Strasbourg, 10 December 2012

CDL(2012)055 *
Engl. only

Opinion no. 685 / 2012

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT 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 NO. 47/1992 REGARDING THE ORGANISATION AND FUNCTIONING OF THE CONSTITUTIONAL COURT AND ON THE GOVERNMENT EMERGENCY ORDINANCE ON AMENDING AND COMPLETING THE LAW NO. 3/2000 REGARDING THE ORGANISATION OF A REFERENDUM

OF ROMANIA

on the basis of comments by
Mr Sergio BARTOLE (Substitute Member, Italy)
Mr Kaarlo TUORI (Member, Finland)
Ms Jacqueline de GUILLENCHMIDT (Member, France)
Ms Hanna SUCHOCKA (Member, Poland)

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Table of Contents

I. Introduction

1. On 6 July 2012, the Secretary General of the Council of Europe has asked the Venice Commission to provide an 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.

2. On 9 July 2012, the Prime Minister of Romania, Mr Ponta, requested an opinion from the Venice Commission on the Government Emergency Ordinance on amendment to the Law no. 47/1992 regarding the Organisation and Functioning of the Constitutional Court and on the Government Emergency Ordinance on amending and completing the Law no. 3/2000 regarding the Organisation of a referendum (CDL-REF(2012)032). Given that these requests overlap, the Commission decided to prepare a single opinion covering both requests.

3. The Commission invited Mr Bartole, Ms de Guillenchmidt, Ms Suchocka and Mr Tuori to act as rapporteurs on this opinion.

4. On 10-11 September 2012, a delegation of the Commission, composed of Mr Bartole, Ms Suchocka and Mr Tuori, accompanied by Mr Markert and Mr Dürr from the Secretariat visited Bucharest and had meetings with (in chronological order) Mrs. Alina Nicoleta Ghica, President of Romanian Superior Council of Magistracy, Mr. Augustin Zegrean, President of Romanian Constitutional Court and the Judges of the Court, Mr. Traian Băsescu, President of Romania, Mr. Titus Corlăţean, Minister of Foreign Affairs of Romania, Mr. Victor-Viorel Ponta, Prim-minister of Romania, Mr. Crin Antonescu, President of the Senate, Mr Gheorghe Iancu, former Advocate of the People, Mr. László Borbély, Vice-president of the Democratic Union of Hungarians in Romania, Mr. Vasile Blaga, President of the Liberal Democratic Party, Mr. Valer Dorneanu, interim Advocate of the People and Ms Mona Pivniceru, Minister of Justice. The opinion takes into account information provided by the Government, NGOs and results of the visit to Bucharest. The Venice Commission is grateful to the Romanian authorities for the excellent co-operation in the organisation of this visit and for the explanations provided.

5. In order not to interfere with the parliamentary election on 9 December 2012 and in line with its practice, the Commission postponed the adoption of this opinion. *The present Opinion was adopted by the Commission at its … Plenary Session (Venice, …).*

II. Preliminary remarks

6. This opinion deals with two different types of actions: (a) formal legal texts, such as the government emergency ordinances, submitted by Prime Minister Ponta, but (b) also actions taken by representatives of the Government and the Parliament of Romania in respect of other state institutions, some of which are public statements, rather than formal legal acts. This opinion will examine both legal texts (see notably CDL-REF(2012)031 and 032) and statements made.

7. A yardstick for these acts are the formal rules for the adoption for the legal texts and, especially as concerns public statements, also the principles of the European Constitutional Heritage, which ensure a fair implementation of the provisions of the Constitutions.

III. Chronology of main events

The chronology below is far from exhaustive and only refers to main events, which are of relevance for the present opinion:

27 June 2012	PRESS RELEASES[1] by the Constitutional Court issues announcing the publication in the official journal of two decisions: Declaration of unconstitutionality of a revision of the electoral law which introduced a first-past-the-post system (DECISION 682). Decision that the President has the right and obligation to represent Romania in the European Council (DECISION 683).
3 July 2012	Parliament DECISION no. 32 on the removal from office of the Advocate of the People, Mr. Gheorghe Iancu
3 July 2012	Senate DECISION no. 24 regarding Mr. Blaga's dismissal as President of the Senate
3 July 2012	DECISION of the Chamber of Deputies no. 25 on the dismissal of Ms. Roberta Alma Anastase from the office of President and member of the Permanent Bureau of the Chamber of Deputies
4 July 2012	GOVERNMENT EMERGENCY ORDINANCE no. 38 for amending Law no. 47/1992 concerning the Organization and Functioning of the Constitutional Court
5 July 2012	Parliament is convened in extraordinary session to deliberate a proposal for the suspension from office of the President of Romania. The Constitutional Court is given 24 hours to formulate its opinion on the proposal.
5 July 2012	GOVERNMENT EMERGENCY ORDINANCE no. 41 for amending Law no. 3/2000 concerning the Organization of the Referendum
6 July 2012	DECISION No. 34 of the Parliament of Romania concerning the object and the date of the national referendum for the dismissal of the President of Romania
6 July 2012	ADVISORY OPINION no. 1 of the Constitutional Court, concerning the proposal to suspend from office the President of Romania, Mr. Traian Băsescu
6 July 2012	DECISION No. 33 of the Parliament of Romania concerning the Suspension from Office of the President of Romania
9 July 2012	RULING no. 1 of the Constitutional Court on ascertaining the existence of the circumstances justifying the ad interim exercise of the office of President of Romania
9 July 2012	DECISION no. 727 of the Constitutional Court on the referral of unconstitutionality of the Law amending Article 27(1) of Law no. 47/1992 on the Organisation and Operation of the Constitutional Court
9 July 2012	DECISION no. 728 of the Constitutional Court on the rejection of the claim of inconsistency with the Constitution of the Decision of the Senate no. 24 of 3 July 2012 for the dismissal of Mr. Vasile Blaga from the office of President of the Senate
9 July 2012	DECISION no. 729 of the Constitutional Court on the rejection of the claim of inconsistency with the Constitution of the Decision of the Chamber of Deputies no. 25 of 3 July 2012, on the dismissal of Mrs. Roberta Alma Anastase from the office of President and member of the Permanent Bureau of the Chamber of Deputies
9 July 2012	DECISION no. 732 of the Constitutional Court on the rejection of the claim of inconsistency with the Constitution of the Decision of the Parliament no. 32 of 3 July 2012 for the dismissal of Mr. Gheorghe Iancu from the office of Ombudsperson
10 July 2012	DECISION No. 731 of the Constitutional Court on the rejection of the claim of inconsistency with the Constitution of the Law amending Article 10 of Law No. 3/2000 concerning the Organization of the Referendum

[1] http://www.ccr.ro/default.aspx?page=press/2012/27iunie.

