follows from these legal provisions that the persons mentioned above were obliged to pay the fixed fee and the expenses incurred by the administrator/liquidator in the insolvency proceedings even if they were not guilty.

The Court found an interference with the right to property of the above-mentioned persons.

The Court noted that the general purpose of the Insolvency Law was to satisfy creditors' claims on the debtor's assets by applying the restructuring or bankruptcy proceedings to it and by distributing the final product. This general aim was to ensure stability and financial discipline in the market economy. The Court also established that the legislature pursued the specific purpose of protecting the right to property of the administrator, and the sums of money forming his fee constituting goods. The specific purpose of the Law contributes both to the achievement of its general purpose and to the achievement of the constitutional goals of economic welfare and the protection of the rights and freedoms of others. The mentioned legal purposes fell within the legitimate aims allowed by Article 54 of the Constitution.

The Court also examined whether there were less intrusive alternative measures and whether the legislature could adopt them in order to equally achieve the legitimate aim(s) pursued and to limit less the protected fundamental right, compared to the impugned measures. The Court held that it did not possess the necessary expertise to exactly determine whether the practices identified in other States, for example, would achieve the legitimate aims pursued more effectively than the impugned measures.

At the same time, the Court noted that, from the perspective of Article 54 of the Constitution, there was a conflict of principles in this case. One of the principles was the right to property of the members of the governing bodies. The other principles, on the other side of the conflict, were the right to property of the insolvency administrator/liquidator, which sought to pay the fee and expenses related to the insolvency proceedings, the right to property of creditors and the interest of the country's economic well-being.

The Insolvency Law established a presumption of guilt of the members of the governing bodies, given their obligation to cover the remuneration of the insolvency administrator or the liquidator and the expenses of these subjects in connection with the insolvency and liquidation proceedings. That presumption could be rebutted, as it was clear from the legal texts examined by the Court.

The Court held that the balance between principles should not presuppose the existence of an individual and excessive burden on a person. A person must have effective and adequate safeguards in the event of abuse (e.g., some members of the managership bodies should not be held liable to cover the administrator's and liquidator's fees and expenses when insolvency has been caused by other members of the managership bodies). Even if the affected persons, i.e. the members of the managership bodies and the associates, the shareholders or the members of the debtor, would have had the possibility to prove the absence of their guilt in eventual judicial proceedings, the impugned provisions did not absolve them from the obligation to pay the fee and related expenses. The Court emphasized that such rigid measures clearly disadvantaged the right to property of the persons in question. From this point of view, their right to property was not sufficiently guaranteed.

The Court noted that the category of members of the debtor's governing bodies was a broad category, but not all functions listed in the Insolvency Law and included in the category of members of the debtor's governing bodies had an equal and decisive role in the management of a company. Therefore, the impugned rules had negative consequences for the members of the governing bodies of the insolvent company, which compelled them to pay the fixed fee of the insolvency administrator/liquidator, as well as the expenses incurred by him/her, even if they were not guilty in any way.

The Court noted that Article 248 para. (1) of the Insolvency Law established that "if in the course of the proceedings persons to whom the occurrence of the insolvency status of the debtor is attributable are identified, at the request of the insolvency administrator/liquidator the insolvency court may order that part of the insolvent debtor's debts be borne by the members of its governing bodies". The Court considered that the principle of fair balance required that the standard of guilt of the members of the governing bodies in the occurrence of the debtor's insolvency established by Article 248 of the Law, applicable to the general purpose of the Insolvency Law, be applicable to the specific purpose of payment of the administrator's/liquidator's fee.

The Court found the texts "shall be borne jointly by the members of the governing bodies and the associates, the shareholders or the members of the debtor" of Article 32 para. (2) and "under the obligation of the governing bodies" of Article 70 para. (13) of the Insolvency Law no. 149 of 29 June 2012 *constitutional*, insofar as they are proven guilty in the event of insolvency.

13. THE EXECUTIVE`S POWERS IN A STATE OF EMERGENCY

On 23 June 2020, the Constitutional Court delivered a Judgement on the constitutional review of some provisions of Law no. 212 of 24 June 2004 on the Regime of the State of Emergency, Siege and War and some provisions of Parliament Decision no. 55 of 17 March 2020 on declaring the state of emergency[13].

The authors of the application requested the Court to verify the constitutionality of some provisions of Law no. 212 of 24 June 2004 on the regime of the state of emergency, siege and war, and of the Parliament Decision no. 55 of 17 March 2020 on declaring a state of emergency.

[13] Judgement no. 17 of 23.06.2020 on the constitutional review of some provisions of Law No. 212 of 24 June 2004 on the Regime of the State of Emergency, Siege and War and of some provision of Parliament Decision No. 55 of 17 March 2020 on declaring the state of emergency

They claimed that the contested provisions did not meet the quality of law requirements, offers unlimited and unforeseen powers to the authorities responsible for managing the state of emergency, siege or war, allowed a disproportionate application of emergency measures and enabled the authorities to exercise both executive and the legislative prerogatives. The Court examined the complaints in the light of Articles 6, 20, 23, 54, 60 and 66 of the Constitution.

To determine whether the contested provisions comply with the standards of the Constitution, the Court examined the following problems:

a) Whether the contested provisions were foreseeable

On the compliance with the accessibility requirement, the Court noted therefore that the impugned provisions were published in the Official Gazette and, thus, accessible according to Article 23 of the Constitution.

On the compliance with the foreseeable requirement the Court noted that Article 2 para. 12) of Parliament Decision no. 55 of 17 March 2020 states that the contested provisions may be applied "only in order to prevent, mitigate and eliminate the consequences of the coronavirus pandemic (COVID-19)".

Also, taking into account the various emergency situations that may occur in the state of emergency, it was indispensable and inevitable for the legislator to use texts as “to apply other necessary measures”, “to exercise other necessary functions” or "to perform other necessary actions".

Authorities responsible for managing the state of emergency needed flexibility to be able to react promptly to various emergencies that may endanger the country. Using uptight wording or exhaustive description of the measures may limit the capacity of the executive branch to deal with the emergency situation it faces. Therefore, **in a state of emergency, a flexible regulation of measures that may be taken by the authorities to deal with the state of emergency is acceptable and necessary.**

b) Whether the contested provisions offered excessive powers to the executive in the context of the state of emergency

The Court noted that the Constitution does not provide many details on the state of emergency. The Basic Law stipulates that the Parliament declares the state of emergency, siege and war, that the regime of the state of emergency, siege and war is regulated by organic law, that during this period the Constitution cannot be revised and that Parliament cannot be dissolved. The Constitution thus does not establish what follows after declaring a state of emergency, or which authority is responsible to manage it, or the role of the Parliament, of the President and of the Government. Neither the Constitution does not provide whether the state of emergency increase or diminish the powers of this authorities.

In the absence of expressly mentioned exceptions in the Constitution, the Court held that both in ordinary situations and during the state of emergency, siege or war, the balance of powers must be the same. The constitutional organization of the Republic of Moldova, based on the checks- and balances principle, cannot be subject to modifications following declaring the state of emergency. Even in these exceptional circumstances, the Constitution does not allow for any derogation from this order and a fortiori does not allow to concentrate the branches of state

power in a single authority. Given the country's historical past and the fact that most abuses are committed against the background of emergencies this clause was established by the constituent to prevent the emergence of dictatorship.

On the other hand, the Constitution does not prohibit the Parliament from conferring additional powers on the executive to deal with an emergency, within the limits of constitutional provisions. At the same time, in order to avoid abuse, it is necessary to have certain guarantees that could reconcile the balance of powers in the state, on the one hand, and the need to ensure state security, on the other.

Thus, in order to assess whether through the contested provisions the Parliament gave excessive powers to the executive, the Court examined the following issues: (i) whether the powers of the executive are limited in time; (ii) whether the powers of the executive have a limited scope; (iii) whether the law provides for a parliamentary scrutiny mechanism; and (iv) whether the executive's exceptional measures may be challenged.

(i) Whether the powers of the executive are limited in time

The Court noted that Article 18 of the Law on the Regime of the State of Emergency, Siege and War limits the state of emergency to 60 days at most and depending on the evolution of the situation it can be extended or reduced by the Parliament at the request of the President of the Republic or of the Government. The same Law provides that, after the lifting of the state of emergency, siege or war, the normative acts adopted for this period are repealed without special notice in this respect [Article 4 para. (3)]. The Court therefore held **the powers of the executive are limited in time.**

(ii) Whether the powers of the executive have a limited scope

The Court noted that Parliament had given increased powers to the authorities responsible for managing the state of emergency.

The authorities responsible for managing the state of emergency are, by their nature, part of the executive branch. Thus, even though the legislator used flexible wording to describe the measures that may be ordered by these authorities, the Court noted that they cannot go beyond the executive's competence, as the only powers they have in Parliament are executive. **The contested legal texts do not contain provisions that would allow these authorities to take over from the attributions of the legislative power, i.e. to adopt, amend or repeal laws.**

The Parliament, according to Article 60 para. (1) of the Constitution, remains in all cases the supreme representative body of the people of the Republic of Moldova and the sole legislative authority of the state. The Parliament cannot relinquish its constitutional status even in the state of emergency, and no other authority can change its status, otherwise it would undermine the sovereignty of the people.

If the authorities responsible for managing the emergency need to legislate in order to overcome an imminent danger, the Constitution offers them several alternatives. They may require the application of the exceptional legislative procedures provided in the Constitution, namely, they may require the Government to assume its responsibility for a draft law [Rule 106^1] or they may require Parliament to empower the Government with the right to issue ordinances in fields

outside the scope of organic laws [Article 106[2]]. Also, the draft laws presented by the Government, as well as the legislative proposals of the MPs accepted by it can be examined by the Parliament in the manner and according to the priorities set by the Government, including in the emergency procedure [Article 74 para. (3)].

The Court therefore concluded that **the additional powers of the authorities responsible for managing the state of emergency are strictly limited by the reasons and objectives underlying the declaration of the state of emergency and cannot exceed the powers of public authorities established by the Constitution.**

Given that **the contested provisions may be applied only within the competence of the executive branch** and that they are limited to the reasons and objectives underpinned the declaration of the state of emergency, the Court held that **they are limited, concrete and strictly functional in scope.**

(iii) Whether the law provides for a parliamentary scrutiny mechanism

In the view of the Venice Commission, parliamentary scrutiny of the acts and actions of the emergency authorities and the establishment of special procedures for such scrutiny are important for the rule of law and democracy.

The Court observed that the Law on the Regime of the State of Emergency, Siege and War only provides that the Parliament participates in the declaration [Article 12 para. (1)], extension [Article 15] and lifting of the state of emergency [Article 16 paras. (1) and (2)].

The Court reiterated that the purpose of any parliamentary scrutiny is to verify the acts and actions of the representatives of the executive branch in terms of compliance with the law, respect for human rights and freedoms, as well as compliance with the general interest of society.

The above-mentioned law does not establish sufficient mechanisms that would allow Parliament to verify whether the authorities responsible for managing the state of emergency act within the limits provided by law. In this regard, the Court noted that **parliamentary scrutiny is necessary to compensate for the imbalance of power in the State created by giving the Executive increased powers and to ensure respect for the principle of the rule of law.**

On the lack of effective parliamentary scrutiny, the Court held that the Constitution does not require the legislator to regulate this mechanism according to a certain model. For this reason, the Court issued a Request to Parliament in order to regulate an effective parliamentary control mechanism over the measures ordered by the Executive during the state of emergency.

(iv) Whether the executive's exceptional measures may be challenged

The Court reiterated that, together with Parliament, the judiciary plays a crucial role in controlling the prerogatives of the executive during the state of emergency, with common law judges verifying the legality of concrete emergency measures. The judiciary must ensure the right to a fair trial in these situations as well. The individuals should also have the right to an effective remedy if public authorities violate their fundamental rights through emergency measures.

The Court found that in Article 225 para. (3) of the Administrative Code, the legislator established that the notified courts may exercise judicial control only over a) the existence of the exceptional situation on the date on which the act was issued; b) the power of the public authority to issue the act; c) the existence of the public interest that justifies the issuance of the administrative act; d) the actual impossibility of the public authority to issue the act under normal conditions.

The Court held *prima facie* that the emergency measures of the authorities responsible for managing the state of emergency may be challenged before the courts. However, **the judges are not allowed to examine whether the contested measures are "strictly required by the requirements of the emergency", i.e. whether they are proportionate.**

Thus, the control provided by the Administrative Code the on complaints of emergency measures **is not sufficient and does not ensure its exercise before a tribunal with "full jurisdiction", as required by Article 20 of the Constitution.**

(c) Whether the contested provisions are proportionate to the legitimate aim pursued

As it had to consider legislative measures with a very wide scope, the principle of proportionality requires the existence of guarantees which could compensate for the possible abusive application of the contested provisions. First, there must be a remedy in the form of judicial review against the abusive actions of public authorities in the event that they occur. Thus, the law must provide persons affected by the emergency measures of the executive during the state of emergency access to a court with "full jurisdiction".

As Article 225 para. (3) of the Administrative Code does not ensure a review by a court with "full jurisdiction", the Court held that the contested provisions are disproportionate.

The Court recognized as constitutional the contested provision of the Law no. 212 from 24 June 2004 on the state of emergency, siege and war regime and the text "other necessary actions" from Article 2 para. 12) of the Parliament Decision no. 55 of 17 March 2020 on the declaration of a state of emergency, insofar as:

> (a) the authorities responsible for managing the state of emergency perform only the tasks, measures or actions necessary to achieve the objectives which were the basis for declaring the state of emergency;
>
> (b) the tasks, measures and actions do not go beyond the scope of executive power, and
>
> (c) the Parliament can exercise an effective control over the measures in question.

The Court also declared Article 225 para. (3) of the Administrative Code insofar as it limits the jurisdiction of the courts to control the proportionality of the measures ordered by the public authority.

The Court noted that until the Parliament amends the Administrative Code, in the case of challenging the measures taken by the authorities responsible for managing the state of emergency, the courts will have to assess whether the measure ordered by the public authority is proportionate to the situation that determined it.

14. NON-COMPLIANCE WITH MEASURES FOR THE PROPHYLAXIS, PREVENTION AND/OR CONTROL OF EPIDEMIC DISEASES, IF THIS ENDANGERED PUBLIC HEALTH

On 30 June 2020, the Court delivered a Judgment on the constitutional review of Article 76^1 para. (1) of the Contravention Code[14].

The Court analyzed the applications in the light of Articles 20, 22 and 46, in conjunction with Articles 1 para. (3), 23 para. (2) and 54 para. (2) of the Constitution.

In order to assess whether the contested provisions comply with the constitutional standards, the Court examined them under two aspects: a) the compliance with the requirements of the law and b) the compliance with the principle of individualization of the penalty.

a) On the compliance with the requirements of the law

On the compliance with the foreseeable requirement the Court noted that Article 76^1 para. (1) of the Contravention Code is a reference rule. It cannot be viewed in isolation, but in conjunction with other applicable normative acts.

In this regard, the Court noted that there are several acts establishing measures for the prophylaxis, prevention and/or control of epidemic diseases. Moreover, these measures may be adopted in the case of several epidemic diseases, including the coronavirus pandemic (COVID-19).

The Court therefore emphasized that the measures referred to in Article 76^1 para. (1) of the Contravention Code are established according to the nature and evolution of the epidemic disease, the rules of prophylaxis and the methods of treatment of each epidemic disease. In this respect, the Court noted that **the ascertaining agents must prove and the courts must verify in each particular case by which actions/omissions the person endangered public health.**

In this regard, the Court noted that Article 76^1 para. (1) of the Contravention Code provides for the endangerment of public health as *a sine qua non* condition for committing the contravention. The lack of establishing a danger to public health results in the non-meeting of the objective side as a constituent element of the contravention.

Therefore, the Court stressed that **the provisions of Article 76^1 para. (1) of the Contravention Code, "non-compliance with measures for the prophylaxis, prevention and / or control of epidemic diseases, if it endangered public health" are accessible and foreseeable,** from the perspective of the lawfulness of the substantial criminal law (*nullum crimen, nulla poena sine lege*).

b) On the compliance with the principle of individualization of the penalty of Article 76^1 para. (1) of the Contravention Code

The Court held that the Parliament cannot regulate a penalty in a way to deprive the court of the possibility of individualizing it effectively and reasonably. By limiting the role of the courts, it lacks the guarantees of the right to a fair trial, guaranteed by Articles 20 of the Constitution and 6 of the European Convention.

[14] Judgement no. 18 of 30.06.2020 on the constitutional review of Article 76^1 para. (1) of the Contravention Code

In this respect, the Court has ruled that not only a fixed penalty set by the legislator, but also **a relatively small difference between the minimum and the maximum limit of the penalty, depending on the harmful act and the multitude of factual means of committing it, are likely to affect the right to a fair trial, by restricting the jurisdiction of the courts to exercise its full jurisdiction over the individualization and opportunity of the penalty.**

Therefore, the Court stressed out the a relatively small difference between the minimum of 450 conventional units and the maximum of 500 conventional units of a penalty limits does not give the courts the opportunity to assess the proportionality of the penalty applied in relation to the offence and the circumstances of the case, in order to ensure a fair balance between the aim pursued and the means, and that the means used do not restrict the rights of the person more than necessary to achieve these aims.

Moreover, the Court pointed out that in the case of a legal person the fine can be set from 1000 conventional units to 1500 conventional units. Therefore, the Court noted that the margin between the minimum and maximum limit is 500 conventional units, which allows the courts to individualize the penalty according to the committed offense. The Court also held that factual means to commit the harmful act by a legal entity are not so varied as for individuals.

Therefore, the Court found that **the text "from 450" in Article 761 para. (1) of the Contravention Code is unconstitutional.**

The Court has ruled that, in order to enforce this judgment, until the modifications of the legal framework, for non-compliance with measures for the prophylaxis, prevention and/or control of epidemic diseases, if it endangered public health, a fine from the minimum limit, established by Article 34 para. (2) of the Contravention Code, up to the maximum limit of 500 conventional units, provided by Article 76^1 para. (1) of the Contravention Code shall be imposed to the individual.

15. THE POSSIBILITY OF DISSOLUTION OF THE PARLIAMENT IN THE LAST SIX MONTHS OF THE TERM OF OFFICE OF THE PRESIDENT OF THE COUNTRY AND THE POSSIBILITY OF ORGANIZING PARLIAMENTARY AND PRESIDENTIAL ELECTIONS IN THE SAME PERIOD

On 7 July 2020, the Court issued a judgement on the interpretation of Articles of the Constitution[15] explaining the following issues:

(1) Does the Constitution allow the dissolution of the Parliament in the last 6 months of the term of the President of the Republic?

(2) Does the Constitution allow the dissolution of the Parliament in the last 6 months of the term of office of the President of the Republic if during this period the President resigns and the conditions for the dissolution of the Parliament are met?

(3) Does the Constitution allow for the holding of parliamentary elections and presidential elections (ordinary or early) at the same time?

(4) Does the Constitution allow the simultaneous conduct of two elections in the same period?

[15] Judgement no. 19 of 07.07.2020 on the interpretation of Articles 2 para. (1), 38, 61 paras. (1) and (3), 78, 85 paras. (1), (2) and (4), 90 paras. (1), (2) and (4) of the Constitution

(5) What is the procedure to be followed for holding early parliamentary elections and presidential elections at the same time?

I. Whether the Constitution allows the dissolution of the Parliament in the last 6 months of the term of office of the President of the Republic

The Court found that its interpretation of Judgement no. 29 of 24 November 2015 was given only for the situation in which the President of the Republic was elected by the Parliament, an interpretation which is not currently valid, because the President of the Republic is elected by the people.

The constant nature of this prohibition is also explained by the fact that in the idea of the constituent on the separation of branches of power, provided for in Article 6 of the Constitution, this separation implies that public authorities elected by the people be constituted in a way that prevents their uniformity, thus offering the solution of the temporal separation of the parliamentary and presidential electoral campaigns.

The Court noted that the **Basic Law explicitly and absolutely prohibits the dissolution of Parliament in the last 6 months of the term of the President of the Republic and does not provide for exceptions to this ban.**

Therefore, the dissolution of the Parliament in the last 6 months of the term of office of the President of the Republic of Moldova **is prohibited under any circumstances.**

II. Whether the Constitution allows the dissolution of the Parliament in the last 6 months of the term of office of the President of the Republic if during this period the President resigns and the conditions for the dissolution of the Parliament are met

The Court noted that the President of the Republic has the right to resign if he deems it necessary and that his decision is of an absolute nature, being described as a "voluntary and subjective" circumstance arising on his own initiative. The President may not be compelled to exercise his/her office against his/her will. If he/she resigns, his/her duties shall be taken over, in accordance with the provisions of Article 91 of the Constitution, by the President of Parliament or the Prime Minister.

