**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# ROMANIA

# OPINION

# ON EMERGENCY ORDINANCES GEO No. 7 and GEO No. 12 AMENDING THE LAWS OF JUSTICE

**Adopted by the Venice Commission**
**at its 119th Plenary Session**
**(Venice, 21-22 June 2019)**

**on the basis of comments by**

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**Table of Contents**

## I. Introduction

1. By letter of 12 March 2019 the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (the Monitoring Committee) decided to request an opinion of the Venice Commission on Government Emergency Ordinance 7/2019 of 20 February 2019 on amendments to the three laws of justice in Romania (CDL-REF(2019)013; hereinafter GEO no. 7).

2. The three laws of justice in question are Law no. 303/2004 on the Statute of Judges and Prosecutors, Law no. 304/2004 on Judicial Organisation, and Law no. 317/2004 on the Superior Council for Magistracy (the SCM), all amended in 2018.[1] In 2018 the three laws of justice were further amended by Government Emergency Ordinances (GEOs) nos. 77, 90 and 92. In 2019 they were further amended, first by GEO no. 7, and next, on 5 March 2019, by GEO no. 12 (CDL-REF(2019)012, hereinafter GEO no. 12).

3. The English translation of the texts of GEO No. 7 and GEO No. 12 was provided by the authorities of Romania. The rapporteurs also had at their disposal the English translation of the original three laws of justice (as amended by Parliament in 2018) and of GEOs nos. 77, 90 and 92, prepared by the European Commission. Inaccuracies may occur in this opinion as a result of incorrect translation. The rapporteurs also considered observations submitted by the Supreme Council of Magistracy and Parliament of Romania.

4. For the present opinion, the Venice Commission invited Ms Claire Bazy Malaurie, Mr Nicolae Eşanu, Mr Martin Kuijer, Ms Hanna Suchocka and Mr Kaarlo Tuori to act as rapporteurs. From 24 to 25 April 2019 a delegation of the Venice Commission composed of Ms Claire Bazy Malaurie, Mr Nicolae Eşanu, Mr Martin Kuijer and Mr Kaarlo Tuori, accompanied by Mr Grigory Dikov, legal officer at the Secretariat, visited Romania. The delegation met with the President of the Republic, the Minister of Justice, the Prosecutor General, his deputies and other prosecutors, the Superior Council for Magistracy, judges of the High Court of Cassation and Justice, parliamentarians, NGOs, representatives of various associations of magistrates, and other stakeholders. The Venice Commission is grateful to the Romanian authorities for the preparation of the visit.

5. The present opinion was prepared based on the contributions of the rapporteurs and the information provided by the interlocutors during the visit. It was adopted by the Venice Commission at its 119th Plenary Session (Venice, 21-22 June 2019).

## II. Analysis

### A. Background and scope of the opinion

6. On 13 July 2018 the Venice Commission adopted a preliminary opinion on draft amendments to the three laws of justice.[2] Conclusions of the preliminary opinion were repeated by the Plenary of the Venice Commission, with some minor additions, in an opinion adopted on 20 October 2018 (hereinafter – the October opinion).[3]

[1] See CDL-REF(2018)022, CDL-REF(2018)023 and CDL-REF(2018)024.
[2] CDL-PI(2018)007, Romania - Preliminary Opinion on draft amendments to Law No. 303/2004 on the statute of judges and prosecutors, Law No. 304/2004 on judicial organization, and Law No. 317/2004 on the Superior Council for Magistracy.
[3] CDL-AD(2018)017, Romania - Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy.

7. Both opinions expressed serious concerns about the ongoing judicial reform. The Venice Commission is aware of the political controversies surrounding the functioning of the Romanian judiciary in the past years. In particular, the October opinion (see §§ 12 -17) mentioned the role allegedly played by the Romanian Intelligence Service in certain criminal proceedings. The Venice Commission did not question the need for a reform as such. However, both opinions expressed strong reserves about the overall direction of this reform which, "taking into account [the] cumulative effect [of the proposed measures], in the complex political context currently prevailing in Romania, [is] likely to undermine the independence of Romanian judges and prosecutors, and the public confidence in the judiciary" (see § 161 of the October opinion), and may have negative consequences for the fight against corruption (§ 164).

8. The 2018 legislative amendments, adopted by Parliament, were further supplemented and changed by five GEOs (nos. 77, 90, 92 of 2018, and GEOs nos. 7 and 12 of 2019). The request of the Monitoring Committee concerns GEO no. 7 of 2019. In essence, GEO no. 7 enacted a patchwork of legislative changes to the three laws of justice and to the previous emergency ordinances. It is virtually impossible to examine GEO no. 7 alone, without looking at previous and subsequent amendments introduced by the other four ordinances. Thus, while the focus of this opinion will be on GEO no. 7, the Venice Commission will also consider some other legislative changes which were made in parallel and/or after the adoption of its October opinion. The present Opinion does not however intend to provide an exhaustive analysis of all aspects of the legislative framework concerning the Romanian judiciary.

### B. Legislation by emergency ordinances

9. Before addressing the substance of the recent legislative changes, the Venice Commission wishes to comment on the law-making process. This process has drawn strong criticism in Romania and internationally: a special and speedy parliamentary procedure (an emergency procedure) was chosen to pass the amendments to the three laws (see §§ 23 and 24 of the October opinion). "Various interlocutors of the rapporteurs have described the process as excessively fast and lacking transparency, and being conducted in the absence of inclusive and sufficiently effective consultations" (§ 30). Although the Government denied those allegations (§ 29), in general, it is rarely (if ever) justified to use an extraordinary and accelerated procedure in Parliament for fundamental institutional changes.