17 July 2012	LAW no. 131 for amending Article 10 of Law no. 3/2000 concerning the Organization of the Referendum
24 July 2012	DECISION no. 734 of the Constitutional Court on the rejection of the claim of inconsistency with the Constitution of the provisions of Article 3 of the Decision of the Parliament no. 34 of 6 July 2012 concerning the establishment of the object and of the date of the national referendum for the dismissal of the President of Romania
24 July 2012	LAW no. 153 for approving the Government Emergency Ordinance no. 41/2012 amending Law no. 3/2000 concerning the Organization of the Referendum
2 August 2012	RULING no. 3 of the Constitutional Court on the claims related to the compliance with the procedure for the organization and carrying out of national referendum of 29 July 2012 for the dismissal of the President of Romania, Mr. Traian Basescu
21 August 2012	RULING no. 6 of the Constitutional Court on the compliance with the procedure for the organization and conduct of the national referendum of 29 July 2012 for the dismissal of the President of Romania, Mr. Traian Basescu, and on the confirmation of its results
19 September 2012	APPROVAL by the Senate of the Law amending Government Emergency Ordinance no. 41 for amending Law no. 3/2000 concerning the Organization of the Referendum
19 September 2012	DECISION no. 738 on the objection of unconstitutionality of the Law approving the Government Emergency Ordinance no. 38/2012 modifying Law no. 47/1992 on the Organisation and Functioning of the Constitutional Court
27 September 2012	DECISION no. 805 of the Constitutional Court on the rejection of the claim of inconsistency with the Constitution of the Decision of the Senate no. 24 of 3 July 2012 for the dismissal of Mr. Vasile Blaga from the office of President of the Senate
1 November 2012	DECISION no. 924 of the Constitutional Court on the rejection of the claim of unconstitutionality of the Senate Decision no. 38 of 8 October 2012 on the establishment of a Commission of Inquiry into reported abuses in the activities of public authorities and institutions in the context of the referendum of 29 July 2012

IV. Government emergency ordinances

A. Scope and use of Government Emergency Ordinances

8. Article 115 of the Constitution provides for two types of government ordinances. Paragraph 1 to 3 of Article 115, allows for legislative delegation by enabling Parliament to empower the Government to adopt ordinances, which have the force of law (outside the scope of organic law). However such ordinances lose their force if they are not approved by Parliament.

9. Paragraphs 4 to 8 of Article 115 enable the Government, without a delegation from Parliament, to adopt emergency ordinances, including in the field of organic law but under special conditions, which remain in force as law, unless one of the Chambers of Parliament explicitly rejects the ordinance within 30 days.

10. During its visit, the delegation of the Venice Commission learned that government emergency ordinances had been used frequently also by the previous Governments. No less than 140 government emergency ordinances had been adopted in 2011. Such a frequent recourse to an emergency tool gives reason for serious worries. Article 115.4 clearly states that "[t]he Government can only adopt emergency ordinances in exceptional cases, the regulation of

which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents." Using such an exceptional procedure 140 times in a single year amounts to an abuse of this instrument.

11. The problem probably lies in the fact that the Constitution itself provides incentives to have recourse to emergency ordinances because they remain in force unless one of the chambers of Parliament rejects them (Article 115.5 of the Constitution: "If, within 30 days at the latest of the submitting date, the notified Chamber does not pronounce on the ordinance, the latter shall be deemed adopted and shall be sent to the other Chamber…"). In order to keep a government emergency ordinance in force, the governmental majority in Parliament only needs to prevent a vote in the two Chambers of Parliament during a 30 day period. Such a facility nearly invites for its abuse and can explain the high number government emergency ordinances in the past.

12. However, two restrictions limit the scope of government emergency ordinances. Article 115.6 of the Constitution provides that they cannot be adopted "… in fields pertaining to constitutional laws, nor may these affect the status of the State fundamental institutions or any of the rights, freedoms and duties set forth in the Constitution, the electoral rights, or envisage any measures for the forcible transfer of assets into public property." This opinion will discuss this limitation in relation to the Government Emergency Ordinances no. 38 and no. 41 of 2012.

13. The second limitation pertains to emergency ordinances in the field of organic law. Emergency ordinances can even affect the scope of organic laws but such ordinances have to pass a stricter control than emergency ordinances in the field of ordinary law. While the latter ordinances "shall be deemed adopted" if the notified Chamber of Parliament does not pronounce itself within 30 days, emergency ordinances in the field of organic laws have to be expressly approved by Parliament in order to remain in force ("An emergency ordinance containing norms of the same kind as the organic law must be approved by a majority stipulated under article 76 (1).", Article 115 of the Constiution). Such a distinction in the procedure for validation of government emergency ordinances is required by the Constitution because otherwise the Government could easily undermine the hierarchy of norms between Constitution, organic law and ordinary law.

14. However, in practice this important distinction is not followed and government emergency ordinances in the field of organic law remain in force, even if they are not expressly approved by Parliament with the majority of Article 76.1 of the Constitution.[2]

15. As an element of the rule of law, a constitutionally established hierarchy of norms needs to be preserved and it is essential that governmental emergency ordinances in the field of organic law have to pass a higher threshold than those in the field of ordinary law.

