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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON THE

DRAFT LAW ON THE REVIEW

OF

THE CONSTITUTION OF

ROMANIA

on the basis of comments by

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I. Introduction

1. On 21 March 2013, the Prime Minister of Romania, Mr Victor Ponta, requested the assistance of the Venice Commission in the process of revision of the Constitution of Romania.

2. A working group of Rapporteurs was set up, composed of Mr Bartole, Ms de Guillenchmidt, Mr Hamilton, Ms Suchocka, Mr Tanchev, Mr Tuori and Mr Malinverni (expert, former member of the Venice Commission).

3. A series of meetings were held by the rapporteurs in 2013 in Bucharest with various stakeholders involved in the constitutional process: first with the Constitutional Forum of the Civil Society on 8-9 May and subsequently (on 4-5 July 2013) with members of the Joint Parliamentary Committee for the Revision of the Constitution (thereinafter the "Constitutional Committee"), as well as with representatives of all parliamentary forces represented in the Romanian Parliament. The Venice Commission is grateful to the Romanian authorities and the civil society partners for the excellent co-operation in the organisation of the above meetings and to all participants for the exchanges held.

4. On 7 February 2014, the Prime Minister of Romania submitted to the Venice Commission for legal assessment the revised version of the draft law on the revision of the Constitution of Romania (thereinafter "the draft revision law"), as finalised by the Constitutional Committee.

5. The present opinion was adopted by the Commission at its … Plenary Session (Venice, …. 2014).

II. Preliminary Remarks

A. Scope

6. The present opinion aims to review the draft law on the revision of the Constitution of Romania (see CDL-REF(2014)004). The present opinion pays particular attention to the measures taken by the Romanian authorities to implement the recommendations contained in the Opinion adopted by the Venice Commission in December 2012 in relation to developments in Romania in the summer 2012[1].

7. According to the domestic procedure for constitutional amendment, the draft revision law submitted to the Venice Commission was at the same time submitted to the Constitutional Court[2].

8. The Romanian Constitution in its article 152 contains provisions regulating the limits of the revision of the Constitution. As a rule, such provisions are intended to serve as safeguards

[1] 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*, Adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14-15 December 2012)

[2] Verification on the constitutionality of the initiatives for the revision of the Constitution is regulated by the provisions of Article 146 a) second sentence of the Constitution and by Article 19-22 of Law no.47/1992. Before submission to the Parliament in order to initiate the legislative procedure for the revision of the Constitution, the bill or the legislative proposal, accompanied by the opinion of the Legislative Council, shall be submitted to the Constitutional Court by its initiator. The Court, within ten days, shall assess the observance of the constitutional provisions of Article 150 on the initiative of the revision and Article 152 on the limits of the revision. Then, the bill or legislative proposal can be presented to the Parliament only together with the decision of the Constitutional Court (see www.ccr.ro)

against possible non-democratic amendments to the Constitution[3]. Article 152 reads as follow:

> *"(1) The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision.*
> *(2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof.*
> *(3) The Constitution shall not be revised during a state of siege or emergency, or in wartime."*

9. On 17 February 2014[4], the Constitutional Court of Romania declared, in the light of Article 152, the unconstitutionality of certain provisions of the draft revision law. It is not the role of the Venice Commission to assess the constitutionality of given proposals or the judgment of the Constitutional Court. As previously indicated, the present analysis aims at assessing the proposed amendments to the Romanian Constitution in the light of existing European standards and experience.

10. The present opinion is based on the English translation of the revised draft law and a consolidated version of the draft revised Constitution as transmitted by the Romanian authorities. Since the translation may not accurately reflect the original version, certain comments and omissions might be affected by problems of the translation.

B. Background

11. The Venice Commission adopted in December 2012, at the request of the Secretary General of the Council of Europe, 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 July 2012, in respect of other state institutions. In its Opinion, the Commission stressed the importance of the loyal co-operation between state institutions and recommended, in addition to specific legislative changes, clarifications and improvements with regard to a number of provisions of the Romanian Constitution.

12. The Commission recommended in particular: the revision of the procedure for suspending the President (article 95); new rules on Government emergency ordinances (article 115); modification of the procedure for the dismissal of the Advocate of the People (article 65); clarification of the respective powers of the President and the Government, especially in the fields of foreign policy and of the relations with the European Union.

13. The coalition that came to power as a result of the parliamentary elections of December 2012 decided, as one of its first and most prominent political projects, to launch the process of revising the Constitution of Romania. One of the explicit aims of the constitutional revision was, in accordance with the recommendation made by the Venice Commission in its 2012 Opinion (see above), to ensure that situations similar to the political crisis of July 2012 cannot arise again.

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[3] See *Report on Constitutional Amendment* adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009) ,CDL-AD(2010)001, (§52)

[4] The Venice Commission was informed of the Constitutional Court hearing of 17 February 2014 during which the Constitutional Court declared unconstitutional, in the light of article 152 of the Constitution, 26 draft amendments to the current Constitution. At the date of the preparation of the present Opinion, the Commission had not been in a position to study the motivation of the Constitutional Court decision.