10. The Venice Commission's concerns are reinforced by the adoption of the five emergency ordinances by the Government between September 2018 and March 2019.[4] The Venice Commission considers that this manner of amending the laws on justice is highly problematic.

11. The lack of proper deliberations is an intrinsic problem of any accelerated procedure. The Venice Commission is – as always[5] – highly critical of rushed adoption of acts of Parliament,

[4] The Constitution of Romania describes the process of adoption of a Government emergency ordinance as follows (Article 115): "(4) The Government can only adopt urgency ordinances in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for their urgency status within their contents. (5) An urgency ordinance shall only come into force after it has been submitted for debate in an urgency procedure to the Chamber having the competence to be notified, and after it has been published in the Official Gazette of Romania. If not in session, the Chambers shall be convened by all means within five days after submittal, or, as the case may be, after forwarding. If, within thirty days at the latest of the submittal date, the notified Chamber does not pronounce on the ordinance, the latter shall be deemed adopted and shall be sent to the other Chamber, which shall also make a decision in an urgency procedure. An urgency ordinance containing norms of the same kind as the organic law must be approved by a majority stipulated under Article 76 (1). 6) Urgency ordinances cannot be adopted in the field of constitutional laws or affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, and cannot set out measures for a forcible transfer of assets to public property."

[5] CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, §§ 16-19; see also CDL-AD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation

regulating important aspects of the legal order, without normal consultations with the opposition, experts or civil society. This manner of law-making raises doubts as regards the soundness of the substantive outcomes of the reform. And this is *a fortiori* true where legislative amendments are adopted not by an act of Parliament, but by the Government, through "emergency" ordinances which acquire the force of law without any discussion in Parliament.[6] In addition, it is reasonable to assume that the excessive use of the emergency ordinances may lead to an irresponsible behavior of the legislature, which knows that its mistakes can be easily corrected by the Government.

12. This assumption – that the lack of proper deliberations negatively affects the quality of the legislation – can be demonstrated empirically *in casu*. Thus, the 2018 draft amendments proposed an early retirement scheme for senior judges, and the extension of the period of training and internship for aspiring young judges. The Venice Commission warned the Romanian authorities that these changes risk creating a "generation gap" in the Romanian judiciary and seriously undermine the efficiency and quality of justice.[7] Despite this warning the draft amendments were made into law. Soon after their adoption the Government had to pass GEOs nos. 92 and 7, which put on hold the entry into force of those new rules until 2020. So, those GEOs were adopted to remedy a problem created by a legislation passed in an accelerated procedure.

13. However, legislation by GEOs is also a problem in itself. As the rapporteurs learned during the visit, the High Court of Cassation and Justice (the HCCJ) was not consulted before the adoption of GEO no. 7, and the Supreme Council for Magistracy (the SCM) had less than two days to examine the draft ordinance before its adoption. These institutions submitted their objections to the Government after GEO no. 7 had been adopted, and, less than a month later, the Government issued GEO no. 12, which remedied some of the issues flagged by the relevant stakeholders.[8] In particular, GEO no. 12 restored the requirement of seniority for the candidates to the positions of top prosecutors (which was removed by GEO no. 7). Similarly, GEO no. 12 repealed the provision of GEO no. 7 which prohibited delegation of prosecutors to leading positions for which the President of Romania makes appointments (Article 57 (7-1) of Law no. 303). These examples are not exhaustive[9] and demonstrate that the reliance on accelerated procedures – by the legislature and even more so by the Government – inevitably affects the quality of the legislation.

14. In the second place, this manner of amending laws affects legal certainty. Even for legal experts it is difficult to grasp what the current state of affairs is,[10] let alone for an ordinary Romanian citizen. Certain issues are not only covered by the three laws of justice but also by the five consecutive GEOs, which have made patchwork amendments to the original texts and to the previous ordinances. It becomes increasingly difficult to explain what the current *status quo* is. In any event, the very notion of *status quo* becomes blurred in the Romanian context, where the

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and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, § 74.

[6] In Romania, the Government's emergency ordinances are subject to *ex post* approval by Parliament. However, the Constitution does not set any time-limits within which Parliament should consider an emergency ordinance, and the GEOs as such have no "expiry date".

[7] See § 152 of the preliminary opinion of July 2018.

[8] It has been acknowledged in GEO no. 12 that there have been a number of negative reactions regarding certain legislative solutions in the previous GEO expressed by the professional institutions.

[9] See for example also Article 65 (1) (i) of Law no. 303 which established, amongst other grounds for the removal of judges and prosecutors, the lack of "good reputation". Amendments to Law no. 303 removed the reference to the "good reputation" (see Article 121). GEO no. 7 added the "requirement of good repute" as a ground for removing a judge (see Article 12 of GEO no. 7). Finally, the reference to the "good repute" was again removed from the text of the law by GEO no. 12 (see Article I (3) of GEO no. 12). The vagueness of the condition of "good reputation" is problematic, so its removal is positive, but these fluctuations clearly demonstrate that the law in this part has not been thoroughly considered.

[10] The rapporteurs, during the visit to Bucharest, observed a great uncertainty as to the interpretation of the GEOs amongst the magistrates themselves.

rules on the functioning of the judiciary are changed repeatedly by the Government at short intervals. The Venice Commission recalls that, according to the Rule of Law Checklist, clarity, predictability, consistency and coherency of the legislative framework, as well as the stability of the legislation, are major concerns for any legal order based on the principles of the rule of law.[11]

15. Frequent changes of rules concerning institutions and appointments to leading positions or dismissals from them, sometimes by legislation, sometimes by the GEOs, gives the impression that the aim of those amendments is not a systematic reform of the system, but adaptation of the rules to specific candidates or situations. In the following section the Venice Commission will give examples of such tinkering with the rules which raises legitimate questions about the real purpose behind them.