16. The Commission's delegation learned that many of the government emergency ordinances were used to implement urgent EU legislation. The Venice Commission does not doubt that sometimes legislation has to be adopted speedily in order to avert serious risks to the country. The nearly constant use of government emergency ordinances is however not the appropriate way to do so. In the first place, the procedures in Parliament itself should be streamlined in order to enable Parliament to adopt ordinary laws in a speedy way. If indeed it were 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). This would provide quite some flexibility for introducing urgent legislation outside the scope of organic law.

[2] E.g. Law No. 62/2012 on approving the Government Emergency Ordinance No. 103/2009 amending and complementing [organic] Law No. 3/2000 (published in the Official Journal of Romania, Part I, No. 247 of April 12, 2012) - this Ordinance remained in force for three years before it was approved by Parliament.

B. Government Emergency Ordinance no. 38/2012, amending Law no. 47/1992 on the Organisation and Functioning of the Constitutional Court

17. On 4 July 2012, the Romanian Government issued the Emergency Ordinance no. 38/2012, which concerned the competences of the Constitutional Court. The ordinance amended Article 27.1 of the Law no. 47/1992 on the Organisation and Operation of the Constitutional Court to the effect that the Court lost its power to check the constitutionality of resolutions of the Parliament. This competence had been introduced in 2010.

18. Already on 27 June 2012, 67 members of Parliament had challenged the constitutionality of a Law amending the same Article 27.1 of Law no. 47/1992. Because of the challenge, this Law had not yet entered into force. This case was still pending before the Court, when the Government adopted the Emergency Ordinance no. 38/2012 with exactly the same content, but removing the Court's control competence with immediate effect.

19. By decision no. 727 of 9 July 2012, the Court qualified the adoption of this Ordinance while a law of the same content was already pending before the Court as "unconstitutional and abusive behaviour towards the Constitutional Court". The Court came to the conclusion that its competence to control Parliamentary decisions remained intact.

20. This government emergency ordinance raises two issues:
- the question of the control of internal acts of Parliament (resolutions);
- the use of a government emergency decree to achieve a limitation of the competences of the Constitutional Court.

1. The control of internal acts of Parliament

21. At first sight, the argument sounds convincing that internal, often individual acts of Parliament should not be controlled by a court because these decisions are usually of a political nature, which is not accessible to judicial control. However, with its Rules of Procedure and other general rules, Parliament however adopts normative acts, which are a yardstick for Parliament as a whole and its members individually. Judicial control of the application of normative acts is an essential element of the rule of law. The absence of judicial control means that the majority in Parliament becomes the judge of its own acts.

22. If only the majority can decide on the observance of parliamentary rules, the minority has nowhere to turn for help if these rules are flouted. Even if the acts concerned are individual ones, this affects not only the rights of the parliamentary minority but, as a consequence, also the right to vote of the citizens who have elected the parliamentary minority.[3]

23. Judicial control of individual acts of Parliament is therefore not only a rule of law issue but, as the right to vote is affected, even a question of human rights. What is important is that the procedure, not necessarily the substance of the decision (e.g. which person is appointed to a given post), should be controllable in judicial proceedings.

[3] This argument has been consistently developed by the German Federal Constitutional Court, e.g. Maastricht: BVerfG, 2 BvR 1877/97 of 31 March 1998 (CODICES GER-1993-3-004); Lisbon Treaty: BVerfG, 2 BvE 2/08 of 30 June 2009 (CODICES GER-2009-2-019).

2. The use of a government emergency ordinance to reduce the jurisdiction of the Constitutional Court

24. Government Emergency Ordinance no. 38 of 4 July 2012 removes the competence of the Constitutional Court, introduced in 2010, to "cover the decisions of the Chamber of Deputies, of the Senate, as well as of the plenum of the two reunited Chambers" and leaves within the competence of the Court only "Parliament's regulations". The competence to control decisions of Parliament (for example on appointments or dismissals) was thus removed. Three issues are raised by the fact that this amendment was adopted by way of an emergency ordinance: (a) does the Ordinance affect the status of a fundamental State institution, (b) does it affect the domain of organic law and (c) are the reasons for the emergency status of the Ordinance substantiated?

25. (a) Article 115.6 of the Constitution provides that "[e]mergency 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 establish steps for transferring assets to public property forcibly". A reduction of the competences of the Constitutional Court, even if this is not a competence based on the Constitution but only on law (Article 146.l of the Constitution) would affect "the status of the State fundamental institutions" and thus should not be regulated by a government emergency ordinance.

26. (b) The law on the Organisation and Operation of the Constitutional Court has the status of an organic law (Articles 142.5 and 146.l of the Constitution). As set out above, an express validation of the government emergency ordinance, within 30 days and with a qualified majority would have been required when the ordinance covers the field of organic law.[4]

27. (c) Moreover, according Article 115.4 of the Constitution, "[t]he Government can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents". As the main argument in order to justify why it was necessary to adopt a government emergency ordinance, the preamble of Ordinance no. 38 states that "the conferral to the Constitutional Court of the competence to decide on Parliament decisions is likely to generate inconsistencies in the Parliamentary activity". Ordinance no. 38 did not set out what kind of inconsistencies in parliamentary activity would have resulted from the control of decisions Parliament by the Constitutional Court but only expressed a fear that such inconsistencies were likely to be generated. Such a vague fear is insufficient to support the urgency of the Ordinance.

28. To sum, up Ordinance no. 38 is problematic from a constitutional viewpoint because it affects the status of a fundamental state institution - the Constitutional Court -, it would have required an express approval by Parliament because it affects the domain of organic law and the urgency of the measure has not been established.

29. By decision no. 727 of 9 July 2012, the Constitutional Court had qualified the adoption of this Ordinance while a law with the same content was pending before the Court as "unconstitutional and abusive behaviour towards the Constitutional Court". As concerns the Law under review, the Court came to the conclusion that a removal of its competence to control parliamentary resolutions violated the rule of law and separation of powers (CDL-REF(2012)031, p. 29).