The prohibition provided by Article 85 para. (4) of the Constitution operates regardless of whether in the last 6 months of the term of office of the President of the Republic this function is exercised by the President-elect or by the persons who constitutionally ensure the interim position during that period.

Therefore, **the Constitution does not allow the dissolution of the Parliament in the last 6 months of the term of office of the President of the Republic if during this period the President resigns and the conditions for the dissolution of the Parliament are met.**

III. Whether the Constitution allows for the holding of parliamentary elections and presidential elections (ordinary or snap) at the same time

The Court noted that the Constitution prohibits the creation of situations in which the structures of the state elected by the people are lacking in continuity, that the separation of powers presupposes that the public authorities elected by the people be constituted in a way that prevents their uniformity, which means banning the overlapping of election campaigns for the

election of Parliament with that for the election of the President of the Republic. The Court noted that in the case of the simultaneous organization of presidential and parliamentary elections (ordinary or snap) the requirements in question would not be met.

Therefore, the Constitution does not allow parliamentary elections and presidential elections (ordinary or snap) to take place during the same period.

IV. Whether the Constitution allows the simultaneous conduct of two elections in the same period

The Court noted that the only prohibition on the simultaneous conduct of two elections concerns the status of parliamentary and presidential elections (ordinary or snap) during the same period. The latter results from Article 85 para. (4) of the Constitution, which prohibits the dissolution of Parliament in the last six months of the term of office of the President of the Republic. Regarding the holding of other elections on the same day (e.g. parliamentary and local or presidential and local), the Court noted that the Constitution does not contain provisions that would prohibit this.

Therefore, the Constitution **allows the simultaneous conduct of two elections in the same period, except for the conduct of parliamentary and presidential elections (ordinary or snap).**

V. On the procedure to be followed for holding early parliamentary elections and presidential elections during the same period

The Court noted that by this question the applicant addressed to the Court not because the text of the Constitution is unclear to him, but rather to obtain legal advice. The Constitution does not confer such jurisdiction on the Court. The Court therefore considered that this complaint should be rejected as inadmissible.

16. THE POSSIBILITY TO CHALLENGE THE DECISIONS OF THE CONSTITUTIONAL COURT BEFORE ORDINARY COURTS

On 9 July 2020, the Constitutional Court delivered a Judgment on the interpretation of Articles 134 para. (1) and (2), 136 para. (3) and 140 para. (2) of the Constitution[16].

The authors of the applications asked the Court to explain, by interpreting the Articles of the Constitution, the following issues:

(1) Is the final nature of the decisions of the Constitutional Court provided by Article 140 para. (2) of the Constitution applicable to all the decisions delivered by the Court in the exercise of its powers provided by the Constitution?

(2) Are the decisions of the Constitutional Court on the election and/or removal of the President of the Constitutional Court subject to appeal?

I. Whether the final nature of the decisions of the Constitutional Court provided by Article 140 para. (2) of the Constitution is applicable to all the decisions delivered by the Court in the exercise of its powers provided by the Constitution

[16] Judgement no. 20 of 09.07.2020 on the interpretation of Articles 134 paras. (1) and (2), 136 para. (3) and 140 para. (2) of the Constitution

The Constituent Assembly established in Article 140 para. (2) the same constitutional status for all the decisions adopted by the Plenary of the Constitutional Court regarding the problems attributed to its exclusive power by the Constitution, namely that they „are final and cannot be appealed".

The Court notes that the acts issued in the context of the exclusive constitutional powers of the Constitutional Court cannot be subject to censorship neither on the constitutionality aspect, nor in respect to lawfulness, by any public authority, including by an ordinary court in administrative proceedings. Therefore, the Constitution does not empower other public authorities to examine a decision of the Constitutional Court and to consider it unconstitutional or illegal.

Otherwise, if it would be possible to challenge the acts of the Court issued in the exercise of its powers expressly provided by the Constitution in administrative proceedings, that would enable the direct intervention of the judicial power in issues concerning the functionality of the Court, infringing the principles of supremacy of the Constitution and separation of State powers, the enforcing of which needs to be ensured, according to Article 134 para. (3) of the Constitution, by the Constitutional Court itself. In this case, ordinary courts would verify, in light of infra-constitutional acts, how the Court, in the exercise of its constitutional powers, applied the Constitution. Moreover, the potential judicial review of the acts of the authority of constitutional jurisdiction mentioned *supra* would undermine the role of the Constitutional Court as guarantor of the Constitution and as an independent body, which abides only by the Supreme Law.

Thus, if the guarantor of the supremacy of the Constitution may be subject to control by other State authorities, then the constitutional status of the Constitutional Court as the sole authority of constitutional jurisdiction would be illusory and fictitious.

The only instrument of verification and modification of the decisions of the Constitutional Court is their revision, which is an exclusive power of the Constitutional Court. The Court notes that the investment of the Constitutional Court with the power to review its own acts and procedures is a fundamental element of its independence.

In the eyes of the Venice Commission, it is important that only the Constitutional Court itself be able to revise its judgments. No other public authority can be authorized to do so. If a public authority were to be given the power to review the constitutionality or lawfulness of an act of the Constitutional Court, the independence of the Constitutional Court would be compromised.

Thus, any act of the Constitutional Court (judgement, advisory opinion, decision), delivered in relation to the exercise of a power expressly provided in the Constitution enjoys final and unchallengeable nature, prescribed by Article 140 para. (2) of the Constitution.

II. Whether the decisions of the Constitutional Court on the election and/or removal of the President of the Constitutional Court may be subject to appeal

The Court noted that the election and dismissal of the President of the Court is a constitutional power of the Constitutional Court. The presence of an express text in the Constitution concerning the election of the President of the Constitutional Court, a text that covers, reasonably, his removal as well, makes these procedures gain a strictly constitutional nature.

The Court noted that this power belongs to the functional autonomy of the Court, which arises from the constitutional guarantees of its independence. The Court mentioned that the acts concerning the election or removal of the President of the Court are adopted by virtue of its right to self-administration in order to perform the Court's powers expressly provided by the Constitution. The relations between the Constitutional Court and its President have an exclusive constitutional nature.

The function of President of the Constitutional Court is a primus inter pares one, exercised without holding any superior jurisdictional function over that of the other constitutional judges, the Plenary of the Constitutional Court leading, de facto, the overall activity of the Court.

The Court notes that no other State authority, including ordinary courts, may replace the option and secret vote expressed by constitutional judges when electing the President of the Court. The election of the President of the Court is done by equal judges who are independent in the option expressed by their vote. The President of the Court is not appointed by a public authority, so as to ensure the functional autonomy of the Constitutional Court, and the entirely personal option of constitutional judges, expressed by secret ballot in order to exercise a constitutional power, may not be challenged.

Therefore, the Court noted that the decisions of the Court on the election and removal of the President of the Constitutional Court cannot be challenged before ordinary courts.

17. PROHIBITION TO LEAVE THE COUNTRY OR PLACE OF RESIDENCE IN INSOLVENCY PROCEEDINGS

On 4 August 2020, the Court delivered a Judgement on the exception of unconstitutionality concerning the omission to regulate in Article 84 of the Insolvency Law the maximum duration for which the prohibition to leave the country or place of residence in insolvency proceedings may be imposed[17].

The relevant provisions of the Insolvency Law provide that "after initiating insolvency proceedings, the insolvency court, *ex officio* or at the request of the administrator/liquidator, may prohibit the debtor or the representative of its governing bodies from leaving the territory of the Republic of Moldova without its express permission if there is evidence that he may be hiding or evading participation in the proceedings" [Article 84 para. (1)], as well as that, in case of evasion by the debtor from fulfilling the obligations provided by law, the insolvency court, at the request of the administrator, the creditors' meeting or the creditors' committee or *ex officio*, may prohibit the debtor from leaving the place of residence without its express permission" [Article 84 para. (2)]. Therefore, in the event that he/she does not fulfill his/her obligations and/or attributions provided by law, the court may prohibit the natural person debtor or the debtor's legal entity representative from leaving the country or place of residence.

The legislator established that the prohibition to leave the country or, as the case may be, the place of residence is valid for "the entirety of the insolvency proceedings unless the insolvency court establishes otherwise" [Article 84 para. (3) of the Insolvency Law]. The Court found that the above-mentioned rule does not set time limits for which the prohibition to leave the country or place of residence is valid, and insolvency proceedings, depending on the type of procedure (restructuring, bankruptcy, etc.), the number of creditors, the value of the debt mass, etc., could

[17] Judgement no. 21 of 04.08.2020 on the exception of unconstitutionality of Article 84 of Insolvency Law no. 149 of 29 June 2012

have a greater or lesser complexity and, respectively, a different duration. This rule does not provide for any criteria or conditions that would allow the court to determine and the person concerned to know the period of time for which the ban is applied.

Thus, the Court found that Article 84 para. (3) of the Insolvency Law does not offer the persons concerned sufficient foreseeability and sufficient safeguards against arbitrary interference, as required by Article 23 para. (2) of the Constitution.

The Court noted that the lack of regulation on the maximum duration of the prohibition to leave the country and, respectively, the place of residence constitutes a legislative omission contrary to the Constitution.

At the same time, the Court emphasized that, faced with a legislative omission, and by virtue of its role as guarantor of the supremacy of the Constitution, it cannot only establish the unconstitutionality of the impugned rule, but must come up with a provisional solution. The Court noted that Article 64 of the Enforcement Code states that "the prohibition to leave the country shall be applied by the judge for no more than 6 months, at the request of the bailiff, only when the presence of the debtor is necessary for the effective execution of the enforcement warrant and only after taking measures to ensure the execution of the enforcement warrant, with the obligation of the bailiff to periodically carry out a review regarding the necessity of maintaining the prohibition". In case it is necessary to maintain the prohibition for a longer period of time, the prohibition may be applied repeatedly following a reasoned request by the bailiff, but no more than three times in the course of the same enforcement proceedings. As in the case of insolvency, the enforcement procedure has the task of contributing to the realization of creditors' rights. Therefore, the Court considered that until the amendment of Article 84 of the Insolvency Law by the legislator, and in order to establish a practice in accordance with the Constitution, the insolvency courts will, accordingly, apply the deadlines set by Article 64 of the Enforcement Code when instituting a prohibition to leave the country or place of residence.

18. PRESENTATION OF TAX INFORMATION AS EVIDENCE TO THE COURTS AND PROSECUTING AUTHORITIES

On 6 August 2020, The Court delivered a Judgement on some provisions of the Fiscal Code, which provide that information held by the tax services may be presented to the courts and prosecuting authorities only for the purpose of examining cases related to tax evasion[18].

The Court noted that Article 26 of the Constitution guarantees the right to defence. The right to defence implies the possibility of every person to react independently, by legitimate means, before a court, to the violation of his/her rights and freedoms. The Court emphasized that the right to defence, as a guarantee of the right to a fair trial, encompasses all the rights and procedural rules that offers to a person the opportunity to defend against allegations and to challenge them in order to prove his/her innocence. Therefore, the right to defence must be ensured throughout the criminal proceedings. In this respect, the European Court noted that in determining the fairness of the trial as a whole, it must be taken into account whether the right to defence has been respected. Thus, it is necessary to examine in particular whether the accused was given the opportunity to have access to and to administer the evidence which

[18] Judgement no. 22 of 06.08.2020 on the exception of unconstitutionality of some provisions of Article 226[16] para. (11) of the Fiscal Code, adopted by Law no. 1163 of 24 April 1997

he/she considers necessary to use in his/her defense (see *Rowe and Davis v. the United Kingdom*, 16 February 2000, § 60).

The Court noted that under constitutional and legal provisions, judicial authorities are required to take all necessary measures to ensure that the defense is effectively exercised. To exercise the right to defence, the accused must have the possibility to benefit from all the means of evidence, which may be decisive for the defense. Therefore, a person's right to effectively prepare his/her defense is inextricably linked to the right of access to evidence.

The Court emphasized that a distinct issue in the context of ensuring the defendant's right to defence is the access to all the evidence relating to the case in order to exercise the right to defence, but in some cases the State has the right not to disclose certain facts, thus guaranteeing the respect for another fundamental right, e.g. the right to private life. The weight of competing rights is determined by common law courts through balancing, depending on the circumstances of each particular case. In accordance with the provisions of Article 54 of the Constitution, any legal limitation of the right to defence must be convincingly justified by the pursuit of a legitimate aim. It must be proportionate to the situation which gave rise to it and must not affect the existence of that right. In other words, when a right is limited, a fair balance must be struck between it and the legitimate aim pursued.

The Court noted that, in criminal matters, the regulation of safeguards specific to a criminal trial must be limited to a clear and effective procedure allowing access to evidence. The Court noted that the contested provisions of Article 226^{16} para. (11) of the Fiscal Code, which regulates the mechanism for declaring and ensuring the confidentiality of tax information, provide for the presentation of information held by tax services to courts and prosecuting authorities only for the purpose of examining cases of tax evasion, not in other cases. At the same time, the Court noted that the contested provisions of Article 226^{16} of the Fiscal Code prohibit access to information that may lead to the identification of a person, in particular access to the identification code, name, surname, availability of funds and personal property.

The Court stressed that the legislator had given a greater protection to the right to private life over the right to defence. In this regard, the Court held that both rights are protected by the Constitution, by Article 28 and Article 26 respectively. Neither of them is absolute. Each right may be subject to restrictions, *inter alia*, for the protection of the rights of others, as provided in Article 54 para. (2) of the Constitution. Moreover, the Constitution does not establish an *a priori* hierarchy between these fundamental rights.

By adopting such measures, the legislator denied *de plano* the interests of the person to ensure an effective defense in the criminal proceedings he/she is involved in, not related to the tax sphere. Thus, the manner in which the criticized text was regulated prohibits any balancing of competing interests by the common law judge.

Accordingly, the Court found that the contested provisions of Article 226^{16} para. (11) of the Fiscal Code are in breach of Article 26 of the Constitution, as they do not ensure a fair balance for the right to defence, as prescribed by Article 54 of the Constitution.

19. THE PRESIDENT OF THE REPUBLIC'S ROLE IN THE NOMINATION PROCEDURE OF THE CANDIDATE FOR THE POSITION OF PRIME MINISTER

On 6 August 2020, the Court delivered a Judgment interpreting Articles 89, 91 and 98 para. (1) of the Constitution[19].

The author of the application asked the Court to explain some issues, by interpreting Articles 91 and 98 para. (1) of the Constitution:

(1) Does the President of the Republic have an absolute margin of discretion in the nomination of the candidate for Prime Minister or is he/she obliged to nominate the candidate proposed by the parliamentary majority during consultations?

(2) Can the mechanism for establishing the interim position of President of the Republic, established by Judgement of the Constitutional Court no. 28 of 17 October 2017, be applied if the President refuses to nominate the candidate for the position of Prime Minister submitted by the parliamentary majority?

I. As regards the President of the Republic's discretion to nominate a candidate for Prime Minister and whether he/she is required to nominate a candidate proposed by a parliamentary majority during consultations

The Court observed that this aspect of the application was elucidated by Judgment of the Constitutional Court no. 32 of 29 December 2015. In this Judgment, the Court held that Article 98 para. (1) of the Constitution provides for the exclusive power of the President of the Republic to nominate a candidate for the position of Prime Minister. At the same time, the Court emphasized that, although exclusive, the nomination could not be discretionary, as the President would nominate a candidate for the position of Prime Minister only after consulting the parliamentary factions. The Court noted that the vote of the Parliament is essential in the procedure of forming and swearing in the Government. The purpose of the consultations is to identify the political support of the MPs for a particular person, capable of forming a Government that enjoys the confidence of the Parliament. What matters in these consultations is obtaining political support for the person who could be nominated as a candidate for the position of Prime Minister. The Court also noted that the President of the Republic may come to the consultations with his/her own proposal, which may be accepted. However, it is equally possible that in these political consultations the candidate proposed by the President for the position of Prime Minister will not be approved by his consulting partners. In this regard, the Court noted that the President of the country cannot subordinate the political dialogue partners he/she consults. In this role, the President of the Republic acts only as a representative of the State, which has the right and responsibility to find a way of dialogue and to assess the will and capacity of the MPs consulted to support a particular candidate from a parliamentary point of view. In appointing the candidate for Prime Minister, the President of the Republic must prove his/her impartiality and political neutrality, his/her equidistance from all parliamentary groups. The President has no constitutional right to overlap with parliamentary groups.

The Court noted that the President intervenes exclusively as a representative of the State, in order to establish and formalize by the significance and solemnity of his/her function and in order to maintain with the authority of his/her power the balance between the Parliament and a

[19] Judgement no. 23 of 06.08.2020 on the interpretation of Articles 89, 91 and 98 para. (1) of the Constitution

possible future Government. The interpretation of the Constitution in the sense of the existence of a discretionary right of the President of the country to nominate the candidate for the position of Prime Minister may lead to institutional conflicts, because the President of the Republic cannot impose on the Parliament a certain option regarding the person who will hold the office of Prime Minister.

Analyzing the role of each of the two public authorities in the procedure of forming the Government, the Court concluded that the role of the Parliament is a decisive one in relation to the role of the President of the Republic. The Court held that, in accordance with the provisions of Article 60 para. (1) of the Constitution, the supreme representative body of the people of the Republic of Moldova is namely the Parliament.

The Court noted that there is no constitutional and democratic reason for the President of the Republic not to nominate as candidate for the position of Prime Minister the person who has the support of the parliamentary majority, even if he/she is opposed to the President.

Thus, in case of constituting an absolute parliamentary majority, the President of the Republic is to nominate the candidate supported by this majority. Only if an absolute parliamentary majority is not constituted, the President of the country has the obligation, after consulting the parliamentary factions, to nominate a candidate for the position of Prime Minister, even if the parliamentary factions do not agree with the President's proposal.

Exercising in this way the power of the President of the Republic regarding the nomination of the candidate for the position of Prime Minister, regulated by Article 98 of the Constitution, is likely to maintain the relations between the Parliament and the President in the balance imposed by the Constitution for the parliamentary republic.

The Court held that the manner of electing the President of the Republic (by universal, equal, direct, secret and free vote or by Parliament) does not influence in any way the manner in which the head of State exercises the constitutional power regulated by Article 98 para. (1) of the Constitution.

II. As regards the possibility to establish on the basis of Judgement of the Constitutional Court no. 28 of 17 October 2017, an interim President of the Republic, in case the President refuses to nominate the candidate for the position of Prime Minister submitted by the parliamentary majority

In order to elucidate whether the mechanism provided by Judgement of the Constitutional Court no. 28 of 17 October 2017 is applicable in this case, the Court examined, first of all, whether it maintains its solution. The Court goes through this exercise in every case in which it is called upon to apply a previously delivered Judgment. This way, the Court ensures that its case-law is consistent and in accordance with the requirements established by the Constitution.

Analyzing Judgement no. 28 of 17 October 2017, the Court observed that it applied the institution of the interim office of the President of the Republic, regulated by Article 91 of the Constitution, in the event the President of the country deliberately refused, for subjective reasons, to exercise his/her constitutional powers, although this case had to be resolved in the light of the institution of suspension from office and dismissal of the President of the Republic, established by Article 89 of the Constitution. The Court considered that, unlike dismissal,

which is a complex and lengthy procedure, the interim office promptly resolves the issue of the complete functionality of the fundamental institutions of the State.

In this respect, the Court noted that the suspension from office and the dismissal of the President of the Republic is a complex procedure but, at the same time, it is a procedure expressly prescribed by the Constitution in the event the President of the Republic commits serious acts that violate the provisions of the Supreme Law. Therefore, the Court came to the conclusion that **a mechanism not based on the Constitution was created by the functional interpretation of the Constitution in the case of Judgement no. 28 of 17 October 2017.**

The Court noted that this conclusion can also be found in the Opinion of the Venice Commission on the constitutional situation with particular reference to the possibility of dissolving Parliament, adopted at the 119th plenary session (Venice, 21-22 June 2019), CDL - AD(2019)012.

In view of the reasoning presented *above*, the Court considered necessary to re-evaluate its considerations and the solution established by Judgement no. 28 of 17 October 2017.

The Court noted that the head of State cannot be out of liability. The Constitution of the Republic of Moldova provides for two mechanisms of liability of the President of the Republic, namely: legal (criminal) liability and political (constitutional) liability.

The legal (criminal) liability of the President of the country is regulated by Article 81 para. (3) of the Constitution. This Article provides that the Parliament may decide to impeach the President of the Republic of Moldova, with the vote of at least two thirds of the elected MPs, if he/she commits a crime. The jurisdiction belongs to the Supreme Court of Justice, in accordance with the law. The president is dismissed by law on the date of the final conviction.