16. Thirdly, external checks on the Government's power to legislate through emergency ordinances (regulated by Article 115 (4) of the Constitution) are quite weak. Article 115 (5) of the Constitution provides for parliamentary control of the GEOs by Parliament, but this provision does not *require* the legislature to pronounce on the validity of emergency ordinances, leaving space for a GEO to remain effective indefinitely without a formal vote.[12] It is understood that, so far, only one of the five emergency ordinances (namely GEO no. 90) has been examined and approved by Parliament,[13] while Parliament has not pronounced itself on the other four GEOs which continue to be applicable, while no "sunset clause" is provided for such ordinances.[14]

17. Furthermore, the law-making by emergency ordinances does not permit the Constitutional Court to exercise a preliminary control of constitutionality of such legislation. A bill adopted by Parliament can be challenged before the Constitutional Court by a number of institutional actors before it is made into law.[15] By contrast, a GEO enters into force immediately upon publication and its formal notification to Parliament. Constitutionality of a GEO may be tested by the Constitutional Court only through the "objection of constitutionality" procedure, brought by the courts examining a specific case, or directly by the Advocate of the People (Article 146 (d) of the Constitution). Alternatively, constitutionality of the GEO may be tested by the Constitutional Court under Article 146 (a) of the Constitution if the GEO is transformed into a bill, but since the Constitution does not oblige Parliament to transform a GEO into a bill within a specified period of time, this possibility remains in many cases theoretical.[16] Absence of *ex ante* control of constitutionality of the GEOs is additionally problematic because the GEOs come into force immediately, may create rights and obligations, impose sanctions or exonerate from liability, etc. GEOs create expectations and new institutional arrangements which could be difficult to undo even if some *ex post* control of the GEOs is available by the Constitutional Court or by Parliament.

18. Fourthly, the excessive use of the law-making powers by the Government under the pretext of an "emergency" is arguably at odds with the principles of democracy and separation of powers, which are proclaimed in Article 1 (3) and (4) of the Romanian Constitution. In the 2014 opinion

[11] See, CDL-AD(2016)007, the Rule of Law Checklist, §§ 58 and 59, as regards clarity and foreseeability of the laws; see § 60 as regards the stability of the legislation. See also the Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of EU legislation, principles 1 to 4; see also the 2012 OECD recommendations on Regulatory Policy and Governance, Recommendation no. 2.

[12] See CDL-AD(2014)010, § 172.

[13] The Venice Commission was informed that on 19 April 2019 the President refused to sign the bill approving GEO no. 12.

[14] See, as an example, the pending procedure of the examination of GEO no. 77 by Parliament: https://www.senat.ro/legis/lista.aspx?nr_cls=L633&an_cls=2018 (last accessed 21 May 2019).

[15] See Article 146 (a) of the Romanian Constitution.

[16] The Venice Commission was informed that GEO no. 90, since it was the only GEO transformed into a bill, was checked by the Constitutional Court. The Venice Commission recalls its observations regarding the emergency decrees adopted by the Turkish government following an attempted military coup: "the lack of timely control of the emergency decree laws is all the more problematic as there was no judicial review of the decree-laws during the period under examination, and the Constitutional Court may review the emergency decree-laws *in abstracto* only once they have been approved by the law" (CDL-AD(2016)037, Turkey - Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016, § 53).

on Romania, the Venice Commission noted that the practice of issuing over a hundred of emergency ordinances every year "involves risks for democracy and the rule of law in Romania" (§ 173).[17] In 2018 the Government issued 114 emergency ordinances in different fields, which demonstrates that the notion of "emergency" is interpreted in the Romanian legal order very generously. This runs counter the exceptional character of such legislation (see Article 115 § (4)), and leads to the routine exercise of the legislative function by the Government.[18]

19. The Venice Commission is aware that in many legal orders the Government has the power to issue emergency decrees. But it is questionable, in general, whether Article 115 of the Romanian Constitution was intended to be used for the purposes for which it is currently used by the Government. "Sometimes legislation has to be adopted speedily in order to avert serious risks to the country. [However, in the Romanian context], the nearly constant use of government emergency ordinances is […] not the appropriate way to do so. […] If […] it was not possible to adopt a high number of laws within a short time, Parliament should rather use the instrument of legislative delegation and empower – through special laws – the Government to adopt urgent legislation (paragraphs 1 to 3 of Article 115 of the Constitution). […]".[19]

20. Finally, the emergency ordinances issued by the Romanian Government contain provisions establishing rules of indefinite duration, and not only temporary or transitional solutions. The Venice Commission criticised such use of the emergency powers in cases of a serious nation-wide crisis;[20] it is even more true in the Romanian context where the Government regularly legislates by "emergency ordinances", simply because there is an urgent need to change the law. The legal regime of Article 115, as currently interpreted in Romania, is by itself problematic: there is no declaration of a state of emergency, with the accompanying international and national controls, nor is there any mandatory parliamentary *ex post* control which is usually attached to emergency decrees issued in a state of emergency. In addition, the validity of the ordinances is not tied to the duration of the emergency situation.