30. By decision 738 of 19 September 2012, the Constitutional Court found the Law approving the Government Emergency Ordinance no. 38/2012 unconstitutional because the distinction

[4] The Law validating the Emergency Ordinance was found unconstitutional by the Constitutional Court in its decision 738 of 19 September 2012, see below.

made in the Law between parliamentary decisions, which concern Parliament's internal autonomy and those which concern individual acts is redundant and because it Law restricts access to constitutional justice.

C. Government Emergency Ordinance no. 41/2012 amending Law no. 3/2000 on the Organisation of the Referendum

31. On 5 July 2012, the Government issued the Emergency Ordinance no. 41/2012, amending *inter alia* Article 10 of Law no. 3/2000 on the Organisation of the Referendum. According to the Ordinance, the dismissal of the President required a majority of votes cast, instead of a majority of citizens registered on the electoral lists. Article 10 has a volatile history as set out in the table below, taken over from Decision no. 731/2012 of 10 July 2012 of the Constitutional Court:

Law No. 3/2000 on the Organization of the Referendum (published in the Official Journal of Romania, Part I, No. 84 of 24 February 2000)	"Article 10: *The dismissal of the President of Romania is approved if it meets the majority of votes of the citizens registered on the electoral lists"*
Law no. 129/2007 amending Article 10 of Law no. 3/2000 (published in the Official Journal of Romania, Part I, No 300 of May 5, 2007)	"Article 10: *By derogation from Article 5 paragraph (2), the dismissal of the President of Romania is approved if it meets the majority of valid votes cast at country level, by the citizens that took part at the referendum"* [Article 5 paragraph (2) of Law No.3/2000 provides: "*The referendum is valid if at least half plus one of the persons registered in the permanent voters list participate at it"*].
Law No. 62/2012 on approving the Government Emergency Ordinance No. 103/2009 amending and complementing Law No. 3/2000 (published in the Official Journal of Romania, Part I, No. 247 of April 12, 2012)	"Article 10: *The dismissal of the President of Romania is approved if it meets the majority of votes of the citizens registered in the electoral lists".*
The Law for amending Article 10 of Law No. 3/2000 (subjected to the *a priori* control exercised by the Constitutional Court)	"Article 10: *The dismissal of the President of Romania is approved if, following the conduct of the referendum, the proposal meets the majority of the votes validly expressed."*
The Government Emergency Ordinance No. 41/2012 for amending and complementing Law No. 3/2000 on the Organization of the Referendum (published in the Official Journal of Romania, Part I, No 452 of July 5, 2012).	"Article 10: *By derogation from Article 5 paragraph (2), the dismissal of the President of Romania is approved if it meets the majority of valid votes of the citizens that took part in the referendum".*

32. The general rule of Article 5.2 of Law 3/2000 is more stable. The original text of this article, referring to all types of referendum, reads: *"The referendum is valid if at least half plus one of the voters included in electoral rolls participates in it"*. Government Emergency Ordinance n°103/2009 for amending and completing Law n°3/2000 amended this rule to read: *"The referendum is valid if half plus one of the number of persons on permanent electoral lists participated in it".* While it is regrettable that such a rule would be amended by a government emergency ordinance, the basic idea of a 50 per cent participation threshold is not touched by this amendment.

33. Law no. 129/2007 removing the 50 per cent participation quorum for the referendum on the suspension of the President was adopted on 5 May 2007. A referendum on presidential suspension was held on 19 May 2007. The Government Emergency Ordinance no. 41/2012, also removing the quorum, was published on 5 July 2012. The referendum took place on 29 July 2012. This means that both in 2007 and in 2012, the quorum required for the adoption of a referendum on the suspension of the President was changed while a suspension was imminent. In other words, the rules of the game were changed while the game was under way. Such event driven changes of electoral legislation amount to a violation of the rule of law[5] and the principle of electoral stability[6].

34. As for Government Emergency Ordinance no. 38/2012, it is also necessary to test whether Ordinance no. 41/2012 (a) affects the domain of organic law, (b) whether it affects the status of a fundamental state institution and (c) whether the urgency can be established.

35. (a) The Law no. 3/2000 on the Organisation of the Referendum is an organic law. According to Article 115.5 of the Constitution, last sentence, amending such a law would have required an express approval of the Emergency Ordinance within 30 days by the majority stipulated in Article 76.1 of the Constitution. On 19 September 2012, the Senate approved the Law amending Government Emergency Ordinance no. 41 for amending Law no. 3/2000 concerning the Organization of the Referendum.

36. (b) The possibilities and thresholds for Parliament to dismiss or suspend the Head of State influence the balance of power between these state institutions. Amending a provision, which defines the majority needed for dismissing the President, therefore affects "the status of the State fundamental institutions" and consequently falls outside the legitimate scope of government emergency ordinances as defined by Article 115.6 of the Constitution.

37. (c) As concerns urgency, Ordinance no. 41/2012 states that "that it is mandatory to immediately adopt the legal and technical measures required to ensure, under best conditions, consultation of the electorate" and that "taking into consideration the necessity to ensure a coherent election process, all of the above concerning the public interest and amounting to an extraordinary situation, the regulation of which may not be postponed". The Ordinance thus states that there is an urgency but it does not provide reasons why this would be the case.

38. The Commission concludes that the use of government emergency ordinances to immediately bring into force a Law, which is being examined by the Constitutional Court, amounts to an abuse of the instrument of government emergency ordinances and is not in conformity with basic principles of correctness derived from the rule of law and the separation of powers.

39. Of course, it is up to the Constitutional Court to make final decisions on unconstitutionally. In its Decision no. 731/2012 of 10 July 2012, the Constitutional Court examined, by way of *a priori* control, the Law amending Article 10 of Law 3/2000 concerning the Organisation of the Referendum. The Court started by citing its Decision no. 147 of 21 February 2007, which had rejected the symmetry principle - the President should be removed from office with the same majority, with which he or she was elected. They Court then had found that "the dismissal of the President of Romania by referendum does not mean an election contest, but is a penalty for committing serious acts that violate the Constitution".