The political (constitutional) liability of the President of the country is established by Article 89 of the Constitution. This Article stipulates that in case of committing serious acts that violate the provisions of the Constitution, the President of the Republic of Moldova may be suspended from office by the Parliament, with the vote of two thirds of the MPs [para. (1)]. The proposal for suspension from office may be initiated by at least one third of the MPs and shall be brought to the attention of the President of the Republic of Moldova without delay. The President may give an explanation to the Parliament regarding the facts imputed to him/her [para. (2)]. If the proposal for suspension from office is approved, a referendum shall be held within 30 days for the dismissal of the President [para. (3)]. The possibility of suspending and dismissing the President of the Republic in case of serious violation of the Constitution ensures the principle of separation and cooperation of powers in the State regulated by Article 6 of the Constitution, this constitutional mechanism operating to restore the balance of powers in the State, violated by the head of state by defying the provisions of the Supreme Law.

Regarding the sufficiency of the refusal of the President of the Republic to nominate the candidate for the position of Prime Minister, submitted by the parliamentary majority, to trigger the procedure for his removal from office, The Court held that according to Article 89 para. (1) of the Constitution the President of the Republic may be suspended from office and dismissed in case of committing serious acts that violate the provisions of the Constitution. The Supreme Law does not establish a notion of "serious facts" that violates the provisions of the Constitution. The Constituent established only an adjective clause for the intensity of the

violation of the Constitution for which the President of the country can be suspended from office and dismissed.

The authority vested with the power to qualify and ascertain whether or not the acts for which the President of the Republic is accused are serious acts of violation of the Constitution is the Constitutional Court, which, according to the provisions of the Supreme Law, guarantees the supremacy of the Constitution [Article 134 para. (3)], interprets the Constitution [Article 135 para. (1) b)] and notes the circumstances that justify the dismissal of the President of the Republic of Moldova [Article 135 para. (1) f)].

Considering the fact that in this case the Court was not notified, on the basis of Article 135 para. (1) f) of the Constitution, to ascertain the circumstances that justify the dismissal of the President of the Republic, the Court noted that it could not answer *in abstracto* the question of the sufficient nature of the President's refusal to nominate the candidate for the office of Prime Minister, submitted by the parliamentary majority, to initiate the procedure for suspension from office. The finding of the serious factual nature of a violation of the provisions of the Constitution, in the sense of Article 89 para. (1) of the Constitution, can be made in each case separately, analyzing the factual (i.e. what is the context of violation of the Constitution) and legal (i.e. which provision of the Constitution has been violated) aspects.

However, the Court noted that, in general, in order to assess whether the President of the Republic can be suspended and dismissed for refusing to nominate the candidate for Prime Minister, submitted by a parliamentary majority, the following issues must be considered.

First, it is important whether by **his/her refusal the President of the Republic violated a provision of the Constitution and/or a Judgement of the Constitutional Court.**

Second, it must be examined **whether the President of the Republic complied with his/her obligation of impartiality and political neutrality in the process of nominating the candidate for the position of Prime Minister.**

The Court noted that the criteria in question are not exhaustive and are starting points in the analysis of whether the President of the Republic's refusal to nominate a candidate for the position of Prime Minister, submitted by the parliamentary majority, is a serious violation of the Constitution. These may be developed by taking into account the particular circumstances of the notifications aimed at ascertaining the circumstances that justify the suspension from office and the dismissal of the President of the Republic, submitted on the basis of Article 135 para. (1) f) of the Constitution.

The Court interpreted the Constitution and noted the following:

For the purposes of Article 98 para. (1) of the Constitution, the discretionary margin of the President of the Republic when appointing the candidate for the position of Prime Minister is limited. If a formalized absolute parliamentary majority is constituted, the President of the Republic is obliged to nominate the candidate nominated by this majority for the position of Prime Minister. If a formalized absolute parliamentary majority is not constituted, the President of the Republic is obliged, after consulting the parliamentary factions, to nominate a candidate for the position of Prime Minister, even if the parliamentary factions do not agree with the proposal.

For the purposes of Articles 89 and 91 of the Constitution, if the President of the Republic refuses to nominate the candidate for the position of Prime Minister submitted by a formalized parliamentary majority, this situation must be resolved in the light of Article 89 of the Constitution, which provides for the suspension from office and dismissal of the President of the Republic. In order to assess whether the refusal of the President of the Republic to nominate the candidate for the position of Prime Minister, proposed by the parliamentary majority, is a serious act, within the meaning of Article 89 para. (1) of the Constitution, the following elements must be taken into account: a) if by this act the President of the Republic violates a provision of the Constitution and/or a Judgement of the Constitutional Court, and

b) if by this act the President of the Republic violates his/her obligation of impartiality and political neutrality in the process of nominating the candidate for the position of Prime Minister.

20. BAN ON PROVINDING SERVICES BY NON-PROFIT ORGANIZATIONS FOR ELECTORAL CONTESTANTS DURING THE ELECTION CAMPAIGN

On 8 October 2020, the Constitutional Court delivered Judgement no. 24 on the constitutional review of some provisions of Article 6 para. (5) of Law no. 86 of 11 June 2020 on Non-Profit Organizations[20].

The applicant claimed that the contested provisions prohibit only non-profit organizations from providing services to electoral contestants during the election campaign, without imposing the same ban on commercial organizations, although both types of organizations are in similar situations, according to the law. In that regard, the applicant considers that the impugned provisions established a discriminatory measure by the legislature.

The Court examined the referral in the light of Articles 16, 32, 46 and 54 of the Constitution.

The Court held that, according to the law, non-profit and profit organizations are in similar situations, both may carry out economic activities and may use the income obtained from this activity to achieve the statutory purposes of the organization, but the contested prohibition is applicable only to the former.

As regards the legitimate aim pursued by the impugned measure – The Court noted that non-profit organizations are prohibited from providing both free and paid services (for a fee) to electoral contestants during the election campaign.

In the case of **providing free services** by non-profit organizations to electoral contestants during the election campaign, the Court accepted that it could be considered a form of political support within the meaning of Article 32 of the Constitution. The Court noted that the application of the impugned prohibition to non-profit organizations is based on the fact that, unlike commercial organizations, the former may benefit from financial support, other facilities provided by the State and the percentage designation mechanism. In order to grant these legal benefits, the legislator aimed for non-profit organizations to show political neutrality during the election campaign. The Court therefore considered that the aim in question fell within the notion of "public policy" established by Article 54 (2) of the Constitution.

[20] Judgement no. 24 of 08.10.2020 on the constitutional review of some provisions of Article 6 para. (5) of Law no. 86 of 11 June 2020 on Non-Profit Organizations

In the case of **providing paid services**, the Court noted that, according to the law, both non-profit and commercial organizations can carry out economic activities. Non-profit organizations may also provide services for consideration to potential electoral contestants outside the election campaign. Temporary limitation of this possibility has consequences for property rights. Therefore, the Court did not identify any pertinent reasons that would justify the application of the ban on the provision of onerous services only to non-profit organizations, given that the Law allows non-profit organizations to provide these services outside the election campaign. In most cases, the election campaign is, in fact, a contest in which the work of the pre-campaign period materializes. Thus, since the provision of onerous services by non-profit organizations for political parties is permitted outside the election campaign, there is no legitimate aim to justify enforcing the ban on the provision of these services to electoral contestants during the campaign only in respect of non-profit organizations. Therefore, the Court held that the prohibition on providing paid services to electoral contestants during the election campaign, established by the contested provisions, unjustifiably and discriminatively restricts the property rights of non-profit organizations, contrary to Articles 16 and 46 of the Constitution.

On proportionality of the ban on providing free services – First, the Court noted that the sanctioning of the provision of free services to electoral contestants during the election campaign is applicable only to non-profit organizations receiving financial support and other facilities provided by the State, as well as the right to benefit from the percentage designation mechanism. The ban on providing services to electoral contestants during the election campaign does not lead to the forced liquidation of the non-profit organization, as they can continue to operate.

Second, the Court stated that the contested prohibition was of a general nature. Analyzing whether the contextual assessment of such cases could ensure the political neutrality of non-profit organizations, The Court concluded that the free nature of the services provided carries a message of political support from the electoral contestant. Even if there are cases where a non-profit organization would provide a free service to an electoral contestant during the election campaign, without seeking its political support, they could hardly be seen as apolitical cases or situations.

Third, the Court notes that the contested prohibition has a limited scope, covering only the provision of services, without being applied to other methods of expressing the opinion of the organization in relation to electoral contestants.

On the basis of the above, the Court held that in the case of a ban on the provision of free services, the legislature had rightly optimized the action of the competing principles: on the one hand, the freedom of expression of non-profit organizations, and, on the other hand, the State interest in ensuring public order.

Therefore, in view of the general nature of the contested prohibition, the Court issued a Request to the Parliament in order to regulate Article 6 para. (5) of the Law on Non-Profit Organizations in accordance with this Judgement, so that during the election campaign, non-profit organizations are only prohibited from providing free services, not onerous services.

The Court has recognized as constitutional the text “provide services and/or” from Article 6 para. (5) of Law no. 86 of 11 June 2020 on Non-Profit Organizations, in so far as non-profit

organizations are allowed to provide paid services for electoral contestants during the election campaign.

21. THE AUTHORITIES` OBLIGATION TO PROVIDE INFORMATION REQUESTED BY THE SUPREME SECURITY COUNCIL

On 29 October 2020, the Constitutional Court delivered Judgement no. 25 on the constitutional review of Article 12 paras. (7) and (8) of State Security Law no. 618 of 31 October 1995[21].

The applicant alleged that the text of Article 12 para. (7) of the mentioned Law is unforeseeable and may generate abusive application by the Supreme Security Council. The applicant also alleged that while the Supreme Security Council is not a constitutionally-ranked body, it has become a coordinating and coercive body placed above all State powers.

The Court analyzed the application in the light of Article 28, corroborated with Articles 1 para. (3), 23 para. (2) and 54 para. (2) of the Constitution.

The Court noted that the impugned legal provisions establish the obligation to provide two types of information: **a) any data and information, including those which constitute a State, banking or commercial secret, concerning national security, defense and public order; b) other information.**

In order to establish whether the impugned provisions complied with the standards of the Constitution, the Court examined them in two respects: 1) compliance with the quality of law requirements and 2) the justified nature of the obligation to provide the requested information.

1) As regards the compliance with the quality of law requirements

a) The obligation to provide any data and information, including those which constitute a State, banking or commercial secret, ***concerning national security, defense and public order***

In its case-law, the Court has established that Article 23 para. (2) of the Constitution implies the adoption by the legislator of accessible, foreseeable laws that provide safeguards against abuse.

With regard to the compliance with the accessibility of law requirement, the Court noted that the provisions of Article 12 para. (7) of the State Security Law meet this criterion, as the Law is published in the Official Gazette of the Republic of Moldova.

With regard to the predictability requirement, the Court noted that the above-mentioned Article establishes the obligation of the authorities and autonomous public legal persons to submit any data or information requested by the Council, including information the provision of which is restricted, i.e. constitutes a State, banking or commercial secret, concerning national security, defense and public order.

In this respect, the Court noted that the definition and conditions for the provision of information that constitute a State, banking or commercial secret are detailed in other normative acts, i.e. Law no. 245 of 27 November 2008 on State Secret, Law no. 202 of 6 October 2017 on the Activity of Banks.

[21] Judgement no. 25 of 29.10.2020 on the constitutional review of Article 12 paras. (7) and (8) of State Security Law no. 618 of 31 October 1995

*b) The obligation to provide **other information***

The Court noted that **the text "as well as other information" in Article 12 para. (7) of the State Security Law constitutes a source of legal uncertainty, due to its very general nature, without clear limits** (see, *mutatis mutandis*, JCC no. 15 of 22 May 2018, § 68; JCC no. 24 of 17 October 2019, § 141).

The Court has ruled that **the text "as well as other information" does not ensure the identification of areas for which further information may be requested**, considering that the same rule states that the authorities are obliged to provide any data and information, including data and information which constitute a State, banking or commercial secret, concerning national security, defense and public order.

Therefore, the Court held that **the text "as well as other information" in Article 12 para. (7) of the State Security Law does not meet the quality of law requirements and contravenes Article 23 para. (2) of the Constitution.**

2) As regards the justified nature of the obligation to provide any other data and information, including those which constitute a State, banking or commercial secret, concerning national security, defense and public order.

The Court stressed that the Supreme Security Council is an advisory body that analyzes the activity of ministries and other central administrative authorities in the field of national security and makes recommendations to the President of the Republic of Moldova on foreign and domestic policy (Article 12 para. (1) of the State Security Law).

In this respect, the Court held that State security is an integral part of national security and represents the protection of the sovereignty, independence and territorial integrity of the country etc. (Article 1 para. (1) of said Law).

The Court also pointed out that, according to Article 77 para. (2) of the Constitution, the President of the Republic of Moldova represents the State and is the guarantor of national sovereignty, independence, of the unity and territorial integrity of the State. According to Article 87 para. (4) of the Constitution, the President of the Republic of Moldova may take other measures to ensure national security and public order, within the limits and under the conditions of the law.

Therefore, the Court found **that the presentation of information by authorities and autonomous public legal entities aims at allowing the Supreme Security Council to make recommendations in the field of domestic and foreign policy and, therefore, to ensure State security. This task of the Council may be justified by several legitimate aims provided for in Article 54 para. (2) of the Constitution: ensuring national security, ensuring territorial integrity, ensuring the economic well-being of the country, ensuring public order, protecting the rights, freedoms and dignity of others.**

Moreover, the Court emphasized that it could not verify, according to its powers, the proportionality of the manner in which the impugned provisions were to be applied, that is to say, the proportionality of the interference in concrete terms. This responsibility belongs to the ordinary courts, which may be required to carry out a judicial review in accordance with the relevant provisions of the Administrative Code on the principle and test of proportionality (see

Articles 29 and 225) and the State Security Law (Article 7 para. (6)). The Court only limits itself to noting the existence of these procedural safeguards and whether they are sufficient.

The Court emphasized that if the information requested in a particular case by the Supreme Security Council aims at ensuring State security or if the request for such information violates a person's right to privacy, guaranteed by Article 28 of the Constitution, due to the fact that the request exceeds the legitimate aim, it is a matter that may be subject to common law judicial control, in light of the factual and legal circumstances of each case.

In order to comply with the constitutional principles, the Court has ruled that, **when receiving requests from the Supreme Security Council on the provision of information, public authorities and autonomous public legal entities must assess, in light of the factual and legal circumstances of each case, if the information requested is intended to achieve the legitimate aims of the law and if there is no disproportionate interference with the person's right to privacy.**

The Court also noted that the Supreme Security Council may also request the provision of information from **constitutionally-ranked public authorities** (i.e. which are expressly provided for in the Constitution and which play a fundamental role in the constitutional legal order). The Court emphasized that **constitutionally-ranked public authorities may provide the requested information in so far as such action is without prejudice to their status and autonomy as provided for in the Constitution.**

The Court found that the text "as well as other information" from Article 12 para. (7) of the State Security Law no. 618 from 31 October 1995 was unconstitutional.

22. GROUNDS TO LODGE AN APPEAL FOR ANNULMENT

On 10 November 2020, the Constitutional Court delivered a Judgement on the constitutional review of some provisions of Article 453 para. (1) of the Criminal Procedure Code, adopted by Law no. 122 of 14 March 2003.[22]

The applicant requested the Court to declare unconstitutional Article 453 para. (1) of the Criminal Procedure Code of the Republic of Moldova, insofar as it does not allow the formulation of an appeal for annulment separately or after six months from the date of irrevocability of the judgment, if the European Court informs the Government of the Republic of Moldova about submitting the application.

The Court examined the application in the light of Articles 20 and 119, in conjunction with Articles 23 and 54 of the Constitution.

The Court held that the right of access to a court, the infringement of which was pointed out by the complainant, may generally be subject to limitations (*Deweer v. Belgium*, § 49; *Kart v. Turkey* [GC], § 67). However, limitations must not restrict the exercise of the right in such a way as to reach the very essence of the right.

The Court also held that the legitimate aim pursued by the regulation of Article 453 para. (1) of the Code of Criminal Procedure and which can reasonably be deduced consists, *inter alia*, in guaranteeing extraordinary remedies in order to avoid finding a violation by the European

[22] Judgement no. 26 of 10.11.2020 on the constitutional review of some provisions of Article 453 para. (1) of the Criminal Procedure Code, adopted by Law no. 122 of 14 March 2003

Court of Human Rights, for alleged violation at national level of one or more rights guaranteed by the European Convention on Human Rights. Moreover, in the opinion of the Court, the legislator sought to strengthen the capacity of national courts to protect fundamental rights in accordance with the constitutional provisions and international obligations of the state of the Republic of Moldova.

The Court noted that the use of the term "including" by the legislator in Article 453 para. (1) of the Criminal Procedure Code **raises issues regarding the quality of the law.** The use of that term leaves room for the interpretation that, once an appeal for annulment has been made where a fundamental defect in the previous proceedings has affected the judgment under appeal, a separate appeal may no longer be lodged when the European Court of Human Rights informs the Government of the Republic of Moldova of the application.

The Court found that the interpretation of the term "including" in Article 453 para. (1) of the Criminal Procedure Code in conjunction with the provisions of Article 454 of the Code may lead, *ab absurdo*, in some cases to a conclusion contrary to the legitimate expectation of the recipients of the law.

In this context, the Court noted that the interpretation that **the use of the term "including" may require makes the contested rule uncertain, contrary to the standard of quality of the law and infringes the right of free access to justice, to a fair, full and objective trial**, being likely to lead to adjudgments of the Republic of Moldova by the European Court of Human Rights.

Declaring an appeal for annulment when the European Court informs the Government of the Republic of Moldova about the filing of the application cannot oblige the Supreme Court of Justice to admit this appeal *ipso facto* nor can it serve as a ground of inadmissibility because it is a redundant appeal, given that in the previous procedure an appeal for annulment was examined in the same case, within six months from the date of irrevocability of the judgment.

In view of the essence of Article 6 of the European Convention on Human Rights and of Articles 20 and 119 of the Constitution, **it is necessary to examine such actions for annulment separately in order to establish the existence or absence of any fundamental defect in the previous procedure.** Otherwise, the appeal for annulment based on informing the European Court of Human Rights communicated to the Government of the Republic of Moldova becomes theoretical and illusory.Taking into account one of the purposes pursued by the contested provisions, i.e. guaranteeing the exercise of extraordinary remedies in order to avoid an adjudgment by the European Court of Human Rights, but also to avoid of a violation of the right of access to a court, caused by the uncertain wording of this Article, which affects the legitimate expectation of the recipients of the law, **the Court considered that the term "including" in Article 453 para. (1) of the Criminal Procedure Code was unconstitutional** on the grounds that it contravenes Articles 20 and 119, in conjunction with Articles 23 and 54 of the Constitution.

Therefore, to remedy the situation and to guarantee the effectiveness of the right of access to a court, the Court issued a Request to the Parliament in order to amend Article 453 para. (1) of the Criminal Procedure Code in accordance with this Judgment, so that irrevocable judgments may be appealed for annulment: a) if a fundamental defect in the previous proceedings affected the judgment under appeal, **and** b) if the European Court of Human Rights informs the

Government of the Republic of Moldova about the submission of the application from which the existence of a fundamental defect in the previous procedure that affected the appealed judgment may be deduced.

The Court found the text "including" in Article 453 para. (1) of the Criminal Procedure Code of the Republic of Moldova unconstitutional. Until the amendment of Article 453 para. (1) of the Criminal Procedure Code, in the sense of its conformity with the Court's judgement, irrevocable judgements may be appealed for annulment:

a) if a fundamental defect in the previous proceedings affected the judgment under appeal, **and**

b) if the European Court of Human Rights informs the Government of the Republic of Moldova about the submission of the application from which the existence of a fundamental defect in the previous procedure that affected the appealed judgment may be deduced.

23. GUARANTEES OF THE ALIEN IN THE EVENT OF EXPULSION

On 13 November 2020, the Constitutional Court ruled on a review of the constitutionality of certain texts of the Law on the Regime of Aliens[23].

This Judgement ensures to the respective category of persons the possibility to benefit from real and effective guarantees, when they face the problem of their expulsion from the Republic of Moldova.

The analysis of the applications of the referral in the light of the constitutional provisions and the jurisprudence of the European Court of Human Rights allowed the Court to highlight in the national legislation a series of deficiencies in the declaration of undesirable foreign citizens and their expulsion from the territory of the Republic of Moldova. repaired.

The applicant raised two claims.

On the one hand, the applicant contested the texts from Articles 55 para. (3) second thesis and 56 para. (2) second thesis of the Law on the Regime of Aliens. The contested texts refer to the impossibility of the alien declared as an undesirable person for reasons of national security to know the reasons for that decision, not even in court.

On the other hand, the applicants contested the texts from Article 60 para. (4) and from Article 63 para. (4) of the Law on the Regime of Aliens. Based on these texts, the alien can be expelled if he/she poses a danger to the national security or to the public order of the Republic of Moldova, even if there are justified fears that his/her life will be endangered or subjected to torture, inhuman or degrading treatment in the State of destination.