21. In sum, the routine use of emergency powers is objectionable at many levels. It affects the quality of the legislation, disturbs legal certainty, weakens external checks on the Government, and disregards the principle of the separation of powers. The Venice Commission calls on the Romanian Government to drastically reduce the use of GEOs in all fields of law. Article 115 of the Constitution seems to be interpreted in Romania in an overly broad manner, so its revision may be envisaged in order to define more narrowly the situations in which the Government may legislate by emergency ordinances, and to introduce checks on the Government's legislative power. As to the future of the judicial reform under consideration, the Venice Commission urges

[17] CDL-AD(2014)010, Opinion on the Draft Law on the Review of the Constitution of Romania, § 167 et seq., referring to the 2012 Opinion.

[18] The fact that some of the GEOs were assessed by the Constitutional Court and declared partly or fully constitutional does not affect this analysis. The Constitutional Court's task in those cases is to assess the constitutionality of certain isolated provisions of the emergency ordinances submitted to it, and not the general pattern of abusive reliance on the exceptional law-making powers.

[19] CDL-AD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, § 16.

[20] In an opinion on Turkey (CDL-AD(2016)037, Turkey - Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016) the Venice Commission stressed that "the emergency decree laws should not introduce permanent structural changes to the legal institutions, procedures and mechanisms […]. The idea of a 'democratic [...] State governed by the rule of law', […] enshrines the principle of a limited government. The Turkish Constitution allows the Government to derogate from certain human rights provisions as long as the state of emergency persists and to the extent 'strictly required', but it does not extend this power to legal rules which are to be applied after the end of the emergency period" (§ 89).

the Romanian authorities to adopt necessary future amendments in a normal parliamentary procedure, which should ensure proper (i.e. inclusive, informed, transparent etc.) deliberations.[21]

### C. Response of the Romanian authorities to the key recommendations of the October opinion

22. The Venice Commission will now turn to the substance of the legislative changes introduced by GEO no. 7 and other recent ordinances. It will not offer an exhaustive analysis of all legislative changes but concentrate on those developments which are related to the key recommendations contained in the October opinion.[22]

23. At the outset, the Venice Commission notes with regret that some of its recommendations were not addressed. In particular:

- the law still contains disproportionate restrictions to the freedom of expression of judges and prosecutors (which the Venice Commission recommended to remove – see §§ 123 et seq. of the October opinion);
- provisions on magistrates' material liability have not been qualified (see § 123);
- no attempt was made to specify more clearly the criteria for "screening" of the magistrates (see § 101 et seq.).

24. Some other recommendations were considered, but the measures taken by the legislator were half-hearted and/or fragmentary. For example, the removal of a member of the Supreme Council of Magistracy (the SCM) through a "no confidence" vote was replaced with another procedure, which still has some features of a "no confidence" vote (in particular, the decision to terminate the mandate is still taken by a 2/3 majority of the judges who delegated the member to the SCM, on broadly formulated grounds). The problem of underrepresentation of the members representing the civil society within the SCM was not solved either, even though GEO no. 92 specified more clearly that the civil society members have the right to vote at the Plenary.[23]

25. The Venice Commission will not dwell on these points any longer and refers the Romanian authorities to its October opinion for further details. It will concentrate on those elements of GEO no. 7 and other ordinances which have a bearing on the key recommendations of the October opinion.

### 1. Appointment and removal of top prosecutors

26. At the outset, the Venice Commission reiterates that there is a multitude of possible models of organisation of the prosecution service, and of insuring its autonomy and accountability.[24] The Constitution of Romania provides, in Article 133, for the SCM which has the role of guaranteeing the "independence of justice". Article 134 (1) of the Constitution provides that the SCM will "propose to the President of Romania the appointment of judges and public prosecutors, except for the trainees, according to the law". The SCM is composed of 19 members of whom "fourteen are elected in the general meetings of the magistrates and validated by the Senate; they shall belong to two sections, one for judges and one for public prosecutors; the first is comprised of nine judges, and the second of five public prosecutors". These two sections will henceforth be referred to as the Judges' Section and the Prosecutors' Section. The Plenary of the SCM in

[21] At the meeting in Venice, the Vice Chairman of the Chamber of Deputies, Mr E. Nicolicea, explained that, following the referendum of 26 May 2019, Parliament is considering legislative changes aimed at significantly reducing the use of the emergency ordinances by the Government. The Venice Commission welcomes this initiative.

[22] Summarized in §§ 156 – 165 thereof.

[23] As stressed in § 139 of the October opinion, a constitutional amendment would be needed to increase the number and strengthen the importance of the civil society representatives in the SCM.

[24] CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §§ 7 et seq.

addition includes two representatives of civil society, elected by the Senate, and three *ex officio* members (the Minister of Justice, the President of the High Court of Cassation and Justice, hereinafter "the HCCJ", and the Prosecutor General).

27. The 2018 reform put the appointment of the high-ranking prosecutors essentially into the hands of the Minister of Justice, whereas the President and the SCM would no longer play any significant role. The SCM plays a rather passive role in the appointment process, by giving an opinion on a candidate picked by the Minister, and this opinion seems not to be binding on the latter. The President may reject a candidate proposed by the Minister only once; she or he is "bound to appoint the second candidate proposed by the Minister of Justice even in case of a negative opinion by the SCM" (§ 53 of the October opinion). The President's role in the process of dismissal of top prosecutors was also reduced to the verification of legality of such decisions, and the opinion of the Prosecutors' Section of the SCM in such matters will not bind the Minister (§ 57).