[5] CDL-AD(2011)003rev Report on the rule of law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), para. 41.2.

[6] CDL-AD(2002)023rev Code of Good Practice in electoral Matters: Guidelines and Explanatory Report, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), section II.2.b. The principle of electoral stability has been taken up by the European Court of Human Rights in the case Ekoglasnost v. Bulgaria (application no. 30386/05), paras. 70 seq.

40. The Constitutional Court then found that the amendment of Article 10 of the referendum law, which fixed the majority required for the dismissal of the President as a majority of the votes cast was constitutional. However, the Constitutional Court recalled that another provision of Law No. 3/2000, its Article 5.2, which had not been amended by the Law under review provided for a participation quorum of 50 per cent of the voters for the validity of the referendum (see above).

41. The Constitutional Court noted that contrary to the Law under review, the Government Emergency Ordinance no. 41/2012 had established a derogation from Article 5.2 of Law no. 3/2000, removing the participation quorum. However the Court found that it is "a prerequisite for the referendum to express really and effectively the will of the citizens, being thus the premise of a genuine democratic manifestation of sovereignty by the people" and that the "participation in the referendum of most citizens is an act of civic responsibility, by which the electorate is going to decide on the punishment or not of the President of Romania, with the possibility of dismissal or maintaining him in function".

42. Consequently, the Constitutional Court found that the Law amending Article 10 of Law no. 3/2000 was constitutional to the extent that the participation quorum established by Article 5.2 was also respected.

V. The suspension of the President

A. Procedure

43. According to Article 95.1 of the Constitution, the Chamber of Deputies and the Senate, in a joint session, may suspend the President of Romania from office by a majority vote in case he or she has committed a serious offence in violation of the Constitution. Before the suspension, a consultative opinion from the Constitutional Court must be sought and the President must be provided a possibility to give explanations before Parliament with regard to imputations brought against him or her. In turn, Article 95.3 of the Constitution stipulates that "if the proposal of suspension from office has been approved, a referendum shall be held within 30 days for removing the President from office".

44. On 5 July 2012, the Parliament was convened in an extraordinary session to deliberate on a proposal for the suspension from office of the President of Romania. The Constitutional Court was asked by Parliament to give a consultative opinion within 24 hours. The fact that such a short deadline was imposed on the Court was confirmed to the delegation of the Commission by the President of the Senate.

45. Considering the seriousness of the accusations in the proposal for the suspension of the President, the time the Constitutional Court had at its disposal for preparing its opinion was extremely short. Ruling no. 1 of the Constitutional Court, which was issued on 6 July (formally published on 9 July), does not come to the conclusion that there was a "serious offence" by the President but nonetheless ascertains that the procedure for the suspension of the President was observed and that circumstances existed, which justified the interim exercise of the office of the President. On 6 July, Parliament decided to suspend the President and reportedly the opinion was not even read out before Parliament.

46. The imposition of such a short deadline and the absence of a thorough discussion of the ruling of the Constitutional Court show that there was a lack of respect for this key institution. Although the opinion of the Court is not legally binding, the procedure as a whole implies that the dismissal of the President may have been politically motivated rather than based on a sound legal basis. This gives ground for serious concern, taking into account the very high

constitutional threshold for the suspension of the President ("a serious offence in violation of the Constitution"). The Venice Commission cannot verify the allegation by the President that the suspension procedure was started in order to enable the majority to appoint a new prosecutor general and head of the anti-corruption department, less determined to fight corruption effectively.

47. The referendum on the suspension was held on 29 July 2012 and, following some confusion whether the Constitutional Court had asked the Government to update the electoral lists after the referendum, the Constitutional Court found in its Ruling no. 6 of 21 September 2012 that the participation quorum had not been attained and that the referendum was therefore invalid, even though a majority of voters had voted in favour of the suspension.

B. Participation quorum

48. Some of the interlocutors of the Commission's delegation strongly insisted that the referendum on the suspension of the President had in fact resulted in a clear majority for the dismissal of the President (87,52 per cent) and that the will of the people should prevail over formal rules (i.e. the participation quorum of 50 per cent in the referendum on the suspension).

49. Quorums for the participation in referenda are rather an exception in Europe[7]. In its Code of Good Practice on Referendums[8], the Venice Commission recommends not to have a participation quorum in case of a referendum and the debate in Romania on the validity of the electoral lists indeed shows the difficulties, which can ensue from the introduction of such a quorum. However, it has to be taken into account that in Romania this quorum was part of the legislation in force. In its decision no. 731 of 10 July 2012, the Constitutional Court had confirmed the validity of Article 5.2 of the Law 3/2000 (the participation quorum) also for referenda on the suspension of the President.

50. A call for the non-respect of a provision of the law, even if the result of its application does not correspond to the will of a considerable part of population at a given moment, is in clear contradiction to the rule of law. Such provisions can be amended or removed through the appropriate legislative procedures in Parliament but they cannot simply be ignored or overridden with a reference to the popular will, even if this will is expressed in a referendum. In such cases, which are so critical for the future of the state, it is essential to respect the stability of the established law. One party to the conflict cannot change the 'rules of the game' while the game is already in full swing. Even if there may be valid reasons to change an electoral rule, this must not be done just before elections or a referendum and even less once the official results have been announced.

VI. The dismissal of the Advocate of the People

51. By decision no. 32 of 3 July 2012, the Parliament dismissed the Advocate of the People (ombudsman). According to Article 58.1 of the Constitution, the Advocate of the People is appointed for a term of five years. The Constitution does not include any provision on his or her

[7] CDL-AD(2005)034, Referendums in Europe – An analysis of the legal rules in European States - Report adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005), para 112.