On the legal issues raised by both claims, the Court found the existence of relevant judgments of the Grand Chamber of the European Court of Human Rights: *Muhammad and Muhammad v. Romania*, 15 October 2020, and *F.G. v. Sweden*, 23 March 2016. Those judgments enjoyed a *res interpretata* in the present case. They establish a minimum level of protection with regard to procedural guarantees in the event of the expulsion of aliens, as well as protection of the right to life and the right not to be ill-treated under their procedural aspects. They are relevant

[23] Judgement no. 27 of 13.11.2020 on the constitutional review of some provisions of Articles 55 para. (3), 56 para. (2), 60 para. (4) and 63 para. (4) of Law no. 200 of 16 June 2010 on the Regime of Aliens in the Republic of Moldova

and applicable in all similar cases. The Court therefore examined the contested provisions of the Law on the Regime of Aliens by taking into account the relevant criteria that can be extracted from the two judgments of the European Court, by reference to Articles 19, 20, 24 and 26 of the Constitution.

As regards the first claim, the Court noted that Articles 55 para. (3) and 56 para. (2) of the Law establishes, insofar as it prohibits the alien from becoming aware of the reasons underlying the decision to declare him as an undesirable person for reasons of national security, an absolute ban and gives a greater abstract weight to the legitimate interest of national security.

However, just as the procedural rights of the alien do not have an absolute nature, nor are the interests based on national security absolute in weight.

In this respect, the Court noted that these rules establish a general rule, insensitive to the particularities of certain cases, and thus violate the procedural rights of the alien guaranteed by Articles 19, 20 and 26 of the Constitution.

The Court noted that the alien has the opportunity to hire a lawyer who has the right to access State secrets. Such a lawyer shall be informed of the data and information which constitute the reasons for the decision to declare the alien as an undesirable person for reasons of national security.

Furthermore, in order to verify whether the person really poses a danger to national security, the authorities must submit to the court all relevant documents, including classified documents or any other factual details. In this background, Article 221 para. (1) of the Administrative Code provides that "public authorities are obliged to submit to the court, together with the reference, the administrative files. At the request of the court, public authorities are required to additionally present other documents in their possession, including electronic ones, and to provide information".

The Court emphasized that the need to protect State secrets and the legitimate interest of national security does not preclude the right of the person to know the summary of the reasons which served as the basis for his or her declaration as an undesirable person, in so far as this is compatible with maintaining the confidentiality of the data obtained.

Based on these premises, the Court found that the contested texts of Article 55 para. (3) thesis II and Article 56 para. (2) thesis II of the Law on the Regime of Aliens contravene Article 26 in conjunction with Article 19 of the Constitution and are, therefore, unconstitutional.

The Court further noted that the Law on the Regime of Aliens fulfills an important criterion for counterbalancing the limitation of the exercise of their procedural rights. It provides, in Article 57 para. (1), that the decision regarding the declaration of an alien as an undesirable person may be challenged in court within five working days.

The competent court of law to adjudicate against the decision to declare an alien as an undesirable person is an independent authority, which enjoys constitutional guarantees in this regard.

The Court has therefore examined the extent of the court of law's jurisdiction and, in particular, whether it can verify the need to maintain the confidentiality of classified information for

reasons of national security and the decision to declare the alien as an undesirable person in general.

In this respect, Article 225 of the Administrative Code was relevant, over which the Court extended its control. Paragraph (3) of this Article also refers to the individual administrative and normative acts regarding the national security of the Republic of Moldova, which may also include the decision on declaring an alien as an undesirable person. This paragraph does not allow the court of law to carry out a full review of the proportionality of the contested decision. Although the protection of national security may sometimes preclude the disclosure to the alien of the reasons for decision to declare himself an undesirable person, the court must be able to balance the interests of national security with the interests of the alien, fact that Article 225 para. (3) of the Administrative Code does not allow it.

The Court concluded that Article 225 para. (3) of the Administrative Code is unconstitutional insofar as it limits the power of the courts of law to control the proportionality of individual and normative administrative acts, contrary to Article 20 of the Constitution.

As regards the second claim of the application, the Court noted that under Article 60 para. (4) of the Law on the Regime of Aliens, aliens who pose a danger to public order, national security or suffering from diseases that threaten public health and refuse to follow the treatment established by the medical authorities can be removed even if there are justified fears that their lives are endangered or that they will be subjected to torture, inhuman or degrading treatment in the State in which they are to be returned. Also, according to Article 63 para. (4) of the Law on the Regime of Aliens, if there are reasons of national security or public order, aliens may be deported even in states where their lives may be endangered or where they will be subjected to torture, inhuman or degrading treatment.

In the event that there are justified fears that the lives of aliens will be endangered or that they will be subjected to torture, inhuman or degrading treatment in the State of destination, the Constitution and the case-law of the European Court prohibit any removal or expulsion. In this respect, the rights guaranteed by Article 24 of the Constitution and Articles 2 and 3 of the European Convention are absolute. Therefore, the absolute nature of these aspects of Article 24 of the Constitution and 2 and 3 of the Convention was sufficient to find the text "and e)" in Article 60 para. (4) and the text "(1) and" in Article 63 para. (4) in the Law on the Regime of Aliens unconstitutional.

The Court also established that until the amendment by the Parliament of Articles 55 para. (3) second thesis and 56 para. (2) second thesis of the Law on the Regime of Aliens in the Republic of Moldova, the decision on declaring an alien as an undesirable person for reasons of national security will contain a summary of the reasons, in a manner compatible with the legitimate interest of national security, with the notification of the alien in this form. In view of the above, the Court issued a Request to the Parliament.

24. PARLIAMENTARY RULES OF PROCEDURE FOR THE EXAMINATION OF DRAFT LAWS

On 19 November 2020, the Constitutional Court delivered the operative part of the judgment on the interpretation of Articles 64, 72, 73, 74 and 131 para. (4) of the Constitution [24].
The applicants asked the Court to explain a few issues:

(1) Does the Constitution allow the Parliament to establish temporary rules for the examination of draft laws and amendments, without amending the Parliament's Rules of Procedure adopted by organic law?

(2) Can a MP submit an amendment to draft laws on the basis of his/her right of legislative initiative? Is the MP`s right of legislative initiative violated by the rejection of the amendment by the Parliament on the basis of temporary rules?

(3) Is the Parliament obliged to seek the opinion of the Government in the event of amendments made by MPs which entail an increase or decrease in budget revenue or expenditure? Is the Government obliged to endorse the amendments in question made by MPs?

(4) Does the Constitution allow the Parliament to reject the MPs` amendments aimed at increasing or reducing revenue or expenditure in the budget without seeking the appropriate opinion of the Government on the amendments?

I. Does the Constitution allow the Parliament to establish temporary rules for the examination of draft laws and amendments, without amending the Parliament's Rules of Procedure adopted by organic law?

The Court noted that, through the question referred, the applicants raise the question of the existence of a tension between, on the one hand, the principle of parliamentary autonomy and, on the other hand, the principle of representative democracy and the principle of the supremacy of the Constitution.

The Court noted that the principle of parliamentary autonomy takes into account the discretion established by the first thesis of Article 64 para. (1) of the Constitution, which allows the Parliament to regulate its own procedures for considering draft laws and amendments made by the MPs.

In its case-law, the Court has noted that regulatory autonomy is the expression of the rule of law, of democratic principles, but it can operate exclusively within the limits set by the Fundamental Law. Thus, regulatory autonomy cannot be exercised in a discretionary and abusive manner, in breach of Parliament's constitutional powers or mandatory rules on parliamentary procedure. Parliamentary autonomy does not legitimize the establishment of rules that violate the letter and spirit of the Supreme Law. The European Court held in its case-law that parliamentary autonomy can be validly exercised only in accordance with the principle of the rule of law (see *Mugemangango v. Belgium* [GC], 10 July 2020, § 88).

The Court noted that the discretion enjoyed by the Parliament on the basis of parliamentary autonomy must be compatible with the concepts of "representative democracy" and

[24] Judgement no. 28 of 19.11.2020 on the interpretation of Articles 64, 72, 73, 74 and 131 para. (4) of the Constitution

"supremacy of the Constitution". Parliamentary autonomy can only be validly exercised in accordance with these principles.

Thus, the Court noted that when establishing rules on parliamentary procedures for examining draft laws and amendments, the parliamentary majority must respect a balance between parliamentary autonomy and the principle of representative democracy. This means that the parliamentary majority must ensure a fair and adequate treatment of parliamentary minorities, without abusing its dominant position.

In this case, the Court held that the first thesis of Article 64 para. (1) of the Constitution requires conducting parliamentary proceedings on the basis of the Rules of Procedure, which, in accordance with the provisions of Article 72 para. (3) c) of the Constitution, is adopted by organic law.

By establishing this condition, the Constituent sought to ensure that parliamentary procedures would be conducted on the basis of rules capable of guaranteeing the effective participation of Members of both the parliamentary majority and the parliamentary opposition. In this respect, the parliamentary autonomy enjoyed by the Parliament allows it to amend the Rules of Procedure in question.

At the same time, in order to ensure a fair and adequate treatment of parliamentary minorities, the parliamentary majority must give parliamentary minorities the opportunity to participate in amending the Rules of Procedure and must also establish rules to ensure the participation of parliamentary minorities in parliamentary procedures. In this context, the Court noted that in the event of the establishment of temporary rules on parliamentary procedure that run counter to the Parliament's Rules of Procedure, a parliamentary majority may prevent the parliamentary opposition from participating in the examination of draft laws and from submitting amendments. This is likely to create an imbalance between the principle of parliamentary autonomy and the principle of representative democracy.

In its case-law, the European Court held that a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids abuse of a dominant position. The rules concerning the internal operation of Parliament should not serve as a basis for the majority to abuse its dominant position *vis-à-vis* the opposition. The European Court attaches importance to protection of the parliamentary minority from abuse by the majority (see *Karácsony and Others v. Hungary* [GC], 17 May 2016, § 147).

According to the Venice Commission, the Rules of Procedure should enjoy some stability and not be routinely changed to the detriment of the minority at the beginning of every mandate of the legislature, by the standing orders or otherwise. Parliament should not create special procedures and *ad hoc* aimed at circumventing the normal law-making process and the scrutiny of the bills by the existing permanent committees (Parameters on the relationship between the parliamentary majority and the opposition in a democracy: *checklist*, CDL-AD(2019)015-e, §§ 38 and 91).

The Court also noted that when establishing rules on parliamentary procedures for examining draft laws and amendments, a parliamentary majority must reconcile the principle of parliamentary autonomy with the principle of the supremacy of the Constitution.

Therefore, the rules on parliamentary procedure must comply with the provisions of the Constitution. The Court noted that the principle of parliamentary autonomy could not be interpreted as allowing Parliament to ignore the constitutional provisions governing parliamentary procedures.

In this regard, the Court noted that first thesis of Article 64 para. (1) of the Constitution allows the conduct of parliamentary procedures only on the basis of the rules established by a Regulation, adopted in accordance with the provisions of Article 72 para. (3) c) of the Constitution, by organic law. Thus, in order to ensure a conciliation between the principle of parliamentary autonomy and the principle of supremacy of the Constitution, the Court noted that the **parliamentary majority can amend the rules on the parliamentary procedure for examining draft laws and amendments only by amending the Parliament's Rules of Procedure.**

II. Can a MP submit an amendment to draft laws on the basis of his/her right of legislative initiative? Is the MP`s right of legislative initiative violated by the rejection of the amendment by the Parliament on the basis of temporary rules?

In this case, the Court had to determine whether the MP's right to make amendments to draft laws fell within the notion of "legislative initiative" in Article 73 of the Constitution.

First, the Court found some differences between the MP's right of legislative initiative and the MP's right to make amendments. Beyond the differences found, the Court noted that both rights pursue the same goal, which is to legislate by the Parliament.

Second, the Court noted that, since the Constitution stipulates that MPs have the right of legislative initiative, i.e. they can propose draft laws for examination and adoption, *a fortiori* they can propose amendments to draft laws.

Moreover, it would be unreasonable to conclude that the Constitution allows MPs to propose a draft law, but prohibits them from proposing, in parliamentary debates, the amendment/supplementation of a single article, paragraph or provision of a draft law.

Third, the Court held that if the right to propose amendments to draft laws was not guaranteed by the Constitution, deriving from the right of legislative initiative, but left to the discretion of the Parliament, the parliamentary majority could unduly restrict this right by amending the Rules of Procedure of the Parliament. This situation could create a problem from the perspective of respecting the principle of representative democracy.

With regard to the second aspect of the question, i.e. if the MP's right of legislative initiative is infringed by the rejection of his/her amendment by the Parliament on the basis of temporary rules, the Court answered in the affirmative, having previously held that the Constitution does not allow the Parliament to establish, on the basis of temporary rules, examination of draft laws and amendments without amending the Parliament's Rules of Procedure, adopted by organic law.

III. Is the Parliament obliged to seek the opinion of the Government in the event of amendments made by MPs which entail an increase or decrease in budget revenue or expenditure? Is the Government obliged to endorse the amendments in question made by MPs?

In legislative procedures in the budgetary field, the provisions of Article 131 para. (4) of the Constitution establish a direct decision-making dependence of the Parliament on the Government, in the sense that existence of a prior consent of the Government in respect to the amendments or legislative proposals involving increasing or reducing expenditure of revenues or loans is an imperative condition, from which the legislature cannot derogate in the process of approving the national public budget.

Failure to comply with this condition constitutes a violation of the procedure laid down by the Constitution in matters of budgetary legislation. In this context, in its jurisprudence the Court found that the adoption of a law with a budgetary impact in the absence of the Government's opinion leads to a violation of the procedure provided by Article 131 para. (4) of the Constitution (JCC no. 2 from 28 January 2014, §§ 48 and 74; JCC no. 23 from 10 October 2019, § 77).

With regard to the first aspect of the question, i.e. if the Parliament is required to seek the opinion of the Government in the event of amendments made by MPs which entail an increase or decrease in budget revenue or expenditure, the Court noted that generally the Parliament must seek the Government's opinion on the amendments in question. At the same time, the Court noted that the Parliament may set conditions for the admissibility of amendments (e.g. deadline for submitting them, form of submitting amendments, etc.), which would allow it to avoid delaying the adoption of draft laws involving an increase or decrease in expenditure and revenue budget or loans.

With regard to the second aspect of the question, i.e. if the Government is obliged to endorse the amendments in question made by MPs, the Court has held in its case-law that the Government may not waive a constitutional prerogative, including expressing acceptance or rejection of legislative proposals or amendments having a budgetary impact. (JCC no. 2 from 28 January 2014, § 66; JCC no. 6 from 13 February 2014, § 69; JCC no. 7 from 13 February 2014, § 74).

IV. Does the Constitution allow the Parliament to reject the MPs` amendments aimed at increasing or reducing revenue or expenditure in the budget without seeking the appropriate opinion of the Government on the amendments?

The Court noted that the applicants question the possibility for the Parliament to decide autonomously on amendments by MPs submitted under Article 131 para. (4) of the Constitution, without the participation of the Government. In this respect, the Court noted that the parliamentary autonomy enjoyed by the Parliament in the legislative procedure allows it to reject the MP's amendments made under Article 131 para. (4) of the Constitution only in one situation.

Thus, on the basis of the principle of parliamentary autonomy, the Parliament may lay down in the Rules of Procedure conditions of admissibility applicable to amendments. In this respect, the making of amendments may be subject to conditions such as deadlines for submission, formal requirements, etc. At the same time, the Parliament can verify that the amendments made by MPs meet the conditions for admissibility. Therefore, if the amendments of the MPs aimed at increasing or reducing the budget revenues or expenditures do not correspond to the admissibility conditions established by the Parliament's Rules of Procedure, the Constitution allows the legislature to reject them, without seeking the Government's opinion.

The Court interpreted the Constitution and noted the following:

For the purposes of Articles 64 para. (1) thesis I and 72 para. (3) c) of the Constitution, it is forbidden for the Parliament to establish temporary rules for the examination of draft laws and amendments, without amending the Regulation of the Parliament, adopted by organic law.

For the purposes of Article 73 of the Constitution, MPs may make amendments to draft laws on the basis of their right of legislative initiative. The Constitution prohibits the Parliament from rejecting, on the basis of the temporary rules of procedure, the amendments made by MPs. Failure to comply with this restriction constitutes a violation of the MPs right of legislative initiative, guaranteed by the Constitution.

For the purposes of Article 131 para. (4) of the Constitution, the Parliament is obliged to request the opinion of the Government regarding the amendments submitted in the procedure provided by Article 131 para. (4) of the Constitution only if the amendments meet the conditions of admissibility established by the Parliament's Rules of Procedure. The Constitution obliges the Government to endorse the amendments sent by the Parliament based on the procedure provided by Article 131 para. (4) of the Constitution.

For the purposes of Article 131 para. (4) of the Constitution, if the amendments of the MPs aimed at increasing or reducing the budget revenues or expenditures do not meet the admissibility conditions established by the Parliament's Rules of Procedure, the Constitution allows the legislature to reject them, without seeking the Government's opinion.

25. TRANSFER OF PENSIONS ABROAD

On 26 November 2020, the Constitutional Court delivered a Judgement on the constitutional review of the ban on the transfer of pensions abroad[25] provided by Article 60 of the Law on Ensuring Pension for Military Servicemen and Body Control and Troops of the Internal Affairs Body.

The Court noted that Article 46 para. (1) of the Constitution establishes that the right to private property and claims against the State are guaranteed, and Article 47 para. (2) of the Constitution guarantees the right to insurance for citizens in case of: unemployment, illness, disability, widowhood, old age or in other cases of loss of livelihood, due to circumstances beyond their control. The two above-mentioned rights must not each be safeguarded differently, without objective and reasonable justification, where persons are in similarly relevant situations. Differential treatment is discriminatory if it does not have an objective and reasonable justification, i.e. if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means used and the aim pursued to achieve it.

Article 60 of the impugned Law provides that no pensions are established for the military servicemen and body control and troops of the internal affairs body, as well as civil servants with special status in the penitentiary administrative system, and in the General Inspectorate of Carabinieri or their families who went abroad for permanent residence. Therefore, the impugned Article makes the payment of pension dependent on the place of residence. This condition leads to situations in which persons who have worked in the Republic of Moldova and have acquired the right to a pension are deprived of said right, because the payment of the

[25] Judgement no. 29 of 26 November 2020 on the constitutional review of Article 60 of Law on Ensuring Pensions for Military Servicemen and Body Control and Troops of the Internal Affairs Body no. 1544 of 23 June 1993

pension is halted for the entire period of residence of the pensioner abroad. The persons in question could receive their pension again if they returned to the Republic of Moldova.

The Court emphasized that the legislature's discretion entails its power to adopt actions which would limit the exercise of safeguarded rights, but always respecting the principles of legality, legitimacy of the aim pursued and proportionality. In this regard, the Court considered that invoking economic crisis or financial difficulties to restrict (deprive) fundamental rights and freedoms is unjustified.

The Court reiterated its considerations in Decision no. 10 of 8 May 2018 which declared unconstitutional Articles 2 and 36 of the Law on the Public Pension System that made the payment of pension dependent on the place of residence.

The Court concluded that there is unjustified differential treatment of pensioners in the military and body control and the troops of the internal affairs body, as well as of civil servants with special status in the penitentiary administration system, and in the General Inspectorate of Carabinieri who do not have a residence in the Republic of Moldova, compared to those who reside in the Republic of Moldova, in terms of payment of pensions, as well as to those who receive a pension under Article 36 of the Law on the Public Pension System.

Therefore, the impugned provisions are contrary to Articles 46 and 47, in conjunction with Article 16 of the Constitution, and have been found unconstitutional.

26. CONFIRMATION OF THE RESULTS OF THE 15 NOVEMBER 2020 ELECTIONS AND VALIDATION OF THE TERM OF OFFICE OF THE PRESIDENT OF THE REPUBLIC OF MOLDOVA

On 10 December 2020, the Constitutional Court ruled on the confirmation of the election results and the validation of the term office of the President of the Republic of Moldova[26].

According to Articles 78, 79 para. (1) and 135 para. (1) e) of the Constitution, Article 4 para. (1) e) of the Law on the Constitutional Court, Articles 4 para. (1) e) and 38 para. (3) of the Constitutional Jurisdiction Code, 122 and 123 of the Electoral Code, the Constitutional Court confirms the results of the elections for the position of President of the Republic of Moldova and validates its mandate.

The Court noted that, according to the data presented by the Central Electoral Commission, 48.54% of voters participated in the first round, which is more than a third of the number of voters registered in the electoral lists. Therefore, the Court found that the elections held in the first ballot on 1 November 2020 are valid.

The Court noted the justified nature of the organization of the second ballot, given that in the first round no candidate was elected to meet at least half of the votes of the voters who participated in the elections. The Court noted that the organization of the second ballot was in accordance with the first thesis of Article 78 para. (4) of the Constitution, according to which if none of the candidates has gathered this majority, a second ballot shall be held between the first two candidates established in the order of the number of votes obtained in the first round.