28. GEOs no. 92 and no. 7 introduced some changes to the appointment scheme. Thus, GEO no. 92 provided for the web broadcasting of interviews conducted by the Minister of Justice with the prospective candidates to the top positions in the prosecution system (Article 54 (1-1) of Law no. 303). Broadcasting of interviews adds transparency, but it does not remove the inherently political nature of the process of appointment and cannot replace the examination of the merits of the candidates by an expert body.[25]

29. Other changes related to the eligibility requirement for the candidates, and to the appointment procedure. Before the reform of 2018, a candidate was required to have 10 years' seniority as a judge or prosecutor and it was the Plenary SCM which was "endorsing"[26] the candidate proposed by the Minister (Article 54 (1)). The 2018 amendments provided that the candidate should obtain an "opinion" of the Prosecutors' Section of the SCM; the seniority requirement did not change. GEO no. 92 (Article 4) increased the seniority threshold to 15 years in the position of judge or prosecutor and provided for the "endorsement" by the Prosecutors' Section of the SCM of the candidate chosen by the Minister. Under GEO no. 7, an "opinion" of the Plenary of the SCM (and not of the Prosecutors' Section) is required, and the seniority requirement is not mentioned at all (but a candidate who is a judge should have at least some working experience as a prosecutor). Finally, GEO no. 12 changed these requirements again: an "opinion" of the Prosecutors' Section was needed, and a 15 years' seniority threshold (five years longer than before the adoption of the GEOs) was introduced.

30. Although Article 54 (1) of Law no. 303 on the appointment criteria and procedure constantly changed, its central element remained intact. It is the Minister of Justice who picks the candidate, and the role of the President of the Republic and of the SCM is reduced to a ceremonial approval (for the President), or an advisory opinion[27] (for the SCM, either the Plenary or the Prosecutors' Section). In a 2015 opinion on the prosecution service of Georgia the Venice Commission welcomed giving the Prosecutorial Council a *key* role in the process of appointment of a chief

[25] See CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 48; see the Venice Commission recommendations to this end in CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", §47; see also CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§ 48, 51, and 51.

[26] The Venice Commission observes that different translations of the relevant legislation used different terms to describe the role of the SCM or the Prosecutor's Section: "endorsement" and "opinion". In any event, it is understood that the SCM plays only an advisory role in the process.

[27] The Venice Commission notes that different English translations of the GEOs use the words "endorsement" and "opinion"; it is understood, however, that this does not reflect a substantive difference.

prosecutor, along with the Minister of Justice and the legislature.[28] In Romania, by contrast, the power of the Minister of Justice is not effectively checked neither by the President nor by the SCM. All of that justified qualifying this reform as a "step backwards", increasing the risk of politicization of the appointments (see § 54 of the October opinion). The Venice Commission notes with regret that its recommendation was not addressed.

31. Furthermore, in addition to what the Venice Commission noted in October, the influence of the Minister of Justice over the prosecution service is exacerbated by a very short duration of the mandate of top prosecutors (3 years, with a possibility of reappointment). The Venice Commission considers that not only the new rules of appointment should be reviewed, in order to give the SCM and in particular its Prosecutorial Section the key role in this process, but also the duration of the mandate of the top prosecutors should be significantly increased.

32. Finally, in GEO no. 12 a 15-years' seniority was introduced as a pre-condition for the appointment to the top prosecutorial positions. Article 51 (2) of Law no. 303 provides for the early termination of the mandate of a prosecutor in case he or she "no longer fulfil[s] one of the conditions required for appointment to the management position". Article VII of GEO no. 92 stipulates that prosecutors in the DIT and DIICOT "shall remain in these structures only if they meet the conditions provided for by Law no. 303/2004 […] with subsequent amendments". It appears the new eligibility criteria are applicable to those prosecutors who were already occupying top positions in the system. Such retroactive application of new eligibility criteria is highly objectionable.[29] First, it jeopardizes the security of tenure of the currently serving prosecutors. Second, the reasons for choosing a particular seniority threshold are not clear. The fact that the threshold for the appointment to the top prosecutorial positions kept changing from almost zero to 15 years shows that the Government did not conduct any serious impact or feasibility study. Or, what would be worse, it implies that the threshold was chosen to ensure eligibility (or non-eligibility) of certain persons. This is yet another illustration of dangers associated with the process of legislation through emergency ordinances. The Venice Commission urges the Romanian authorities not to apply the new eligibility criteria to those prosecutors who were already in place when the respective amendments were made.

### 2. Creation of a special Section under the transitional appointment scheme

33. The establishment of a special Section for the investigation of criminal offences in the judiciary (hereinafter – the Section) with an exclusive competence for the prosecution of criminal offences committed by judges and prosecutors, was examined in §§ 80 to 90 of the October opinion. The opinion stressed the fact that "the organization and structure of the Public Prosecution Service is a matter for the competent national authorities to decide" (§ 85). At the same time, the opinion expressed doubts as to the underlying rationale for introducing such a new Section. The creation of the Section would require rerouting of a large number of high-profile cases of corruption from the Anti-Corruption Directorate (the DNA) to the newly established Section, with all the disruption such massive transfer may cause for the cases currently dealt with by the DNA (§ 83), as well as some other directorates (like the Directorate for Investigating Organised Crime and Terrorism, the DIICOT). The competency of the Section was defined very broadly, covering all cases where a judge or a prosecutor may be allegedly involved (§ 80). Creation of the Section may undermine

[28] CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia: the Venice Commission stressed that "an appointment process which involves the executive and/or legislative branch has the advantage of giving democratic legitimacy to the appointment of the head of the prosecution service. However, in this case, supplementary safeguards are necessary in order to diminish the risk of politicization of the prosecution office" (§ 19). "The establishment of a Prosecutorial Council, which would play a key role in the appointment of the Chief Prosecutor, can be considered as one of the most effective modern instruments to achieve this goal" (§ 20).