[8] CDL-AD(2007)008, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007), Chapter III.7:
"It is advisable not to provide for:
7. Quorum
a. a turn-out quorum (threshold, minimum percentage), because it assimilates voters who abstain to those who vote no;
b. an approval quorum (approval by a minimum percentage of registered voters), since it risks involving a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold."

dismissal (see below, section X). However, the Law on the Organisation and Functioning of the Institution of the Advocate of the People provides that the Chamber of Deputies and Senate decide in a joint session on the removal from office of the Advocate of the People as a result of violation of the Constitution and laws. The decision is taken at the proposal of the Standing Bureaus of both Chambers of Parliament, based on the joint report of the juridical committees of both Chambers. The Advocate of the People challenged his dismissal before the Constitutional Court.

52. In its Decision no. 732 of 9 July 2012, the Constitutional Court first referred to its decision no. 727 of the same day, which upheld its competence to decide on resolutions of Parliament. However it found that the removal of the Advocate of the People was an individual act, which could not be controlled by the Constitutional Court and rejected the claim.

53. This decision is consistent with its decisions nos. 728 and 729 of the same day, which rejected as inadmissible the appeals against the dismissal of the Presidents of the Chambers of Parliament. The Commission however identifies a constitutional gap, which deprives the office of the Advocate of the People from the necessary protection of its independence. Obviously, the Constitutional Court could not fill this gap, only the constituent power would be able to do so.

54. The dismissal of the Advocate of the People raises particular concern because of the Government's use of emergency ordinances and the Advocate being the only institution able to raise the issue of the emergency ordinances' constitutionality before the Constitutional Court (Article 146.d of the Constitution). The dismissal of the Advocate of the People resulted in a reduction of the possibility of the Constitutional Court to control the acts of the Government because the interim Ombudsman informed the delegation of the Commission that he is of the opinion that the Advocate of the People is not competent to seek control of all government emergency ordinances, but only of those directly linked to human rights.

55. According to the Law on the Advocate of the People, the office holder can be dismissed only in case of violation of the Constitution or laws. The Advocate of the People was indeed accused of violating his mandate because he appealed to the Constitutional Court against emergency decrees of the Government, which did not relate to human rights, and therefore would have acted *ultra vires* (a case referred to related to cultural institutes). It is however doubtful whether such an appeal could be a violation of the Constitution or laws because Article 146.d of the Constitution gives the Advocate of the People an express mandate to appeal to the Constitutional Court against laws and ordinances and this mandate is not limited to the protection of human rights.

56. If the Advocate of the People were not able to appeal to the Constitutional Court against government emergency ordinances in all cases – not only in human rights cases -, a serious gap in the necessary control of such ordinances would occur. No other state body than the Advocate of the People can appeal against such ordinances to the Constitutional Court and, consequently, all emergency ordinances, which do not relate to human rights, could not be controlled at all. Such a serious lacuna in the system of democratic checks and balances cannot be justified by the purported urgency of the measures adopted.

57. As set out above, by allowing that government emergency ordinances remain in force if they are not contradicted by both chambers of Parliament, the Romanian Constitution even provided incentives to use them for political convenience and opened a wide door for their use. All the more it is necessary that their urgency can be controlled effectively by the Constitutional Court.

58. Summing up, the dismissal of the Advocate of the People showed on the one hand that the control mechanism for government emergency ordinances is insufficient and needs to be

improved and on the other hand that the ombudsman institution needs increased guarantees for its independence (see below, section X.C).

VII. The dismissal of the Chairpersons of the two Chambers of Parliament

59. By Decision no. 24 of 3 July 2012, the Senate dismissed Mr. Vasile Blaga from the office of its President and by Decision no. 25 of 3 July 2012, of the Chamber of Deputies dismissed Ms. Roberta Alma Anastase from the office of its respective President. The dismissed post-holders appealed against their dismissals to the Constitutional Court, alleging that the respective rules of procedure of the Houses of Parliament and the Constitution had been violated.

60. In its decisions no. 728 and no. 729 of 9 July 2012, the Constitutional Court first ascertained whether it was competent to rule on parliamentary resolutions because Parliament had adopted a Law amending the Law on the Constitutional Court[9], removing the possibility to control Parliamentary resolutions, which had been introduced in 2010. Before the Constitutional Court could decide on the constitutionality of this law, the Government adopted an emergency ordinance with the same content, which removed this competence with immediate effect (see above, section IV.B). By decision no. 727 also of 9 July 2012, the Court had come to the conclusion that its competence to control parliamentary decisions remained intact.

61. Nonetheless, in its decisions 728 and 729 the Constitutional Court found that it had no competence to decide on the dismissals because they were individual acts of appointment, without normative character. Decision 738 of 19 September 2012 fully re-established the competence of the Constitutional Court over Parliamentary decisions (see section IV.B.2 above). A reintroduced appeal against the dismissal of the President of the Senate was however rejected by the Constitutional Court in its decision 805 of 27 September 2012. The Venice Commission does not dispose of sufficient elements to ascertain whether the alleged violation of the respective rules of procedure of the two chambers of Parliament was problematic from the viewpoint of the rule of law, which also has to be respected by Parliament in its internal, individual decisions.

VIII. Pressure against the Judiciary

A. Constitutional Court

62. The delegation Venice Commission learned about statements by public office holders which showed disrespect for the Constitutional Court. Such statements included even calls for the dismissal of the judges of the Constitutional Court.

63. Statements, whether they come from the President, members of the Government or Parliament, undermining the credibility of judges are of serious concern, even if they do not formally prevent the judges from fulfilling their constitutional mandate. Even if such statements are later withdrawn, the damage to the state institutions and thus the state as a whole is already done.

64. A public authority, in its official capacity does not enjoy the same freedom of expression as does an individual who is not entrusted with public functions. State bodies can of course also publicly disagree with a judgement of the Constitutional Court but in doing so they have to make clear that they will implement the judgement and they have to limit criticism to the judgement itself. Personal attacks on all judges or individual judges are clearly inadmissible and jeopardize the position of the judiciary and the public trust and respect it requires.

[9] Article 27.1 of Law no. 47/1992 on the Organisation and Operation of the Constitutional Court

65. The independence and neutrality of the Constitutional Court is at risk when other state institutions or their members attack it publicly. Such attacks are in contradiction with the Court's position as the guarantor of the supremacy of the Constitution (Article 142.1 of the Constitution) and they are also problematic from the point of view of the constitutionally guaranteed independence and irremovability of the judges of the Court (Article 145 of the Constitution).