[26] Judgment no. 30 of 10.12.2020 on the confirmation of the election results and the validation of the term of office of the President of the Republic of Moldova

The Court also noted that the Central Electoral Commission approved, by Decision no. 4507 of 20 November 2020, on the basis of Articles 18 para. (2), 26 para. (1) j), 65, 119, 120 para. (5) and 121 of the Electoral Code, the records regarding the totalization of the results of the second round of the elections of the President of the Republic of Moldova of 15 November 2020.

In accordance with Article 125 para. (2) of the Electoral Code, in the second round of elections the elections will be declared valid regardless of the number of voters who participated in the elections. The Court noted that the elections held in the second round of elections on 15 November 2020 are also valid.

The Court also noted that the declaration by the Central Electoral Commission of Ms. Maia Sandu as the winning candidate complied with the provisions of Article 78 para. (4) Thesis II of the Constitution, according to which the candidate who obtained the highest number of votes is declared elected, provided that their number is higher than the number of votes cast against the candidate. Ms. Maia Sandu obtained a higher number of votes than her opponent, Mr. Igor Dodon.

The Court noted that in the process of the presidential elections and in the counting of the votes cast, no violations of the Electoral Code proven in the manner established by law and likely to influence the election results and the assignment of the mandate were found.

Thus, in the exercise of its powers under the Constitution, the Constitutional Court confirmed the results of the presidential election, according to which, on 15 November 2020, Ms. Maia Sandu was elected President of the Republic of Moldova.

Based on Articles 79 para. (1) of the Constitution, 4 para. (1) e) of the Constitutional Jurisdiction Code, 4 para. (1) e) of the Law on the Constitutional Court and 123 para. (1) of the Electoral Code, the term of office of the President of the Republic of Moldova is validated by the Constitutional Court.

According to Article 123 para. (2) of the Electoral Code, until the validation of the mandate, the candidate elected for the office of President of the Republic of Moldova presents to the Constitutional Court the confirmation of the fact that he or she is not a member of any political party and does not hold any other public or private office.

Thus, on 9 December 2020, Ms. Maia Sandu presented to the Court the confirmation that she is not a member of any political party and that she does not hold any other public or private office.

In the light of the foregoing, the Court:

1. *Has confirmed* the results of the election of the President of the Republic of Moldova on 15 November 2020.

2. *Has validated* the election of Ms. Maia Sandu as President of the Republic of Moldova.

27. THE MOMENT OF SERVICE OF THE BAILIFF'S DOCUMENTS TO THE ADDRESSEE

On 17 December 2020, the Constitutional Court ruled on the constitutional review of some provisions of Article 67 paras. (2) and (7) of the Enforcement Code[27], adopted by Law no. 443 of 24 December 2004, regarding the moment of service of the bailiff's documents to the addressee.

Article 67 of the Enforcement Code regulates the legal regime of service of the bailiff's documents. The provisions of Article 67 para. (1) state that the documents of the bailiff shall be communicated by the means provided by law personally to the addressee (means which must ensure the transmission of the text contained in the document and the confirmation of its receipt). In case of absence of the addressee – the natural person, the rule from para. (2) takes effect. In the latter case, if the addressee is absent, the bailiff's documents are handed to a person living with the addressee (an adult member of his/her family, relatives, in-laws) or to a public official from the mayor's office or to the president of the tenants' association at the addressee's home, to be served to him/her. The person who received the documents shall be responsible for their immediate service to the addressee and shall be liable for any damage caused by non-communication or late communication. The document shall be deemed to have been served to the addressee on the date indicated in the acknowledgment of receipt. However, if the delivery of the bailiff's document to the addressee or to the persons indicated in Article 67 para. (2) was not possible, the document shall be communicated by publication in the Official Gazette of the Republic of Moldova (Article 67 para. (4) of the Enforcement Code).

The legislator's option on the communication of the bailiff's documents, where it is not possible to serve them to the debtor in person, is sufficiently clear and foreseeable, this practice being also found in the legislation of other European States.

The obligation to serve the documents received from the bailiff, imposed on the persons indicated in Article 67 para. (2) of the Enforcement Code, arises from the fact that they are in a closer position compared to the bailiff to know the situation of the addressee and his/her whereabouts, to communicate to him/her the documents that concern him/her, to the extent possible.

This method of disclosing documents is also based on the general obligation of all natural and legal persons, provided by Article 120 of the Constitution, to comply with a court decision and to contribute to its enforcement. Only when the addressee of the document is absent, gradually applicable alternative methods of communicating the bailiff's documents are imposed.

The Court noted that, where the existence of an interference with a fundamental right is argued, the person concerned must have sufficient procedural safeguards and must have the possibility of effective access to a court, which shall rule on the alleged interference in his/her right (see JCC no. 8 of 5 April 2019, § 48).

The Court noted that Article 67 para. (7) of the Enforcement Code provides that the time-limit for challenging the bailiff's documents is calculated starting from: (i) the date indicated in the acknowledgment of receipt (para. (1)); (ii) the date indicated in the record of service of the

[27] Judgement no. 31 of 17.12.2020 on the exception of unconstitutionality of some texts of Article 67 paras. (2) and (7) of the Enforcement Code, adopted by Law no. 443 of 24 December 2004

document to third parties (para. (2)); or (iii) the date of communication of the document by publication in the Official Gazette of the Republic of Moldova (para. (4)). Therefore, the record of seizure and/or taking away of goods may be challenged in court in the manner laid down by Article 118 para. (5) of the Enforcement Code. Moreover, the participant in the enforcement proceedings may also obtain the extension of the time-limit pursuant to Article 162 para. (2) of the Enforcement Code under the conditions of the Civil Procedure Code. Article 116 of the Civil Procedure Code states that persons who, for justified reasons, have failed to comply with the time-limit for the performance of a procedural act may obtain the extension of the time-limit by the court (para. (1)). Moreover, the court order rejecting the request for extension of the time-limit may be appealed, and the order of extension of the time-limit is not subject to appeal (para. (5)).

In conclusion, the Court found that the impugned provisions of Article 67 of the Enforcement Code do not restrict free access to justice, they meet the quality criteria and comply with Articles 20 and 23 of the Constitution and found the text "the document shall be deemed to have been delivered to the addressee on the date indicated in the acknowledgment of receipt" in para. (2) of Article 67 and para. (7) of the same Article of the Enforcement Code, adopted by Law no. 443 of 24 December 2004 *constitutional*.

B. Validation of MP mandates

In the plenary sessions of the Court, no circumstances were established that would prevent the validation of the mandates of Member of Parliament assigned by the Central Electoral Commission to the following alternate candidates:

- Mr. Nichita Țurcan, on the list of the Political Party "Party of Socialists of the Republic of Moldova" (JCC no. 4/2020);
- Mr. Nicolae Pascaru, on the list of the Political Party "Party of Socialists of the Republic of Moldova" (JCC no. 14/2020).

At the same time, by Judgement no. 8 of 24.03.2020, the Court confirmed the results of the new parliamentary elections of 15 March 2020, held in the uninominal constituency no. 38, Hâncești municipality, and validated the MP mandate of Mr. Ștefan Gațcan, candidate from the Political Party "Party of Socialists of the Republic of Moldova", elected in the Parliament of the Republic of Moldova in this constituency.

C. Requests

In 2020, the Court issued the following requests to the Parliament:

● Request no. PCC-01/189g/597 of 10.12.2020

By Decision no. 14 of 10 February 2020, the Constitutional Court declared the application on the constitutional review of the text "and of persons who have reached the age of 18, but have not reached the age of 21, who have not been convicted" in Article 84 para. (1) of the Criminal Code, lodged by Mr. Dumitru Robu, interim Prosecutor General, inadmissible.

The Court noted that to the persons who have reached the age of 18, but who have not reached the age of 21 and who have **not been previously convicted** a final punishment for **a maximum of 12 years and 6 months** of imprisonment may be applied pursuant to Article 84 para. (1) of the Criminal Code. On the other hand, if the persons who have reached the age of 18, but have

not reached the age of 21 **have been previously convicted**, then the prison sentence in the case of the concurrence of offences is applied, according to Article 70 para. (4) of the Criminal Code, **for a maximum of 20 years. The difference between the enunciated norms consists in the existence or absence of a previous conviction.** The incidence of one provision or another takes place according to this criterion.

At the same time, the Court noted that, according to the first thesis of Article 70 para. (3^1) of the Criminal Code, "when applying punishment to persons who have reached the age of 18 but have not reached the age of 21, who have committed a crime at the age of 18 to 21, the maximum sentence is reduced by one third". In this regard, the Court found that reducing the maximum sentence by one third for persons who have reached the age of 18 but who have not reached the age of 21 is a first operation carried out by the court of law to individualize sentences, whether or not the persons in question have been previously convicted or whether they have committed one or more offences (i.e. concurrence of offences).

The Court considered that Articles 70 para. (3^1) and 84 para. (1) of the Criminal Code must be analyzed in conjunction. Committing several crimes by the same person indicates his/her criminal perseverance. The concurrence of offences (ideal or real), as a form of the plurality of offences, represents a factual situation that concerns the perpetrator and demonstrates, as a rule, a high degree of social danger that he/she presents. Therefore, **it is reasonable to assume that if a single offense is committed by persons aged between 18 and 21 who have not been previously convicted, a milder punishment should be given than the one provided for committing several offenses of the same seriousness.** In any case, the penalty for committing a single offense must not exceed the limit of the penalty set by the legislator for the same category of persons in the case of concurrence of offences.

The Court noted that the isolated interpretation of Article 70 para. (3^1) of the Criminal Code in the case of committing a single exceptionally serious offence by persons aged between 18 and 21 who have not been previously convicted could lead to a harsher punishment than to the commission of several offences of the same seriousness by the same category of persons. This results not only from the reduction of the maximum limit of the punishment by one third, imposed by the first thesis of Article 70 para. (3^1) of the Criminal Code, but also of the second thesis of the same Article, which allows the judge, depending on the personality of the offender and other relevant circumstances, to apply the sentence within the general limits. On the other hand, the judge does not have the same possibility when applying Article 84 para. (1) of the Criminal Code, which shows that the maximum limit of imprisonment is 12 years and 6 months.

In order to exclude isolated interpretations of Article 70 para. (3^1) of the Criminal Code and, respectively, the application of harsher punishments in the case of committing a single offense by persons aged between 18 and 21 and who have not been previously convicted than in the case of committing several offenses by the same category of persons, the Court considers it necessary for the Parliament to intervene.

Therefore, based on Article 72 para. (3) n) of the Constitution, the Parliament will be able to conceptually adjust the establishment method and the punishment limits applicable in the case of committing a single offence by persons aged between 18 and 21 and who have not been

previously convicted [Article 70 para. (3^1) of the Criminal Code] and, respectively, in the case of committing several offences by the same category of persons (Article 84 para. (1) of the Criminal Code], taking into account the differences in the calculation of the criminal punishment.

● Request no. PCC-01/47a of 23.06.2020

On 23 June 2020, the Constitutional Court delivered Judgement no. 17, by which it, *inter alia*, found Articles 20 k), 22 para. (1) i), 24 g) and 25 j) of Law no. 212 of 24 June 2004 on the Regime of the State of Emergency, Siege and War and the text of "other necessary actions" from Article 2 para. 12) of Parliament Decision no. 55 of 17 March 2020 on the declaration of the state of emergency constitutional, in so far as the authorities responsible for managing the state of emergency fulfill only the tasks, measures or actions necessary to achieve the objectives underlying the declaration of the state of emergency, the tasks, measures or actions required do not go beyond the power of the Executive and the Parliament may exercise effective control of the measures in question.

In the above-mentioned Judgment, the Court found that the Law on the Regime of the State of Emergency, Siege and War did not establish sufficient mechanisms to enable the Parliament to verify whether the authorities responsible for managing the state of emergency acted within the limits laid down by law. The Court noted that parliamentary control is necessary to compensate for the imbalance of powers in the State created by giving the Executive increased powers and to ensure compliance with the principle of the rule of law (see § 126 of the Judgment).

Given that the Constitution does not require the legislator to regulate this mechanism according to a certain model, the Court considered it necessary to issue a Request to the Parliament in order to regulate an effective parliamentary control mechanism over the measures ordered by the Executive during the state of emergency. The Parliament may take into account the recommendations of the Venice Commission in this matter (see §§ 120 and 121 of the Judgment) and the regulation of this mechanism by the European states (see §§ 20-44 of the Judgment).

● Request no. PCC-01/130a/461 of 08.10.2020

On 8 October 2020, the Constitutional Court delivered Judgement no. 24, by which it recognized the text "provide services and/or" in Article 6 para. (5) of Law no. 86 of 11 June 2020 on Non-Profit Organizations constitutional insofar as non-profit organizations are allowed to provide paid services to electoral contestants during the election campaign.

In order to reach this solution, the Court held that the prohibition on providing paid services to electoral contestants during the election campaign, established by the impugned provisions, unjustifiably and discriminatively restricts the property rights of non-profit organizations, contrary to Articles 16 and 46 of the Constitution.

In this context, the Court asked the Parliament to regulate Article 6 para. (5) of Law no. 86 of 11 June 2020 on Non-Profit Organizations in accordance with Judgement of the Constitutional

Court no. 24 of 8 October 2020, so that during the election campaign non-profit organizations will be prohibited only from providing free services, not onerous services.

● **Request no. PCC-01/94a/533 of 10.11.2020**

On 10 November 2020, the Constitutional Court delivered Judgement no. 26, by which the text "including" in Article 453 para. (1) of the Criminal Procedure Code of the Republic of Moldova was declared unconstitutional (*grounds of appeal for annulment).*

In the above-mentioned Judgment, the Court found that the usage of the term "including" by the legislature in Article 453 para. (1) of the Criminal Procedure Code raises issues regarding the quality of the law. The use of that term leaves room for the interpretation that, once an action for annulment has been made for the purpose of remedying errors of law in the judgment in the event a fundamental defect in the previous proceedings affected the judgment under appeal, a separate appeal may no longer be lodged when the European Court of Human Rights informs the Government of the Republic of Moldova of the application.

The Court noted that the interpretation that could be imposed by the usage of the term "including" makes the impugned provision contrary to the standard of the quality of the law and infringes the right to free access to justice, to a fair, full and objective trial, which may lead to convictions by the Republic Moldova by the European Court of Human Rights.

In order to remedy the situation and guarantee the effectiveness of the rights of individuals, the Court reserved the prerogative to establish a temporary solution by the judgement until the Parliament intervenes with amendments in line with the reasoning of the Judgment.

As a result, until the amendment of Article 453 para. (1) of the Criminal Procedure Code, in the sense of its compliance with the Judgment of the Court, irrevocable judgments may be appealed for annulment: a) if a fundamental defect in the previous procedure affected the judgment under appeal, **and** b) if the European Court of Human Rights informs the Government of the Republic of Moldova of the submission of the application from which the existence of a fundamental defect in the previous procedure that affected the appealed judgment may be deduced.

● **Request no. PCC-01/54a-27 of 13.11.2020**

By Decision no. 27 of 13 November 2020, the Constitutional Court found the following texts unconstitutional:

- "in the decision the reasons underlying it will not be mentioned" in Article 55 para. (3) thesis II;

- "Such data and information may not in any form, directly or indirectly, be brought to the attention of the alien declared an undesirable person, including during the examination in court of the contestation of the decision regarding the declaration of the alien as an undesirable person." in Article 56 para. (2);

- "and e)" in Article 60 para. (4);

- "(1) and" in Article 63 para. (4)

of Law no. 200 of 16 July 2010 on the Regime of Aliens in the Republic of Moldova.

The Court also declared Article 225 para. (3) of the Administrative Code unconstitutional in so far as it limits the jurisdiction of the courts of law to control the proportionality of individual and normative administrative acts.

In order to avoid a legislative vacuum, the Court established an interim solution, taking into account the reasoning of the judgment. In particular, until the amendment by the Parliament of Articles 55 para. (3) thesis II and 56 para. (2) the second thesis of Law no. 200 of 16 July 2010 on the Regime of Aliens in the Republic of Moldova, the decision to declare an alien as an undesirable person for reasons of national security will contain a summary of reasons, in a manner compatible with the legitimate interest of national security, with the notification of the alien in this form.

● **Request no. PCC-01/189e/597 of 10.12.2020**

On 10 December 2020, the Constitutional Court delivered Judgement no. 30 on the confirmation of election results and the validation of the term of office of President of the Republic of Moldova.

Examining the case-files, the Court noted the worrying conclusions of national and international observers on the recording of hate speech and incitement to discrimination, intolerant messages and statements of candidates, which left a visibly negative impact on the election campaign.
Also, in its conclusions and recommendations, the Central Electoral Commission stressed that "conducting the election campaign with incitement to hatred or denigration of electoral contestants is becoming more common, a fact reported by accredited observers".
The Court emphasizes that any hate speech and incitement to discrimination that exceeds the admissible limits of freedom of expression and threatens the private life of the electoral contestant, exercised in the election, is unconstitutional. The counter-attack strategies of the electoral contestants expressed through divisive messages, hatred and incitement to discrimination, with attack on privacy, spread through printed materials, disseminated in the media and on social networking platforms, must be sanctioned, prevented and combated.
Thus, taking into account the reasoning set forth in Judgement no. 30 of 10 December 2020, the Court emphasizes the need for the Parliament to regulate prompt control and sanctioning mechanisms in this regard, in order to prevent and combat hate speech between electoral contestants, including in the online environment and social networks.

D. Separate opinions

Judges have given separate opinions on some acts delivered by the Court:

-**Eduard Ababei,** to Judgement no. 10 of 13.04.2020 on the constitutional review of some provisions of Law no. 56 of 2 April 2020 on the establishment of measures to support citizens and entrepreneurial activity during the state of emergency and the amendment of some normative acts; to Decision no. 40 of 13 April 2020 of inadmissibility of application no.50b /2020 on the interpretation of Article 106^1 of the Constitution;
-**Nicolae Roșca,** to Judgement no. 16 of 09.06.2020 on the exception of unconstitutionality of Article 70 paras. (3) and (13) of Insolvency Law no. 149 of 29 June 2012 (payment of the fixed

fee to the administrator/liquidator and reimbursement of the related expenses jointly transferred under the obligation of the governing bodies of the debtor);

-**Vladimir Țurcan,** to Judgement no. 20 of 09.07.2020 on the interpretation of Articles 134 paras. (1) and (2), 136 para. (3) and 140 para. (2) of the Constitution; to Decision no. 40 of 13 April 2020 on the inadmissibility of application no. 50b/2020 on the interpretation of Article 106^1 of the Constitution;

-**Serghei Țurcan,** to Advisory opinion no. 1 of 22.09.2020 on the draft law on amending and supplementing the Constitution (the judiciary [3]) and to Advisory opinion no. 2 of 03.12.2020 on the draft law on amending and supplementing the Constitution (the judiciary [4]).

E. Advisory opinions

In 2020, the Court delivered two advisory opinions on the draft law amending and supplementing the Constitution:

- Advisory opinion no. 1 of 22.09.2020 on the draft law on amending and supplementing the Constitution (the judiciary [3]);
- Advisory opinion no. 2 of 03.12.2020 on the draft law on amending and supplementing the Constitution (the judiciary [4]).

TITLE III. ENFORCEMENT OF THE CONSTITUTIONAL COURT`S ACTS

According to Article 28 of Law no. 317-XIII of 13 December 1994 on the Constitutional Court, the acts of the Court are official and enforceable acts throughout the country, for all public authorities and for all legal and natural persons. The legal consequences of the normative act or of some parts of it declared unconstitutional are to be removed according to the legislation in force.

The acts of the Constitutional Court have an *erga omnes* effect, being binding and opposable to all subjects, regardless of the level of authority.

The finding of legislative inaction, i.e. of the loophole of the law or of another normative act contrary to the Constitution, inevitably generates legal consequences. The judgement of the Constitutional Court presupposes the obligation of the legislator to solve the problem of the existence of legal loopholes through an adequate regulation and the elimination of the defective provisions.

The lack of a legislative intervention of the Parliament in order to execute the acts of the Court of constitutional jurisdiction is equivalent to the non-exercise of its basic power, namely that of enactment, attributed by the Constitution. This situation is attested in the conditions in which some judgements of the Constitutional Court by which a legal provision or an act is declared unconstitutional may generate legislative vacuum, deficiencies and uncertainties in the application of the law.

In order to exclude these negative repercussions, Article 28^1 of the Law on the Constitutional Court stipulates that the Government, within a maximum of 3 months from the date of publication of the Constitutional Court`s judgement, presents to the Parliament the draft law on amending and supplementing or repealing the normative act or parts thereof declared unconstitutional. The draft law is to be examined by the Parliament as a matter of priority.