[29] The SCM in their observations noted that the Prosecutor's Section of the SCM recommended that this provision is used only for the "future application", but this clarification does not remove the ambiguity of the law.

the population's trust in the judiciary (§ 84). There was a risk of conflict of competence between prosecutorial offices, to be resolved by the Prosecutor General (§ 80).

34. The amendments introduced by GEO no. 90 and GEO no. 7 in respect of the Section were designed to give immediate effect to Law no. 304, as amended. The original scheme of appointment of the Chief Prosecutor of the Section and his or her deputy involved the selection of a candidate by a "selection board" composed of 3 judges (members of the Judges' Section of the SCM) and 1 prosecutor (a member of the Prosecutors' Section), with subsequent appointment by the Plenary of the SCM (Article 88-3 and Article 88-1). As understood by the rapporteurs, many SCM members were sceptical about the very idea of creating the Section. To avoid possible blockage of the appointment of prosecutors to the Section, the Government adopted GEO no. 90, which introduced a temporary mechanism of appointment, in order to make the Section operational immediately.

35. Instead of the appointment by the Plenary (provided by the original amendments), Article II of GEO no. 90 provided that functions of the Chief Prosecutor and of 1/3 of prosecutors in leading positions will be performed by the candidates selected by a "selection board", with the final appointment made by the President of the SCM. It is understood that, under the temporary scheme of GEO no. 90, no vote of the Plenary of the SCM was required for the appointment of the top prosecutors to the Section. GEO no. 90 also specified that the "selection board" could function in presence of at least 3 of its members. As the rapporteurs learned during the visit, in practice the Prosecutors' Section of the SCM did not appoint a representative to the selection board, so the Chief Prosecutor of the Section and other top prosecutors were selected by a selection board composed solely of judges and approved by the President of the SCM. GEO no. 7 further provided that the members of the "selection board" will not be disqualified from voting in the Plenary of the SCM.

36. The Venice Commission recalls that the SCM has two sections – one for judges and one for prosecutors, which is also a part of the constitutional design of this body (see Article 133 (2) (a)). The existence of two separate "wings" in the common judicial-prosecutorial council implies at least some symmetry in their functions. It does not mean that the subsequent procedure of appointment of judges and prosecutors should be necessarily the same.[30] Once the Prosecutors' Section of the SCM expressed an opinion on a candidate to a position of top prosecutor, it is reasonable for the Minister of Justice to step in and have a say. However, at the level of the decision-making *within* the SCM, it is reasonable to expect that the functions of the Prosecutors' Section in respect of the prosecutors will mirror the functions of the Judges' Section in respect of judges (except those functions which are entrusted to the Plenary as a whole).

37. The Plenary of the SCM has already a robust relative majority of judges (there are nine judges and only five prosecutors). It is unclear why this judicial domination is reinforced even further in the context of appointments to the Section, where the opinion of the Prosecutors' Section on a candidate is substituted by the opinion of judges – i.e. the "selection board" dominated by judicial members. This cannot be explained otherwise than by a strong mistrust of the Government towards the current prosecutorial members of the SCM and its wish to reduce their role.[31] This is, however, not a legitimate aim: the Government should not be able to influence the balance among the members of a constitutional body which has as its main function to protect the

[30] After all, the prosecution service does not need to enjoy the same guarantees of independence as the judiciary, and it is "it is reasonable for a Government to wish to have some control over the appointment" of a Prosecutor General" - see CDL(1995)073rev., Opinion on the Regulatory Concept of the Constitution of the Republic of Hungary, Chapter 11.

[31] Throughout 2018-2019 the legislator and the Government oscillated between two models of appointment of top prosecutors: one involving the Plenary of the SCM and another the Prosecutors' Section. It is unclear why, for the transitional scheme of appointment of top prosecutors to the Section, the Government entrusted the function to the member of the Judges' Section.

independence of judges and prosecutors from the executive. The proposed appointment scheme does not sit well with the institutional design of the SCM, as described in the Constitution.[32]

38. In addition, the benefits of this scheme are not apparent. In a 2015 opinion on the prosecution service of Georgia, the Venice Commission welcomed giving the Prosecutorial Council a key role in the process of appointment of a chief prosecutor, along with the Minister and the legislature, as diminishing the risk of politicization of the prosecution office.[33] In the Romanian context the Government and Parliament went in the opposite direction. They decided to weaken the prosecutorial wing of the SCM (as regards the appointments of the top prosecutors to the Section) and to strengthen the influence of the Minister of Justice (as regards the general appointment scheme), while removing other external checks (such as the President's power to disagree with the Minister's proposal). As a result, the prosecutors have lost most of their influence as regards the appointments of top prosecutors to the Section under the transitional scheme both in relation to the Minister or to the judicial wing of the SCM. The Venice Commission is not persuaded that this is the right answer to the abuses allegedly committed by some prosecutors in the past. The Venice Commission reiterates its earlier recommendation to reconsider the need for the establishment of the Section. In any event, it is *a fortiori* ill-advised to appoint to the Section top prosecutors who do not enjoy confidence of their colleagues from the Prosecutors' Section of the SCM (which does not exclude, at the same time, that the judges may also be involved in the process of selection of candidates). It is recommended to develop an appointment scheme which would give the Prosecutors' Section of the SCM a key and pro-active role in the process of the appointment of candidates to *any* top positions in the prosecution service, in the Section or elsewhere.