66. Another aspect of the necessary respect for the Constitutional Court is the execution of its judgements. Not only the rule of law but also the European Constitutional Heritage require the respect and effective implementation of decisions of constitutional courts. The Venice Commission was informed that following the public announcement of decision no. 683/2012 of the Constitutional Court on the representation of Romania in the European Council this decision was not followed in practice. It may be true that the decision of the Court was not yet published but acting in contradiction to a publicly known Constitutional Court decision falls short of the due respect for the Court as the guarantor of the Constitution. On the other hand, the Venice Commission welcomes that other decisions of the Constitutional Court, including Decision no. 731 of 10 July 2012 and Ruling no. 6 of 21 August 2012, were implemented.

67. In its practice, the Constitutional Court of Romania first publishes a press release indicating the sentence of the decision and the text of the judgement is published on the site of the Court only after a sometimes considerable delay. The Venice Commission recommends announcing a judgement only when its full text is available for public release. In order to properly implement a judgement of a constitutional court for other state powers the sentence but also the arguments leading to that sentence are essential.

B. Prosecution

68. During its visit in Bucharest, the delegation of the Venice Commission was informed by several interlocutors about pressure against prosecutors.

69. Specialised prosecutors were in recent years quite effective in investigating and indicting for corruption both former and current holders of public office. A number of these cases resulted in convictions.[10] The Commission cannot verify whether these results may have led to pressure on the prosecutors or may even have contributed to the actions, which are being considered in this opinion.

70. By its decision no. 38/2012 of 10 October 2012 the Senate established a Commission in charge of "investigating the abuses notified to have occurred during the activities conducted by public authorities and institutions in the referendum dated 29 July 2012". The establishment of this Commission was challenged before the Constitutional Court as violating Article 1 of the Constitution (*inter alia* on the rule of law and separation of powers) and Article 132.1, which provides that "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."

71. The Commission welcomes that in its decision 924 of 1 November 2012, which finds the establishment of the investigation commission as such constitutional because it does not refer to the judiciary, the Constitutional Court insisted that a parliamentary inquiry commission cannot investigate judicial activities, including that of prosecution. According to the Court, the punishment of possible abuses in the field of the judiciary remains under the control of the Superior Council of Magistracy alone.

[10] Report of the Commission to the European Parliament and the Council on the progress made by Romania under the Cooperation and Verification Mechanism {SWD verification (2012) 231 final}, COM (2012) 410 final of 18 July 2012.

72. The defence against undue pressure on judges and prosecutors is a typical task of a judicial council. As a safeguard for judicial independence it is important that the judicial council has a sufficiently clear legal basis for this competence, including for public statements on behalf of the judiciary. Even if the Superior Council of Magistracy already fulfils this function in practice, such a provision should be introduced into Law no. 317/2004 on the Superior Council of Magistracy.[11]

IX. Constitutional principles at stake

73. Compliance with the rule of law cannot be restricted to the implementation of the explicit and formal provisions of the law and of the Constitution only. It also implies constitutional behaviour and practices, which facilitate the compliance with the formal rules by all the constitutional bodies and the mutual respect between them.

74. In Romania political and constitutional culture need to be developed and that office holders do not always pursue the interests of the state as a whole. First, there is a lack of respect for institutions. Institutions were not kept separate from persons occupying them. This is shown in the way office holders were treated as representatives of the political forces which had nominated them or voted them to office. Office holders may have been expected to favour the positions of respective political parties, and a new parliamentary majority may feel justified to dismiss the office holders appointed by a previous majority. Such a lack of respect for institutions is closely linked to another problem in the political and constitutional culture: namely disregard of the principle of loyal cooperation between the institutions. This principle is of particular importance in cases where offices, for example that of the President and the Prime Minister, are held by persons with different political backgrounds. Only mutual respect can lead to the establishment of mutually accepted practices, which are in compliance with the European Constitutional Heritage andwhich enable a country to avoid and serenely overcome situations of crises.

75. The events in Romania, individually and especially their quick succession within a short time, are a clear indication for the absence of loyal co-operation between state institutions, which has a functional link to the implementation of the Constitution. It seems that some stakeholders were of the opinion that anything, which can be done according to the letter of the Constitution, is also admissible. The underlying idea may have been that the majority can do whatever it wants to do because it is the majority. This is obviously a misconception of democracy. Democracy cannot be reduced to the rule of the majority; majority rule is limited by the Constitution and by law, primarily in order to safeguard the interests of minorities. Of course, the majority steers the country during a legislative period but it cannot subdue the minority; it has an obligation to respect those who lost the last elections.[12]

76. In the Romanian case, mutual respect and loyal co-operation between institutions would have prevented the successive change of the Presidents of both Chambers of Parliament and the change of the referendum law by government emergency ordinance right before the suspension of the President of the Republic with the ensuing referendum, a limitation of the competences of the Constitutional Court by emergency ordinance and the replacement of the Advocate of the People who is the only institution able to appeal to the Constitutional

[11] Article 75.8 of Law 317/2004 only provides that the Council's speaker shall immediately inform the President of the Council in case of events affecting the independence or impartiality of judges. For an example for such a provision, see Article 21bis of the Internal Regulation of the Superior Council of the Judiciary of Italy (decree of the President of the Republic of 15 July 2009), which provides for the power of the Council to intervene in case of declarations of representatives of other state bodies, which endanger the credibility and independence of judges or the Judiciary as a whole.

[12] CDL-AD(2010)025, Report on the role of the opposition in a democratic Parliament, adopted by the Venice Commission, at its 84th Plenary Session (Venice 15-16 October 2010)

Court against these emergency ordinances. Even if part of these acts may have been constitutional and legal on their own, their quick succession contradicts the principle of loyal co-operation between state institutions.