1. The degree of enforcement of the judgements that declare the provisions of some normative acts unconstitutional

In order to monitor the process of amending the legislative acts, the provisions of which have been declared unconstitutional by Constitutional Court`s judgements, the Court regularly requests from the Parliament and the Government information on the level of enforcement of the adopted acts.

Thus, 4 judgements remain unenforced in 2017; in 2018 – 5 judgements; in 2019 – 4 judgements; in 2020 (of those liable to execution) - 4 judgements.

2. The degree of enforcement of the requests of the Constitutional Court

The request represents the act by means of which the Constitutional Court, without substituting the legislative body, exercises, according to the provisions of Article 79 para. (1) of the Constitutional Jurisdiction Code, its role as "passive legislator", pointing out some loopholes or shortcomings in the legislation and insisting on the need to make changes to the legal regulations that have been subject to constitutional review.

The Court notes that during 2011-2020 a number of requests issued by the Court remained unenforced: in 2011 - 1 request; in 2014 -2 requests; in 2015 - 1 request; in 2016 - 1 request; in 2017 - 4 requests; in 2018 - 4 requests; in 2019 - 1 request; in 2020 (of those subject to enforcement) - 2 requests.

TITLE IV. EXTERNAL COOPERATION

In 2020, Constitutional Court (CC) judges and judicial assistants participated in a number of events that contributed to strengthening the Court's external relations and image internationally, improving, to the same extent, bilateral platforms for the exchange of experience and good practice in constitutional matters.

Internationally, 2020 has become remarkable by celebrating the 70th anniversary of the signing of the European Convention on Human Rights. In this regard, the opening of the judicial year at the European Court of Human Rights (ECtHR) was launched by organizing a seminar on the living instrument nature of the European Convention on Human Rights. This event, held in Strasbourg (France), on 31 January 2020, was attended by two judges of the CC, Mr. Nicolae Roșca and Ms. Liuba Șova, offering them the opportunity to hold a meeting with the ECtHR judge on behalf of the Republic of Moldova, Mr. Valeriu Grițco.

At the national level, the Constitutional Court celebrated its 25th anniversary. The event was marked by the organization of an international conference entitled "Constitutional Justice and the Society's Reaction: When the Solutions of the Constitutional Courts are in Disagreement with the Majority Opinion of the Society".

A. The dimension **of bilateral meetings** has been considerably influenced by the global pandemic situation, starting with March 2020. Thus, in the first months of the reference year, the following series of official visits to the Constitutional Court took place.

On 16 January 2020, H.E. Mr. Peter Michalko, Ambassador, Head of the European Union Delegation to the Republic of Moldova, had a meeting with the judges of the CC, in which the latter expressed their appreciation for the support and substantial contribution of the international partners and the European Union, including through the Venice Commission, in

overcoming the political and constitutional crisis of June 2019. H.E. Ambassador Michalko assured that the European Union will remain a supporter and reliable partner of the Republic of Moldova in the process of implementing reforms in all areas, including justice.

On 20 January 2020, during the meeting of the judges of the Constitutional Court with the members of the Council of Europe delegation, chaired by Mr. Christos Giakoumopoulos, Director-General of the Directorate for Human Rights and the Rule of Law, accompanied by representatives of the Secretariat of the Council of Europe, the Venice Commission and the Head of the Council of Europe Office in Chișinău, Mr. William Massolin, the discussions focused largely on the reform of the judiciary.

The representatives of the European institutions assured the judges that the Council of Europe and, in particular, the Venice Commission will provide the necessary support to identify solutions that will be accepted by the country's leadership, while emphasizing the importance of reaching a consensus on reform measures.

During the meeting, confidence in the current composition of the CC and in the further work of this institution was expressed, emphasizing the key role of the CC in the reform process by ensuring compliance with the Constitution and the rule of law. The importance of maintaining a close cooperation between the CC and the Venice Commission was also reiterated, a cooperation which, over the years, has brought beneficial results for the Republic of Moldova.

In turn, the Court's judges expressed their willingness to work with domestic and international institutions to ensure the smooth running of the justice reform process, to increase the confidence of the citizens of the Republic of Moldova in the democratic institutions of the State, and thanked the representatives of the Council of Europe and, in particular, the Venice Commission for their recent opinion and support offered in order to overcome the political-institutional crisis and to strengthen the application of international standards in the field of constitutional jurisdiction.

On 28 January 2020, during the meeting of the judges of the Court with H.E. Mr. Dereck J. Hogan, Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of Moldova, Mr. Vladimir Țurcan, President of the Court, has expressed his high appreciation for the support and contribution of the United States Embassy, along with other international partners of the country, in overcoming the political crisis of June 2019. In a brief presentation of the work of the current composition of the Court since its nomination, the President emphasized the importance of improving the Court's image in society and increasing the citizens' trust in the institution, which guarantees the supremacy of the Constitution, ensures the realization of the principle of separation of powers in the State, as well as the responsibility of the State towards the citizen and of the citizen towards the State.

On 30 January 2020, CC judges met with Mr. Lamberto Zannier, the OSCE High Commissioner on National Minorities. Commissioner Lamberto Zannier mentioned the important role of the Court in the process of carrying out democratic reforms in the Republic of Moldova, noting in this regard that the reforms that will take place should not affect the national minorities in the Republic of Moldova. At the same time, the High Guest welcomed

the good cooperation of the Court with international organizations, especially with the Venice Commission.

On 19 February 2020, a delegation from the Venice Commission, chaired by its President, Mr. Gianni Buquicchio, paid a visit to the Constitutional Court. The constitutional judges thanked the Commission for its efforts and support in developing consultative opinions on sensitive legal issues for the Republic of Moldova. The assistance that the CC has received over the years is extremely valuable, it has allowed a systematization of good practices and has been an important source of inspiration for the decisions made during its work. President Buquicchio emphasized the fruitful cooperation that the Commission has had and will continue to have with the CC, emphasizing that constitutional justice is an important area for the institution he leads, with the work of the constitutional courts being the focus of its attention. Given the interruption of bilateral diplomatic activities for about 7 months, caused by the state of emergency in public health, declared nationally, and the need to apply and comply with measures to control and combat COVID-19 infection and ensure the health and safety of the Constitutional Court's staff, the dialogue in this regard resumed in the autumn of 2020.

Thus, on 29 September 2020, the CC was visited by the Extraordinary and Plenipotentiary Ambassador of the United States of America to the Republic of Moldova, H.E., Mr. Dereck J. Hogan, the discussions being focused mainly on the subject of judicial reform, and the role of the Court in this process, manifested in ensuring the observance of the Constitution and the principles deriving from it. During the discussions, the President of the CC, Ms. Domnica Manole, mentioned the priorities of the Court, emphasizing the importance of respecting the independence of judges in a democratic society, ensuring the supremacy of the Constitution, as well as the authority of the Court.

On 30 September 2020, a meeting took place at the CC of the Republic of Moldova between the judges of the Court and the Head of the Delegation of the European Union in the Republic of Moldova, H.E. Mr. Peter Michalko, in which several topics were discussed, including the justice reform, the effective cooperation with the Venice Commission, the independence of constitutional judges and the imperative to respect the Constitution.

The President of the CC, Ms. Domnica Manole, reiterated the importance of respecting the Constitution and capitalizing on the relationship with the Venice Commission, whose recommendations contributed to the implementation of good political and jurisdictional practices in the Republic of Moldova. On this occasion, the President of the Court informed H.E. Peter Michalko about the fact that from February 2021 to 2024, the CC will hold the presidency of the Conference of European Constitutional Courts.

On 8 October 2020, the Constitutional Court of the Republic of Moldova hosted a meeting of the Court's judges with the delegation of the OSCE/ODIHR Presidential Election Observation Mission of 1 November 2020, led by the Head of Mission, Ms. Corien Jonker.

The discussions during this meeting focused on the conducting of the elections, on legal issues related to the procedure of validation of the presidential elections and confirmation of their legality by the Constitutional Court, on the manner of resolving electoral disputes and the execution of the requests issued by the Court on the previously adopted decisions and the

follow-up of their execution. The President of the Constitutional Court, Ms. Domnica Manole, reiterated the importance of respecting the Constitution by all actors involved, directly or indirectly, in the electoral race, by effectively ensuring the right to vote and the right to stand for election.

On 9 October 2020, the judges of the CC had a meeting with H.E. Ms. Anna Lyberg, Ambassador Extraordinary and Plenipotentiary of the Kingdom of Sweden to the Republic of Moldova, in which several topics were addressed, such as the role of the Court in the process of reforming the judiciary, the taking over of the presidency of the Conference of European Constitutional Courts for three years in February 2021, institutional priorities, the importance of judges' independence, etc. Ms. Domnica Manole, reiterated the importance of developing bilateral relations with Sweden, expressing on this occasion the openness for the implementation of joint projects.

On 12 October 2020, the CC judges had a meeting with Mr. William Massolin, Head of the Council of Europe Office in Chisinau, during which the collaboration and support provided for 25 years by the Council of Europe to the Republic of Moldova for the promotion of democracy and good governance, the respect for human rights and the rule of law were confirmed.

The topics discussed were cooperation with the Venice Commission, the role of the Constitutional Court in ensuring compliance with the Constitution and the independence of constitutional judges. The discussions also focused on the Constitutional Court's advisory opinion on the draft constitutional amendments of 22 September 2020. The President of the Constitutional Court, Ms. Domnica Manole, emphasized the high appreciation of the Court's level of cooperation with the Venice Commission and, at the same time, the openness to support the smooth reform of the judiciary, in accordance with constitutional principles.

On 15 October 2020, Ms. Domnica Manole had a meeting with Ms. Satu Seppanen, EU High Counsel for Justice and the Prosecutor's Office in the Republic of Moldova, in which issues related to the jurisdiction of the Court and its constitutional role in the process of judicial reform in the Republic of Moldova were addressed. The President of the CC expressed her appreciation for the cooperation with the European Union and its support to the authorities of the Republic of Moldova and communicated, on this occasion, about the takeover by the CC, in February 2021, of the presidency of the Conference of European Constitutional Courts for a three-year term, held at that time by the Constitutional Court of the Czech Republic.

B. In 2020, **at the national level**, the CC organized and held the *International Conference dedicated to the 25th anniversary of the founding of the CC*. The event was marked by an international conference entitled “Constitutional Justice and the Society's reaction: When the Solutions of the Constitutional Courts are in Disagreement with the Majority Opinion of Society”.

The event was attended by the delegation of the Venice Commission, led by its President, Mr. Gianni Buquicchio, delegations of 14 constitutional courts and equivalent institutions from abroad, representatives of the diplomatic corps, the national and foreign academics, representatives of the civil society, as well as the heads of State institutions, such as: the

Presidency, the Parliament, the Government, the Superior Council of Magistracy, the Supreme Court of Justice, the Prosecutor's Office and others.

The President of the Constitutional Court, Mr. Vladimir Țurcan, thanked the participants in the event and stressed that these 25 years have been years of transformations, trials and challenges, years of accumulation and development of jurisdictional experience, and that the fundamental purpose for which the Court was founded was to guarantee the supremacy of the Constitution, the protection of human rights and democratic values in a State governed by the rule of law. By founding the Constitutional Court, the Republic of Moldova obtained a key link to ensure the principle of separation of State powers in a constitutional democracy.

The President of the Court emphasized that the task of the Court's judges was and is to create and maintain a bridge between the Constitution and society, based on the coexistence of balance and compromise, as indicators of evolved democracies. During the conference, the participants expressed their views on the topic, highlighting the experiences of other constitutional jurisdictions and emphasizing the idea that the role of a Constitutional Court is not to navigate between the majority and the minority, but to protect constitutional rights.

C. Regarding **the cooperation with other similar institutions**, we note the participation of the President of the Constitutional Court, Ms. Domnica Manole, in the international conference *"The Constitution of the XXI century - the rule of law, human value and State effectiveness"*, dedicated to the 25th anniversary of the adoption of the Constitution of the Republic of Kazakhstan, which took place online on 27 August 2020.

The event was organized under the auspices of the Constitutional Council of the Republic of Kazakhstan and hosted guests of honor, such as the President of the Venice Commission, Mr. Gianni Buquicchio, the Director General of the German Foundation for International Legal Cooperation (IRZ), Mr. Frauke Bachler, the President of the Court of Eurasian Economic Union, the Head of the OSCE Office in Nur-Sultan, etc.

The conference sessions included thematic papers presented by the heads of the Constitutional Courts of Germany, Ukraine, Latvia, Armenia, Indonesia, Korea, Thailand, Kazakhstan, Azerbaijan, Maldives, Myanmar, Mongolia, the Russian Federation, Tajikistan, Uzbekistan, etc., as well as representatives of the Kazakh academic environment and foreign experts.

In September, officials of the Constitutional Courts of the Republic of Moldova and Romania held *a series of online seminars*. In the opening of the event, Mr. Valer Dorneanu, President of the Constitutional Court of Romania, and Ms. Domnica Manole, President of the Constitutional Court of the Republic of Moldova, thanked their colleagues from Romania for this extremely valuable scientific exercise, as well as for their openness.

D. Regarding the participation of the CC in other international events, we note the following:

On 24-27 February, a delegation from the CC, led by President Vladimir Țurcan, attended *a summit of the Global Judicial Integrity Network,* organized in Doha, Qatar. The meeting included in its agenda topics such as: "Usage of social networks by judges", "Usage of artificial intelligence by judges", "Transparency and accountability of the higher bodies of the

judiciary", "Reassessment and dismissal of judges during constitutional transitions" etc. and ended with the signing of a Declaration on the Integrity of the Judiciary.

During the event, the President of the CC had informal talks with the President of the Court of Cassation of the State of Qatar, Mr. Hassan bin Lahdan Alhassan Almohanadi, with representatives of the Superior Council of Magistracy of Romania, of the Supreme Court of the Russian Federation, of the Superior Council of Magistracy of Georgia and of the Constitutional Court of the Czech Republic, present at the meeting.

On 8 December 2020, the President of the Constitutional Court, Ms. Domnica Manole participated online in the international conference *"70 years of the ECHR, 25 years since the adherence of the Republic of Moldova to the Council of Europe – implementation of CoE standards at national level"*, organized under the auspices of the Ombudsman, in which she spoke about the role of the Constitutional Court in ensuring the respect for fundamental human rights and freedoms in the Republic of Moldova in the light of the European Convention on Human Rights.

On 11 December 2020, Ms. Domnica Manole also participated in the international conference *"Women's Leadership and Their Role in the Democratization of the Country"*, also organized online under the auspices of the European Parliament and dedicated to the role of women leaders in the process of democratization of the country.

In one of the sections Ms. Ramona Strugariu, Member of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament, and Ms. Laura Codruța Kövesi, Prosecutor General of the European Union have also held a speech. The President of the Constitutional Court had an intervention on the role and importance of women in promoting the rule of law and fundamental democratic values in the Republic of Moldova.

Title V. The workload of the Constitutional Court in numbers

In 2020, 227 applications were lodged with the Constitutional Court, 46 applications were taken over from 2019, and 71 applications were transferred for 2021 (see chart no. 1 of Annex no. 1).

Most applications were lodged by the courts of law (156 applications), MPs and parliamentary factions (64 applications) (see chart no. 3 of Annex no. 1).

The Court delivered 31 judgments, among which 10 judgments on solving the pleas of unconstitutionality, 10 judgments on the constitutional review of some normative acts, 6 judgments on interpreting some provisions of the Constitution (see chart no. 3 of Annex no. 1).

In 2020, the Court also issued 2 advisory opinions, 140 decisions of inadmissibility, 4 decisions of cessation, 5 decisions to admit the suspension of the contested acts and 15 decisions to reject the suspension of the contested acts (see chart no. 2 of Annex no. 1).

By most of its judgments in 2020, the Court found the impugned normative provisions unconstitutional (see chart no. 5 of Annex no. 1).

Carrying out a dynamic comparative analysis of the Court's acts, it was found that in the number of applications lodged, as in previous years, exceptions of unconstitutionality prevail in the jurisdictional activity of the Court, representing 69% of all applications lodged in 2020.

Out of the total number of applications submitted to the Court in 2020, the authors mostly challenged provisions form the criminal field (34%), being succeeded by the civil field (24%), the administrative field (22%), the field of social, economic and cultural rights (17%) and the field of political rights (3%) (see chart no. 10 of Annex no. 1).

In conclusion, given the complex nature of the applications, as well as the constantly increasing workload of the Court (*see chart no. 11 of Annex no. 1*), in order to streamline the constitutional review process, it is necessary to increase the number of specialized staff within the Secretariat of the Constitutional Court, *i.e.* increasing the number of judicial assistants. This objective can be made effective by strengthening the legal status of the judicial assistants in the Constitutional Court.