### 3. Functioning of the Section

39. The Chief Prosecutor of the Section and a few top prosecutors were appointed in October 2018, under the transitional rules of GEO no. 90. In the first months the Section functioned with only 5 prosecutors, including the Chief Prosecutor. Now the number of prosecutors in the Section is about to be increased to 15. Since 2018 the Section received, according to the figures reported by the Section, over 1400 files, partly from the DNA (which had at the end of 2018 about 150 prosecutors), partly from other departments.[34] In addition, over a thousand of new files were opened by the Section itself. From the exchanges the rapporteurs had in Bucharest it appears that the Section is still seriously understaffed. This required a massive secondment of police officers to the Section, ordered by GEO no. 12.[35] It is clear that the transferal of a large number of cases from the DNA to the new Section puts the criminal justice system under stress, and risks affecting the efficiency and the quality of the pending criminal investigations, especially in complex cases.

40. In addition to the administrative complications, the creation of the new Section raises difficult legal questions. First of all, as already noted in the October opinion, the jurisdiction of the new

[32] It is also hardly compatible with "the principle of separating the careers of judges and prosecutors" to which the Government refers in GEO no. 12 (see the preamble, third paragraph).

[33] CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia: the Venice Commission stressed that "an appointment process which involves the executive and/or legislative branch has the advantage of giving democratic legitimacy to the appointment of the head of the prosecution service. However, in this case, supplementary safeguards are necessary in order to diminish the risk of politicization of the prosecution office" (§ 19). "The establishment of a Prosecutorial Council, which would play a key role in the appointment of the Chief Prosecutor, can be considered as one of the most effective modern instruments to achieve this goal" (§ 20).

[34] Since the competency of the Section concerns not only the corruption-related offences, but any offence allegedly committed by the magistrates.

[35] See the amendment introducing Article 88-1 to law no. 304. Some magistrates expressed strong reservations about the idea that cases against them could be investigated by the police, which will be inevitably the case given the low number of the prosecutors in the Section.

Section is defined very broadly. It includes all cases where a magistrate may be implicated, even in a secondary role. Complex cases involving organized crime and corruption sometimes involve dishonest magistrates. Participants in the criminal proceedings may be tempted to obtain the transferal of the case to the Section by accusing a magistrate of some misbehavior. Such files will then be transferred to the Section, even if the evidence against the magistrate is weak at least, until the accusations are verified and more evidence is obtained. Article 88-1 (5) allows the Prosecutor General to solve the conflict of jurisdiction between the Section and other departments, but it remains to be seen whether this safeguard will be efficient, and whether the Prosecutor General will have sufficient time and resources to study all borderline cases. In practice, the creation of the new Section may lead to the withdrawal of a number of "big" cases, involving high-level corruption and organized crime, from the jurisdiction of the DIT and the DIICOT and their transferal to the Section,[36] which is problematic in itself and also because the new Section is not yet equipped to deal effectively with such an influx of complicated high-level corruption and organised crime cases.

41. Second, the position of the new Section within the hierarchy of the prosecution service is not clear. Under Article 132 (1) of the Constitution, "public prosecutors shall carry out their activity in accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice". It suggests that the prosecution service represents a hierarchical pyramid with the Prosecutor General (attached to the HCCJ) at the top of it.[37] However, opinions on this matter differ. The Prosecutor General, when meeting the rapporteurs, confirmed that his supervisory power over the prosecutors working in the Section, conferred on him by the Criminal Procedure Code, remains unaffected. However, GEO no. 7 points in a different direction: it indicates that a "hierarchically superior prosecutor" for the files investigated by the Section means the Chief Prosecutor of the Section (see the amendment to Article 88-1 of law no. 304), and not the Prosecutor General. In essence, GEO no. 7 seems to depart, in this part, from the idea of "hierarchical control" within the prosecution system, enshrined in the Constitution.[38]

42. Thirdly, Article 88-8 (1) (d), added to Law no. 304, gives the Section the right to lodge and withdraw appeals in pending cases or in cases "which were the subject of a final decision before the Section became operational [under GEO no. 90]." Article 88-1 (6) added that the appeals to the "hierarchically superior prosecutor" (i.e. to the Chief Prosecutor of the Section) may be lodged against decisions made prior to the creation of the Section. It means that, for example, a decision taken by a prosecutor of the DNA, while the case was still in the jurisdiction of the DNA, may now be appealed to the Chief Prosecutor of the Section, who may annul this decision. Similarly, a prosecutor of the Section may withdraw an appeal lodged by his or her predecessor from the DNA or DIICOT.

43. The overall direction of those changes is alarming. It is likely that the Section will receive (or already received) complex and high-profile cases related to corruption or organized crime.

[36] Thus, in particular, the Section claimed from the DIICOT one of the most famous case of corruption, the so-called "TELDRUM" case which involved one of the most high-ranking politicians of the country.

[37] The Venice Commission addressed a similar question in the context of the Polish judicial reform of 2017 (see CDL-AD(2017)031, Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts). In Poland two new autonomous chambers where created within the Supreme Court (the SC), which were not subordinated to the authority of the First President of the SC. The Venice Commission reasoned as follows (references omitted): *"§ 39. The Polish Constitution does not say how many chambers the SC should have. However, it is clear that the Constitution is based on a certain vision of the SC as a supreme instance on the top of a hierarchical pyramid, and of the First President, elected under a special procedure. § 40. The Draft Act proposes to create new chambers, which will be headed by largely autonomous office-holders. […] [By] virtue of their special competencies, the two chambers will be de facto superior to other, "ordinary" chambers of the SC. Establishing such hierarchy within the SC is problematic. It creates "courts within the court" which would need a clear legal basis in the Constitution, since the Constitution only provides for one SC, its decision being final."*

[38] That being said, the special rules of appointment of prosecutors of the Section are not contrary to the principle of the "hierarchical control".