77. Rules on presidential suspension, on constitutional control mechanisms are established to channel political conflict; in a democracy ruled by law, such provisions cannot be made up and changed in the middle of the very conflict, which they are designed to regulate and pacify.

X. Proposals for amending the Constitution and laws in order to avoid similar situations in the future

78. Already during the visit to Bucharest, the interlocutors of the Commission's delegation agreed on the need for constitutional and legislative reform in order to ensure that in future similar situations will not arise again. The Venice Commission warmly welcomes this readiness to improve the constitutional and legislative framework of Romania and it is ready to assist Romania in this process. In discussions with the delegation several points which need reform were identified. Below, the Commission points to some elements which such a reform could include.

A. Procedure for suspending the President

79. The procedure for suspending the President confuses in a rather peculiar way legal and political responsibility. It tends to make the President politically responsible before the Parliament and the electorate, although the grounds for dismissal are formulated in a way which invokes legal responsibility. The role of the Constitutional Court in the procedure is also rather unclear. **If maintained at all, the procedure of Article 95 of the Constitution on the suspension of the President as it stands should be transformed into a clearly legal responsibility, initiated by Parliament but settled by a court.**

B. Government emergency ordinances

80. The issue of government emergency ordinances should be addressed. One of the reasons for the excessive use of such ordinances (140 emergency ordinances in 2011) appears to lie in the cumbersome legislative procedures in Parliament. Reform of Parliament should therefore be on the agenda. If evenquicker action through Government intervention were indeed required, urgent legislation, for example on implementing EU legislation, should be adopted by way of legislative delegation (Paragraphs 1 to 3 of Article 115 of the Constitution). **By streamlining the legislative procedure and through recourse to delegated legislation, the need for government emergency ordinances should nearly disappear; paragraphs 4 to 8 of Article 115 of the Constitution on government emergency ordinances could become redundant. At the very least, the incentive to use these ordinances so frequently, i.e. the continued validity of the ordinances if the Chambers of Parliament do not contradict them explicitly, should be removed**.

C. Dismissal of the Advocate of the People

81. Apart from Article 65.i of the Constitution (on the appointment by Parliament) the institution of the Advocate of the People does not have a constitutional basis. Neither the competences nor the criteria for dismissal of the Advocate are regulated on the level of the Constitution, even though the Advocate performs an essential role for the protection of human rights. In order to be effective in the protection of human rights, the Advocate of the People has to be independent, including from Parliament, which elects the office holder. In view of this independence special, guarantees are required against unjustified dismissal and references to the principle of symmetry - applying the same criteria for appointment and dismissal, i.e. a simple majority - are inappropriate.[13]

82. The events examined above show that the absence of such guarantees can lead to serious problems, not only as concerns the protection of human rights, which are the essential task of the Advocate, but also as concerns the control of government emergency ordinances and, consequently, for the rule of law. The initiation of the constitutional control of government emergency ordinances need not necessarily be attributed to the Advocate, as long as it is assured that such control can be effectively exercised.

83. While there is no common European standard on this issue, the Commission recommends **providing for the basic tenets of the status – including conditions for dismissal - and competences in the Constitution itself, in order to safeguard the independent status of the Advocate of the People**.[14]

D. Clarification of respective powers of the President and the Government

84. The events in Romania have shown that the current constitutional framework of Romania cannot easily sustain a "cohabitation" between a President of the Republic from one side of the political spectrum and a Government and Parliament from the other. In this opinion it is not the task of the Venice Commission to take a position on the choice between a presidential and a parliamentary system[15] but constitutional reform should at least **clarify the respective competences of the President and the Prime Minister, notably in the fields of foreign policy and in relations with the European Union.**

XI. Conclusion

85. In July 2012, the Romanian Government and Parliament adopted a series of measures in quick succession, which led to the removal from office of the Advocate of the People, the Presidents of both Houses of Parliament, a limitation of the competences of the Constitutional Court, changes on the conditions for a referendum on the suspension of the President of the Republic and the suspension of the President itself. The Venice Commission is of the opinion that these measures, both individually and taken as a whole are problematic from the viewpoint of constitutionality and the rule of law.

86. The events examined include ordinances, decisions and procedures whose constitutionality is questionable, especially when taken together in quick succession. The Commission is worried in particular about the extensive recourse to government emergency

[13] CDL-AD(2004)041 Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), paras. 12 and 19.
[14] CDL-AD(2004)041, para. 9.
[15] Or other topics, which were raised in the discussions of with the Commission's delegation like the choice between a unicameral and a two-chamber parliament The Commission remains available to assist in the sharing of experiences also on these topics.

ordinances – both by previous and present majorities – which presents a danger for democracy and the rule of law in Romania.

87. In addition, the events and several statements made demonstrate a worrying lack of respect among representatives of State institutions for the status of other State institutions, including the Constitutional Court as the guarantor of the supremacy of the Constitution.

88. The Commission is of the opinion that the respect for a Constitution cannot be limited to the literal execution of its operational provisions. The very nature of a Constitution is that, in addition to guaranteeing human rights, it provides a framework for the state institutions, sets out their powers and their obligations. The purpose of these provisions is to enable a smooth co-operation of the institutions based on their loyal co-operation. The Head of State, Parliament, Government, the Judiciary, all serve the common purpose of furthering the interests of the country as a whole, not the narrow interests of a single institution or the political party having nominated the office holder. Even if an institution is in a situation of force, when it is able to influence other state institutions, it has to do so with the interest of the State as a whole in mind, including, as a consequence, the interests of the other institutions and those of the parliamentary minority.

89. The Venice Commission is of the opinion that the Romanian state institutions should engage in loyal co-operation between them and it is pleased about the statements from both sides expressing their intention to respect their obligations.

90. The Commission warmly welcomes the fact that its interlocutors were of the opinion that constitutional and legislative reform is required to ensure that a similar situation cannot arise again. In section X above, this opinion refers to elements, which could become part of such reforms.

91. The Venice Commission remains at the disposal of the Romanian authorities for assistance in the implementation of such reforms.