Annex no. 1

Chart no. 1

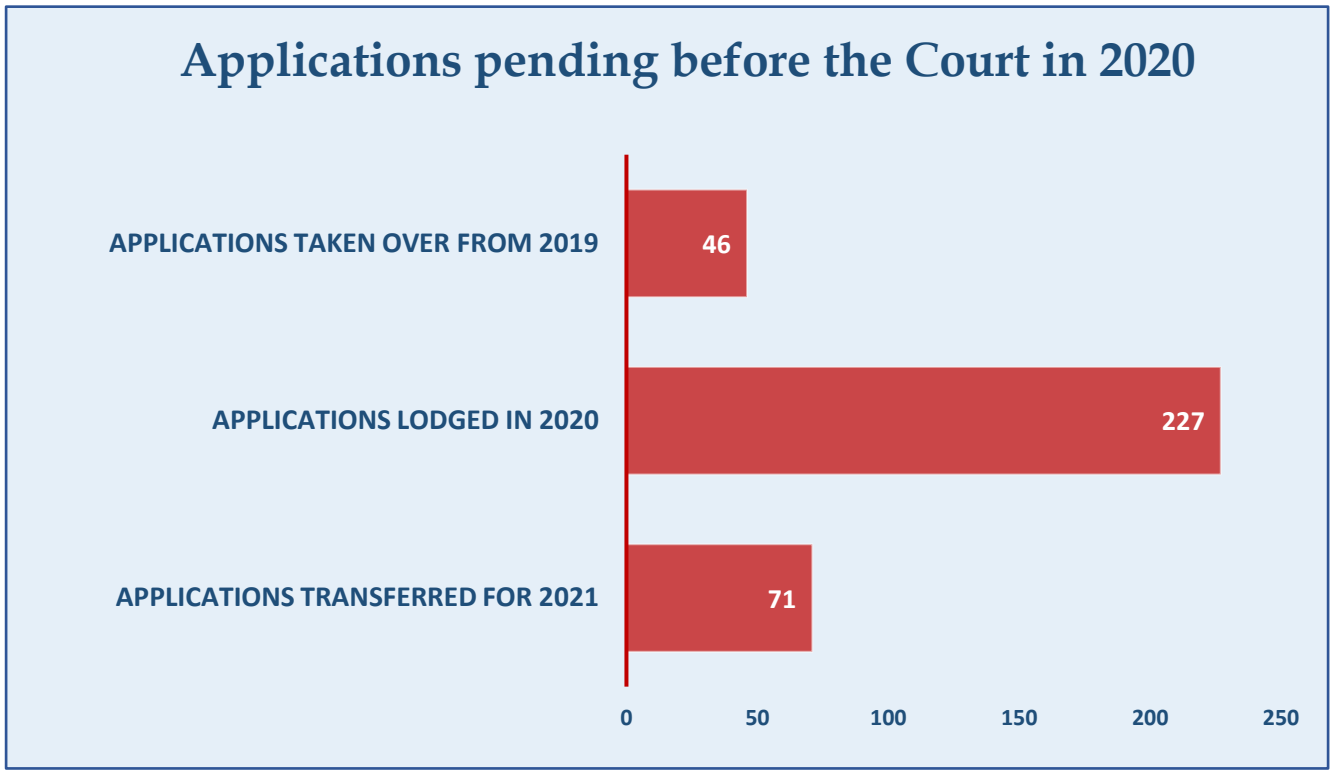


Chart no. 2

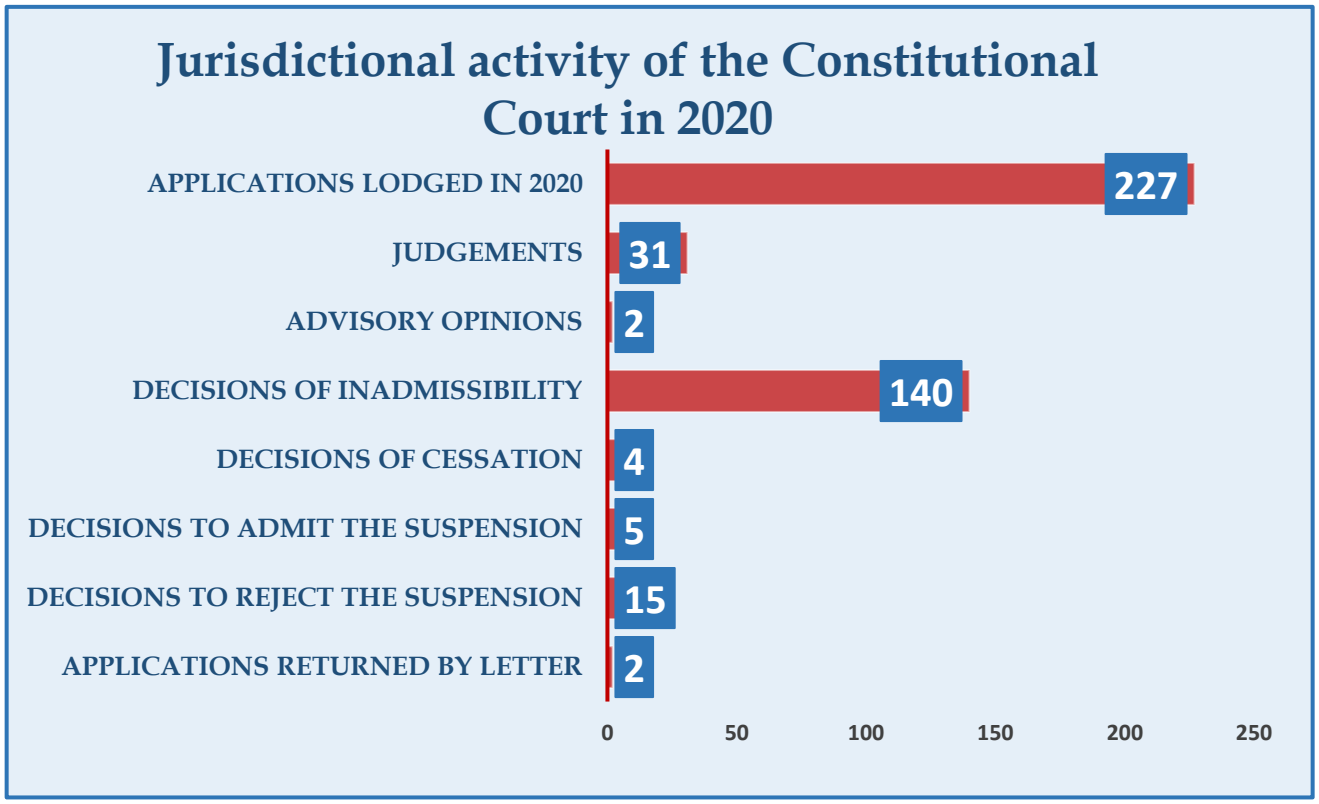


Chart no. 3

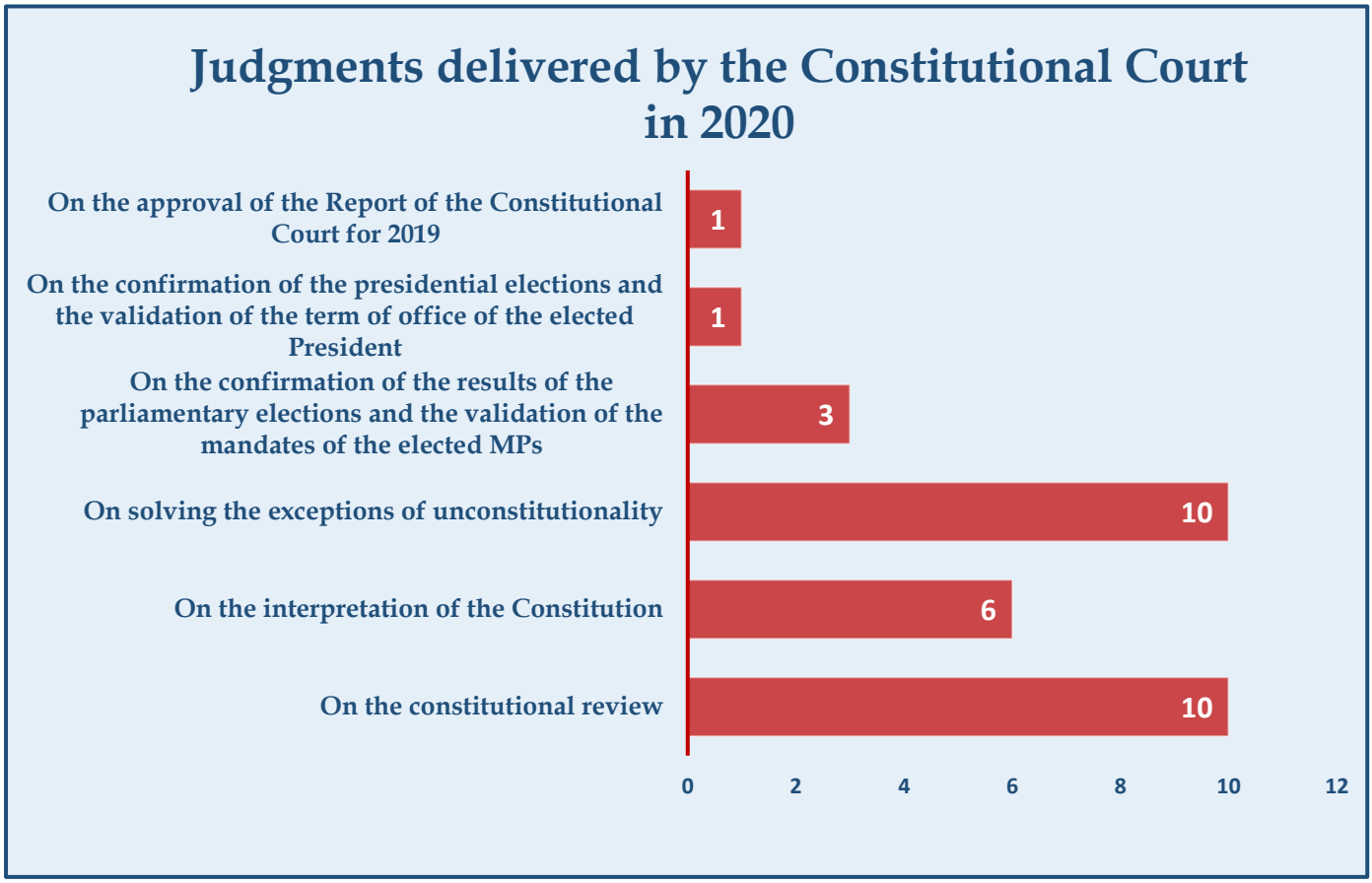


Chart no. 4

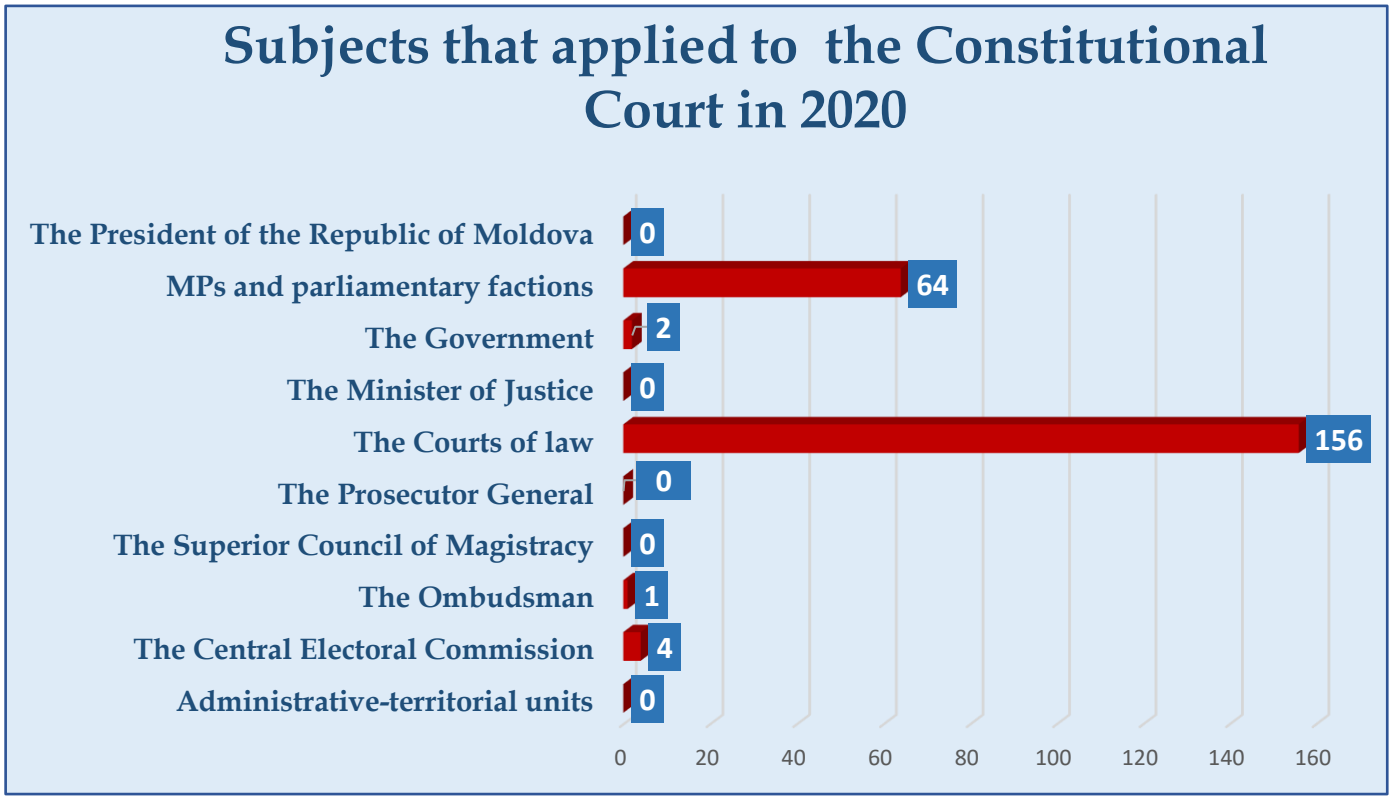
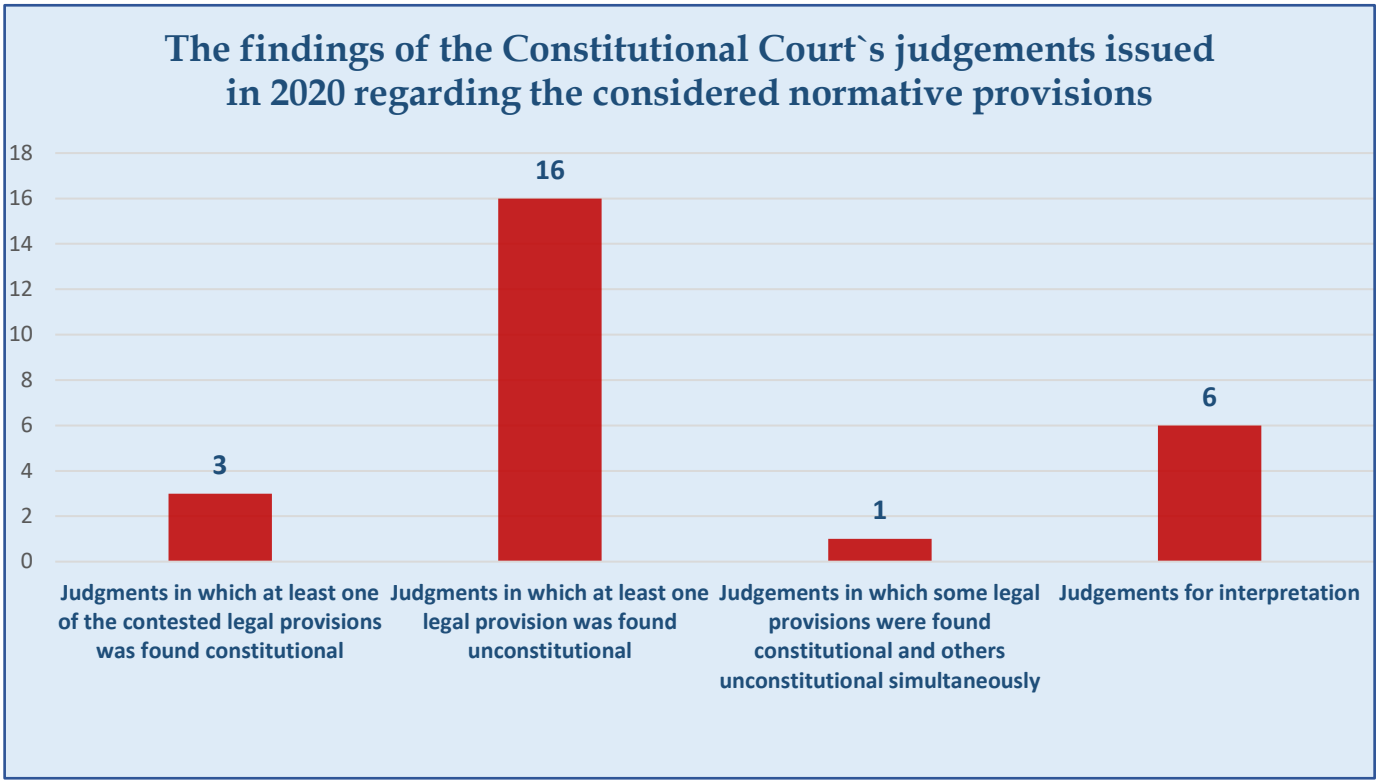


Chart no. 5



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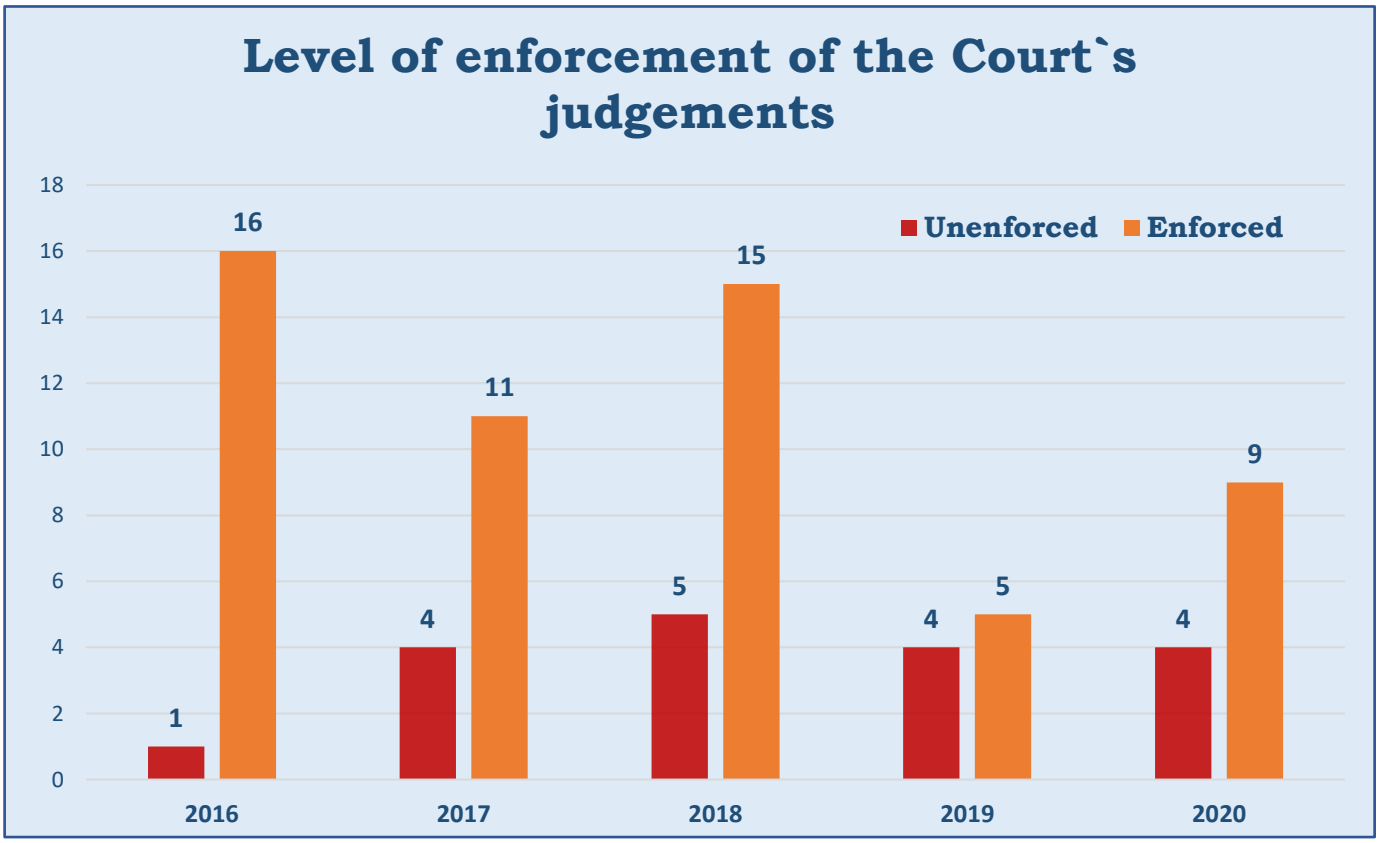

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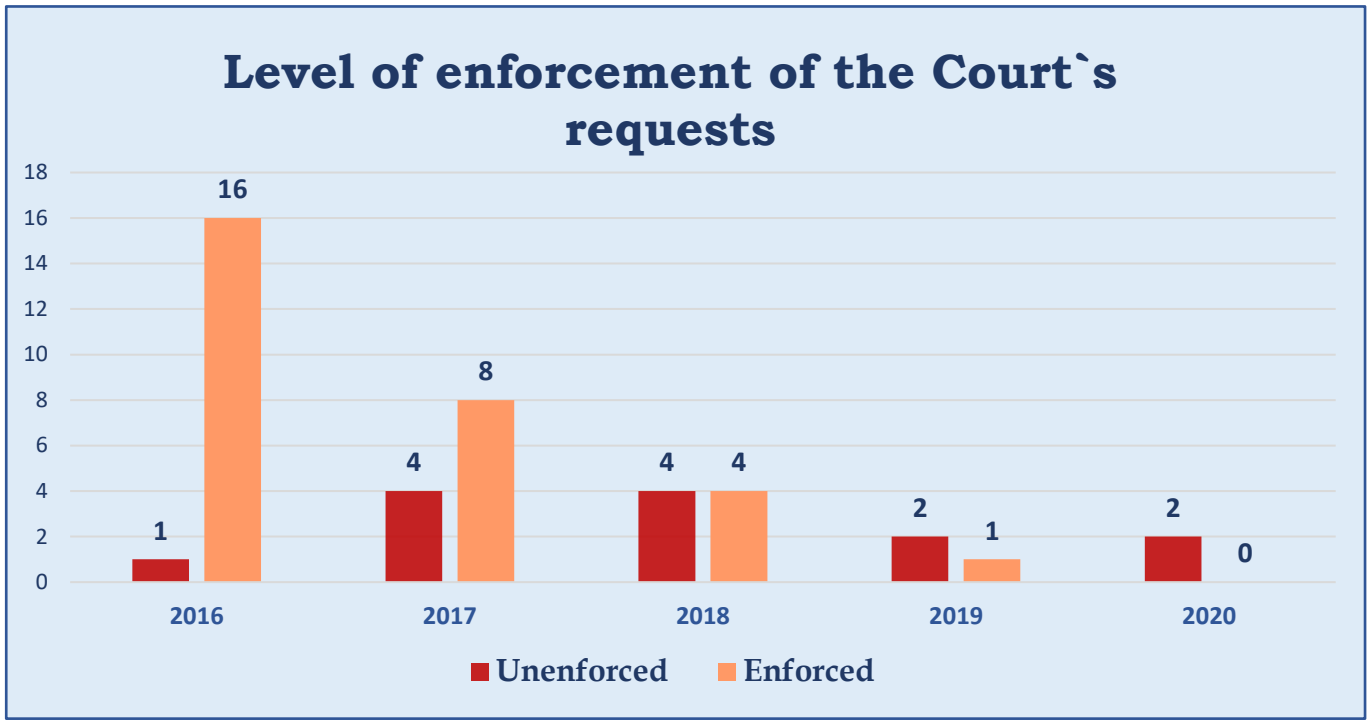