Prosecutors of the Section will be able to review the decisions taken by their predecessors in those cases. It is unclear to what extent the prosecutors of the Section and its Chief Prosecutor are subject to the hierarchical control of the Prosecutor General. It may reinforce the belief held by some that the real reason behind the institutional reform is to change the course of criminal investigations in some high-profile cases.

44. The Venice Commission reiterates its recommendation to seriously reconsider the need ofr the creation of the special Section, its institutional design and the principles of its functioning.

### 4. Early retirement scheme/longer periods of trainings

45. The October opinion was critical of the early retirement scheme for the most senior magistrates, especially taken in combination with extending the duration of training and internship for future first-time judges. The introduction of those two measures was postponed by the GEOs, which is positive,[39] but the risk of massive early retirement of the most experienced magistrates is not removed – it is only postponed. There is no European standard in this area, and, in theory, such measure may raise the attractiveness of a career of a magistrate amongst legal professionals. However, put in the context "of conflict between some holders of political office and magistrates" (§ 154 of the October opinion), this measure may give the impression of having the ulterior goal of encouraging some most senior magistrates to retire, which may "seriously undermine the efficiency and quality of justice" in the country. So, the Venice Commission reiterates its call to reconsider the early retirement scheme, to conduct an impact assessment, and, if no particularly convincing arguments for this scheme are found, to replace the early retirement with other appropriate incentives and benefits for serving magistrates.

46. A similar temporary solution was found in response to § 150 of the opinion concerning the increase of the duration of the training course in the National Institute for Magistracy (the NIM) (from two to four years) and of the subsequent practical internship (from one to two years). GEO no. 7 introduced a temporary scheme and provided that magistrates admitted to the NIM in 2019 will have to complete a two-years training and one-year internship, as under the old rules (see Article 1 (3) and Article 5 (2)). This temporary scheme is supposed to soften the impact of the new rules, which is positive. In principle, the Venice Commission is not against longer periods of trainings as such. However, such a dramatic increase of the time of preparation of new judges may disrupt the work of the courts (which are already understaffed, as the rapporteurs understood during the visit).

47. In any event, the proposed postponement is purely pragmatic and does not respond to the principled concerns raised in the October opinion (see § 152).The postponement also illustrates the point raised by the Venice Commission previously. The need to make amendments could be avoided if a due procedure of law-making, involving an impact assessment, public consultations, and proper parliamentary debate, would have been followed.

### 5. Other changes

48. GEO no. 7 introduced temporary rules on admission of aspiring judges to the National Institute for Magistracy, to be applicable in 2019. GEO no. 7 also changed eligibility criteria for the "on the spot" promotion competitions, for the competitions to the promotion to a higher court, amended the procedure for such competitions, set new scoring levels, etc. Amendments were also made to some regulations governing the disciplinary procedures, powers of the SCM, early retirement of notaries public, secondment of the IT specialists to the Section, etc. The Venice

[39] The "early retirement" scheme was an amendment introduced to Article 82 of Law no. 303 by the amending law (Article 143). This provision was put on hold until 1 January 2020 by GEO no. 92, Article V. As already noted in the October opinion (§ 163), "the decision to postpone, to 1 January 2020, the entry into force of the early retirement scheme for magistrates […] is a positive step, providing time for parliament to reconsider this scheme."

Commission did not examine those new rules in detail, so it reserves its opinion on their substance while raising, once again, concerns about the method of regulation of such issues through government emergency ordinances.

## III. Conclusion

49. The Venice Commission notes with regret that the most problematic elements of the 2018 reform, identified in the opinion of October 2018, either remained unchanged or were aggravated. The most important aspects of the on-going reform of the judiciary are the following:

- most alarmingly, the Government continues to make legislative amendments by emergency ordinances. While the Constitution clearly indicates that this should be an exceptional measure, legislation by the GEOs became a routine. Fundamental rules of the functioning of key State institutions are changed too quickly and too often, without preparation and consultations, which raises legitimate questions about the soundness of the outcomes and of the real motives behind some of those changes. The resulting legal texts are not clear. This practice weakens external checks on the Government, it is contrary to the principle of separation of powers and disturbs legal certainty. The Venice Commission calls on the Romanian authorities to drastically limit the use of the GEOs. As to the further amendments to the three laws in the field of justice, they should be made through a normal legislative procedure;

- the reasons for the creation of the special Section for the investigation of criminal offences in the judiciary (the Section), with loosely defined jurisdiction, remain unclear. Top prosecutors of this Section were appointed under a transitional scheme which *de facto* removed the prosecutors' wing of the Supreme Council of Magistracy (the SCM) from the decision-making process, which does not sit well with the institutional design of the SCM. It is uncertain to what extent the prosecutors of the Section and its Chief Prosecutor are under the full hierarchical control of the Prosecutor General. Since the Section would be unable to effectively deal with all cases within its competence, it risks being an obstacle to the fight against corruption and organised crime;

- the scheme of appointment and dismissal of the top prosecutors remains essentially the same, with the Minister of Justice playing a decisive role in this process, without counter-balancing powers of the President of Romania or the SCM. It is recommended to develop an appointment scheme which would give the Prosecutors' Section of the SCM a key and pro-active role in the process of the appointment of candidates to any top position in the prosecution system;

- it is possible to remove currently serving prosecutors with reference to the new eligibility criteria, arbitrarily chosen. The Venice Commission urges the Romanian authorities not to apply the new eligibility criteria to those prosecutors who were already in place when the respective amendments were made.

50. The Venice Commission remains at the disposal of the Romanian authorities and the Monitoring Committee of the Parliamentary Assembly for further assistance in this matter.