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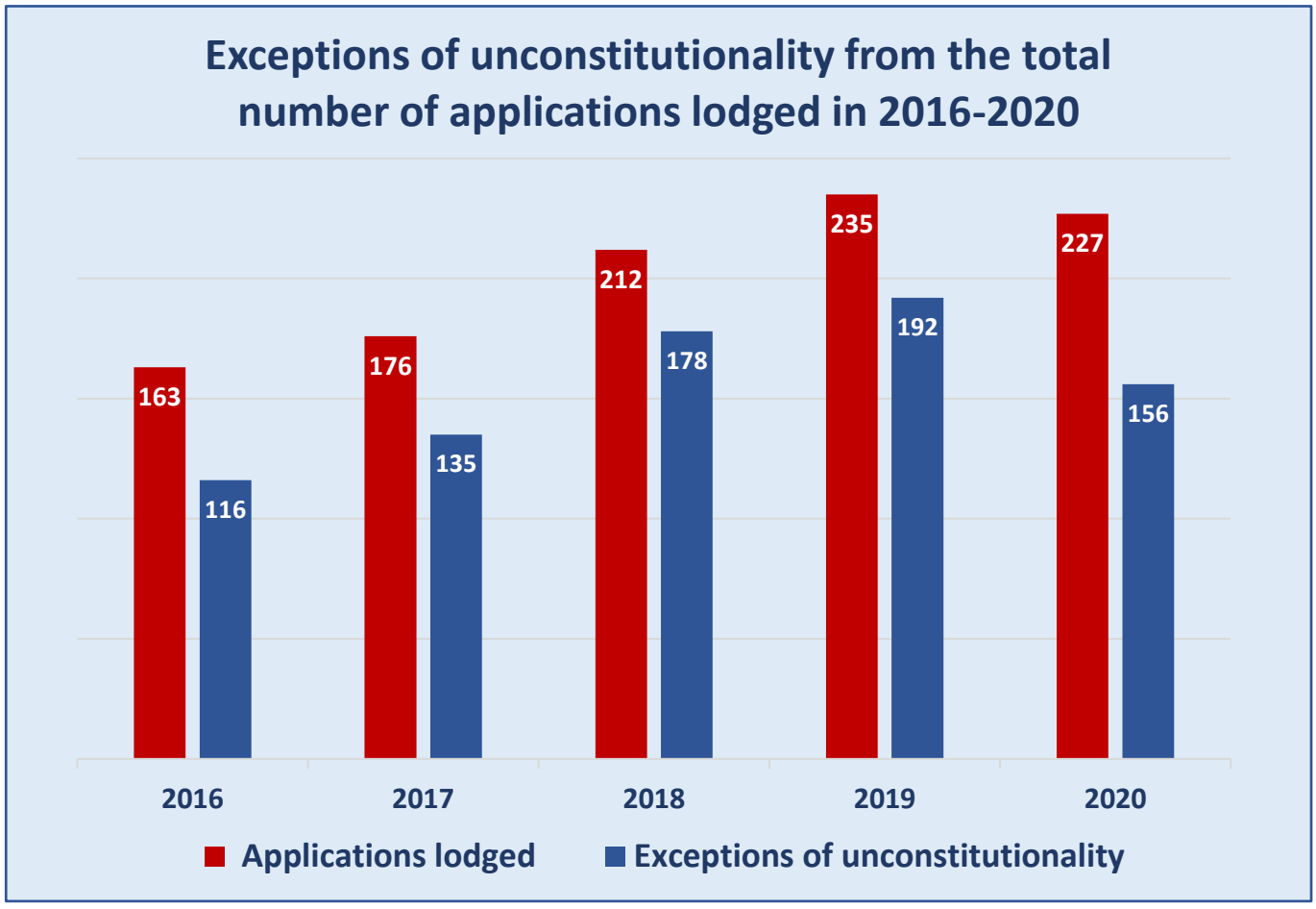


Chart no. 9

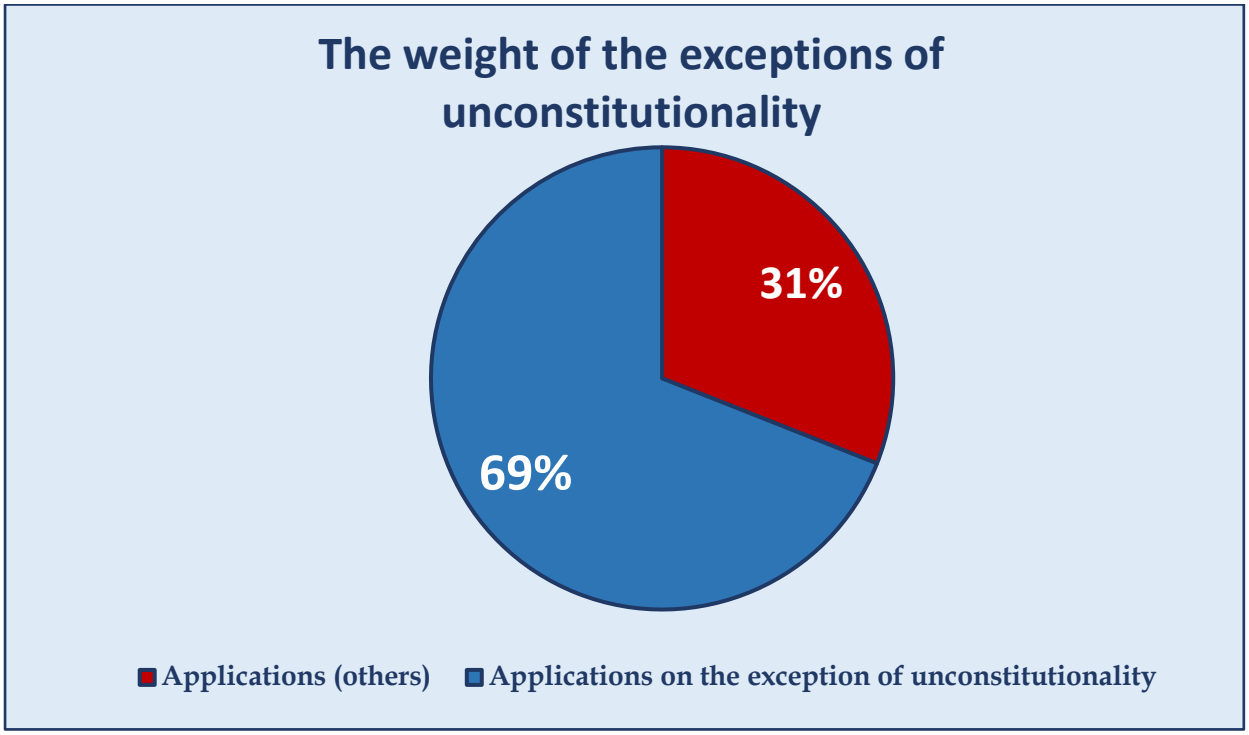


Chart no. 10

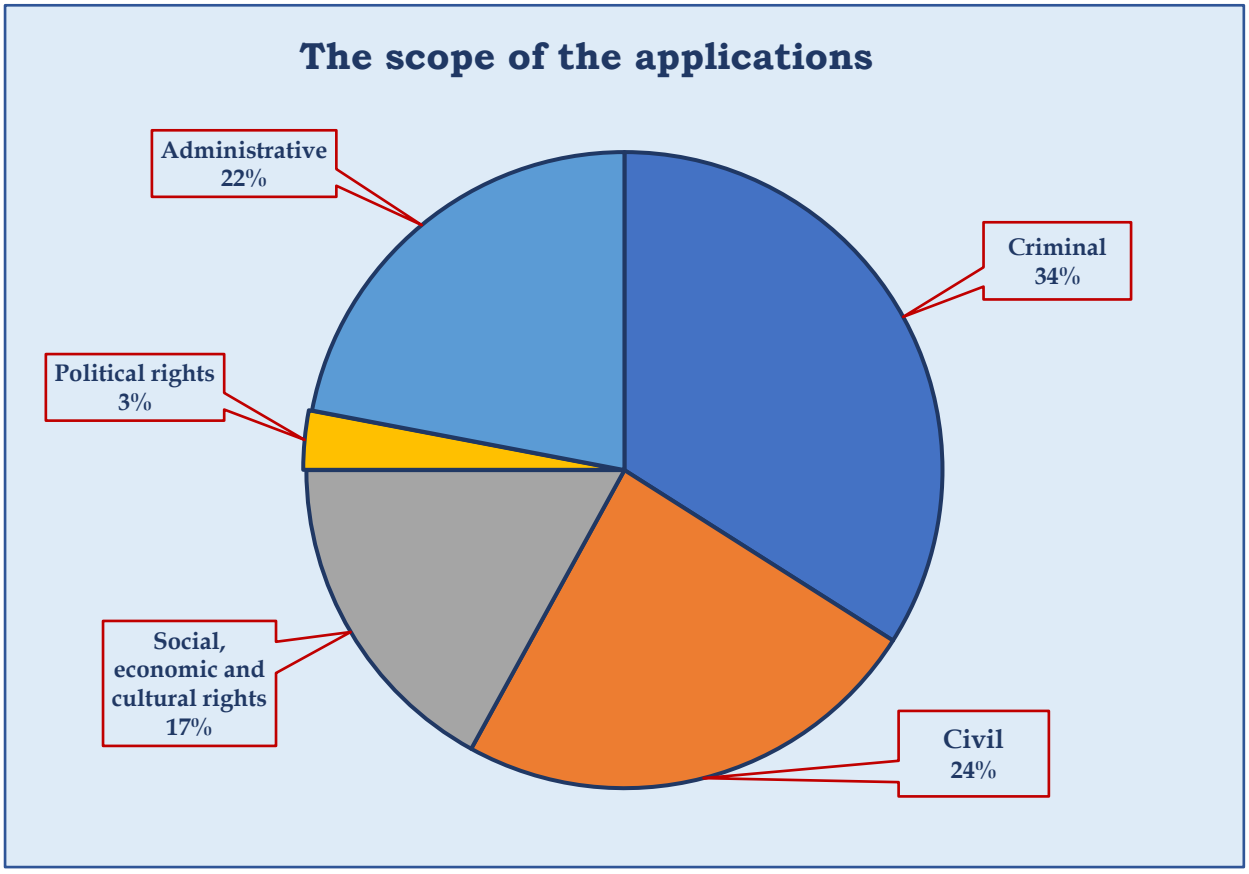
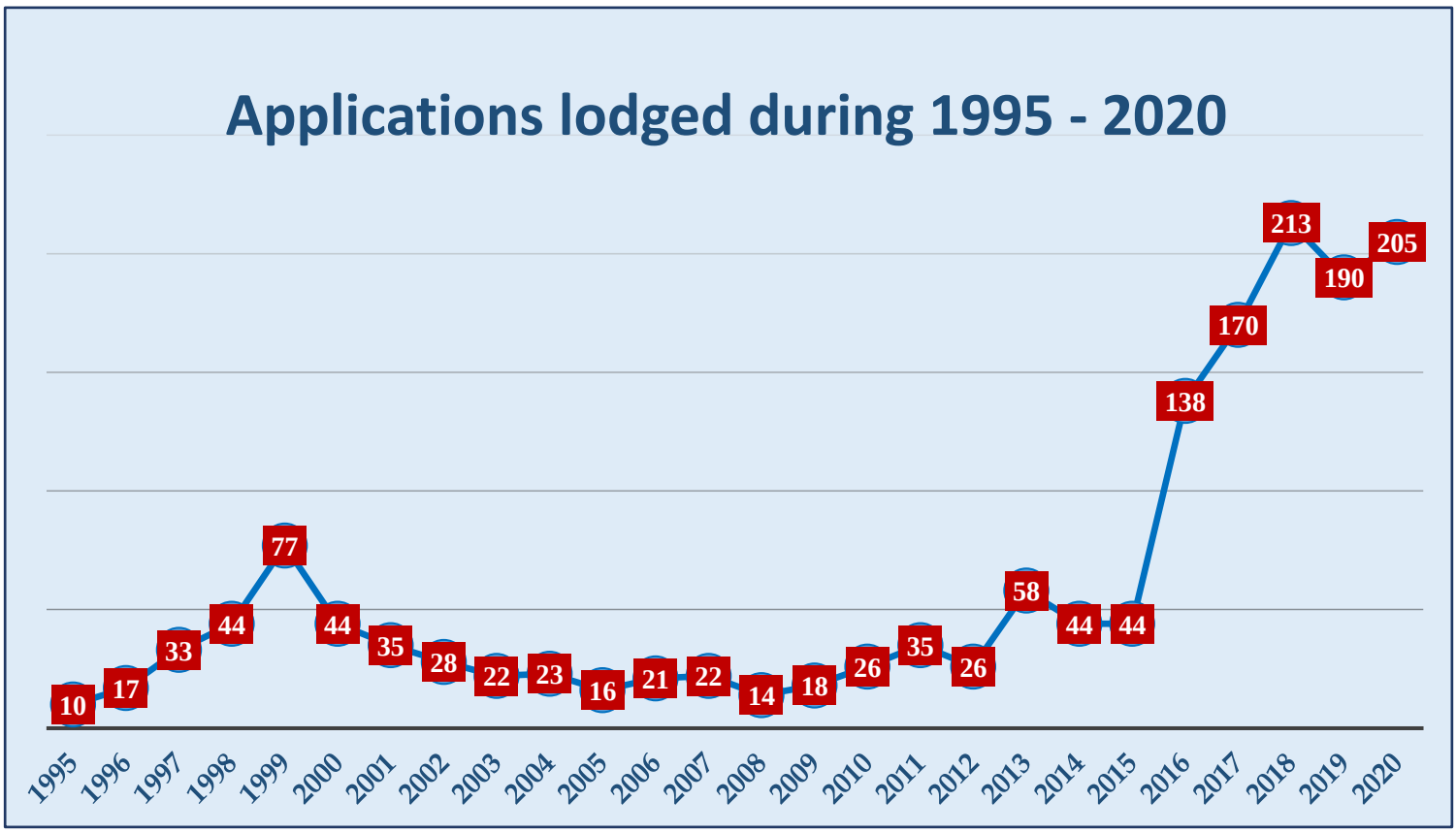


Chart no. 11


Applications lodged during 1995 - 2020
10
17
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Annex no. 2

JUDGMENTS AND ADVISORY OPINIONS DELIVERED BY THE CONSTITUTIONAL COURT IN 2020

No. d/o	Number and title of the act
1.	Judgement no. 1 of 13.01.2020 on the approval of the Report on the exercise of constitutional jurisdiction in 2019
2.	Judgement no. 2 of 23.01.2020 on the exception of unconstitutionality of some provisions of Article 6 para. 11^1) of the Code of Criminal Procedure (definition of the notion of "serious error of fact")
3.	Judgement no. 3 of 04.02.2020 on the exception of unconstitutionality of Article 87 para. (2) and para. (3) of the Labor Code (obligation of the trade union bodies' consent for release [2])
4.	Judgement no. 4 of 25.02.2020 on the validation of a MP mandate in the Parliament of the Republic of Moldova
5.	Judgement no. 5 on the exception of unconstitutionality of some provisions of Article 8 para. (1) d) of Law no. 294 of 21 December 2007 on Political Parties (number of members required to register a political party)
6.	Judgement no. 6 of 10.03.2020 on the exception of unconstitutionality of some provisions of Article 27 para. (5) of Law no. 270 of 23 November 2018 on the Unitary Salary System in the Budgetary Sector and of point 8 of Annex no. 6 to the Government Decision no. 1231 of 12 December 2018 for the implementation of the provisions of Law no. 270/2018 on the Unitary Salary System in the Budgetary Sector (salary guarantees in case of suspension of employment)
7.	Judgement no. 7 of 24.03.2020 on the exception of unconstitutionality of Article 151 para. (5) of Law no. 514 of 6 July 1995 on the Organization of the Judiciary (selection and determination of the judge who will exercise the powers of the investigating judge in case no judge agrees)
8.	Judgement no. 8 of 24.03.2020 on the confirmation of the results of the new parliamentary elections in the uninominal electoral constituency no. 38 of 15 March 2020 and the validation of an elected MP`s mandate
9.	Judgement no. 9 of 26.03.2020 on the interpretation of Article 137 of the Constitution (criminal liability of constitutional judges)
10.	Judgement no. 10 of 13.04.2020 on the constitutional review of some provisions of Law no. 56 of 2 April 2020 on the establishment of measures to support citizens and entrepreneurship during the state of emergency and the amendment of normative acts
11.	Judgement no. 11 of 07.05.2020 on the interpretation of Article 72 para. (3) a) of the Constitution

12.	Judgement no. 12 of 07.05.2020 on the constitutional review of the Agreement between the Government of the Republic of Moldova and the Government of the Russian Federation regarding the granting of a State financial loan to the Government of the Republic of Moldova, signed on 17 April 2020, of Government Decisions no. 169 of 13 March 2020 and no. 252 of 21 April 2020 and of Law no. 57 of 23 April 2020
13.	Judgement no. 13 of 21.05.2020 for the control of the constitutionality of some provisions of Law no. 3 of 25 February 2016 on the Prosecutor's Office, of Parliament Decision no. 101 of 30 July 2019 regarding the submission of the candidacy for the position of interim Prosecutor General of the Republic of Moldova and of Decree of the President of the Republic of Moldova no. 1232-VIII of 31 July 2019 regarding the appointment of Mr. Dumitru Robu as interim Prosecutor General
14.	Judgement no. 14 of 26.05.2020 on the validation of a MP mandate in the Parliament of the Republic of Moldova
15.	Judgement no. 15 of 28.05.2020 on the exception of unconstitutionality of Article 191 para. (2) of the Criminal Procedure Code (provisional release under judicial control [2])
16.	Judgement no. 16 of 09.06.2020 on the exception of unconstitutionality of Article 70 paras. (3) and (13) of Insolvency Law no. 149 of 29 June 2012 (payment of the fixed fee to the administrator/liquidator and reimbursement of the related expenses jointly transferred under the obligation of the governing bodies of the debtor)
17.	Judgement no. 17 of 23.06.2020 on the constitutional review of some provisions of Law no. 212 of 24 June 2004 on the Regime of the State of Emergency, Siege and War and some provisions of Parliament Decision no. 55 of 17 March 2020 on declaring the state of emergency
18.	Judgement no. 18 of 30.06.2020 on the constitutional review of Article 76^{1} para. (1) of the Contravention Code (non-compliance with measures for the prophylaxis, prevention and/or control of epidemic diseases, if it endangered public health)
19.	Judgement no. 19 of 07.07.2020 on the interpretation of Articles 2 paras. (1), 38, 61 paras. (1) and (3), 78, 85 paras. (1), (2) and (4), 90 paras. (1), (2) and (4) of the Constitution
20.	Judgement no. 20 of 09.07.2020 on the interpretation of Articles 134 paras. (1) and (2), 136 para. (3) and 140 para. (2) of the Constitution
21.	Judgement no. 21 of 04.08.2020 on the exception of unconstitutionality of Article 84 of Insolvency Law no. 149 of 29 June 2012 (prohibition to leave the country or place of residence in insolvency proceedings)
22.	Judgement no. 22 of 06.08.2020 on the exception of unconstitutionality of some provisions of Article 226^{16} para. (11) of the Fiscal Code, adopted by Law no. 1163 of 24 April 1997 (presentation of tax information to the courts and prosecuting authorities as evidence)

23.	Judgement no. 23 of 06.08.2020 on the interpretation of Articles 89, 91 and 98 para. (1) of the Constitution
24.	Judgement no. 24 of 08.10.2020 for the constitutional review of some provisions of Article 6 para. (5) of Law no. 86 of 11 June 2020 on Non-Profit Organizations (ban on providing services by non-profit organizations to electoral contestants during the election campaign)
25.	Judgement no. 25 of 29.10.2020 on the constitutional review of Article 12 paras (7) and (8) of State Security Law no. 618 of 31 October 1995 (the authorities' obligation to provide information to the Supreme Security Council)
26.	Judgement no. 26 of 10.11.2020 on the constitutional review of some provisions of Article 453 para. (1) of the Criminal Procedure Code, adopted by Law no. 122 of 14 March 2003 (grounds of appeal for annulment)
27.	Judgement no. 27 of 13.11.2020 on the constitutional review of some provisions of Articles 55 para. (3), 56 para. (2), 60 para. (4) and 63 para. (4) of Law no. 200 of 16 June 2010 on the Regime of Aliens in the Republic of Moldova (guarantees of the alien in case of expulsion)
28.	Judgement no. 28 of 19.11.2020 on the interpretation of Articles 64, 72, 73, 74 and 131 para. (4) of the Constitution
29.	Judgement no. 29 of 26 November 2020 of the application no. 124a/2020 for the constitutional review of Article 60 of Law on Ensuring Pensions for Military Servicemen and Body Control and Troops of the Internal Affairs Body no. 1544 of 23 June 1993
30.	Judgement no. 30 of 10.12.2020 on the confirmation of the election results and the validation of the term of office of President of the Republic of Moldova
31.	Judgement no. 31 of 17.12.2020 on the exception of unconstitutionality of some texts of Article 67 paras. (2) and (7) of the Enforcement Code, adopted by Law no. 443 of 24 December 2004 (the moment of service of the bailiff's documents to the addressee)
32.	Advisory opinion no. 1 of 22.09.2020 on the draft law on amending and supplementing the Constitution (the judiciary [3])
33.	Advisory opinion no. 2 of 03.12.2020 on the draft law on amending and supplementing the Constitution (the judiciary [4])