14. On 13 February 2013, a Joint Committee of the Chamber of Deputies and of the Senate for Elaborating the Legislative Proposal for the Revision of the Constitution ("the "Constitutional Committee") was established with a view to preparing a first draft before the summer 2013.

15. The Constitutional Committee decided to set up a civil society Constitutional Forum, as a means to gather the views and proposals of the civil society concerning the amendment of the Constitution and a framework for debating, prior to the drafting of the constitutional revision law, the input received from the civil society.

16. A prominent Romanian NGO was entrusted with the task of co-ordinating the consultations held through the Forum and the preparation of a report to be subsequently submitted to the constitutional committee. A series of meetings were held with civil society organisations, academics, local elected representatives etc. in Bucharest and various cities in Romania and a consultation space was made available on line.

17. On 8-9 May 2013, a final event was held in Bucharest, with the participation of the Venice Commission experts, devoted to discussing the civil society proposals and expectations gathered by the Constitutional Forum.

18. On 4-5 July 2013, a delegation of the Venice Commission held fruitful discussions in Bucharest with members of the Parliament's Constitutional Committee and other stakeholders involved in the revision process. In this context, the delegation of the Commission also had meetings with the political forces represented in the Romanian Parliament, the Minister of Justice and the representatives of the judiciary - the Superior Council of Magistracy and the professional associations of judges and prosecutors.

19. The meetings allowed discussions and clarifications, in the light of the applicable European standards and best practices, on key issues raised by the first draft revision law adopted by the Parliament's Constitutional Committee.

20. An overview of the main issues discussed with/raised by the experts of the Venice Commission was subsequently provided to the Romanian authorities, including a wider range of matters for further reflection: the appointment of the Government in case of reshuffle or vacancy; the dissolution of Parliament for failure to invest the Government; the dissolution of the Parliament following a vote of the Parliament itself; the initiation of a referendum; the President's powers on foreign policy; the suspension/revocation/liability of the President; the appointment of the Prime Minister; the individual revocation of the Ministers; the prosecution of the members of the Government. The Commission emphasized in this context that a clear and consistent underlying concept, enjoying wide support within society, is essential in devising new constitutional settings. In particular, it stressed the need for increased consistency (in accordance to a prior decision on the form of government) between the choices made throughout the various chapters of the Constitution.

21. At the request of the Romanian authorities, it was agreed that the Venice Commission would not provide an opinion on the first draft but that a revised version of the draft revision law would be submitted to it for assessment in autumn 2013.

22. In early February 2014, the draft was revised by the Constitutional Commission and subsequently submitted to the Venice Commission. According to the Romanian authorities, the Constitutional Committee took into account, in finalizing the draft, the issues raised by the Rapporteurs of the Venice Commission in July 2013, as well as the comments contained in the

opinion issued by the Romanian Legislative Council[5] on 28 June 2013 with respect to the preliminary draft.

C. The amendment process

23. The Venice Commission notes that the draft revision law introduces a considerable number of amendments entailing a substantial revision of key constitutional matters, which was presented by the authorities of Romania as one of their major political priorities.

24. The Commission finds regrettable that, as indicated by various sources, after the first positive steps in the direction of an open process of reflection and consultation, too little efforts have been made to enable transparent and comprehensive discussions with the various circles concerned.

25. According to the information available, it appears that, since the meeting with the delegation of the Commission in July 2013, no public debate has been held at the initiative of the authorities with regard to the preliminary draft. Moreover, no meetings of the Constitutional Committee have been held, before early February 2014, to discuss on the substance the preliminary draft - and available comments - in view of its revision.

26. The Commission finds all the more unfortunate that such a complex process, requiring thorough assessment of long-term political choices for the Romanian society, could not benefit from a genuine exchange between the majority and the opposition, as well as from the input of important institutional actors (such as the Superior Council of Magistracy), professional associations and other interested stakeholders having expressed their wish to contribute to the process.

27. The Commission recalls that "*transparency, openness and inclusiveness, adequate timeframe and conditions allowing pluralism of views and proper debate of controversial issues, are key requirements of a democratic Constitution-making process*". "*In its opinion, a wide and substantive debate involving the various political forces, non-government organizations and citizens associations, the academia and the media is an important prerequisite for adopting a sustainable text, acceptable for the whole of the society and in line with democratic standards*"[6].

28. The Commission expresses the hope that, during the forthcoming stages of the constitutional process, there will be constructive dialogue and co-operation between the majority and the opposition.

29. Informed public debate of the main changes and novelties that might be introduced and their impact for the Romanian society is of key importance, in terms of legitimacy and sense of ownership of the future constitution, for a successful revision process. This is all the more important in Romania in the light of the constitutional requirement that any amendment to the Constitution needs popular approval by referendum.

30. The Venice Commission wonders whether, limiting at this stage, as a first step, the scope of the revision to the issues raised by the Venice Commission in its 2012 Opinion, would not have been a way to avoid complicating the amendment process.

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[5] According to article 79 on the Romanian Constitution, the Legislative Council - a consultative specialised body of the Parliament, gives opinion on all legislative bills, including those aiming at amending the Constitution.

[6] See CDL-AD(2011)001, *Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary*, Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), § 18-19.

III. Analysis

A. TITLE I - GENERAL PRINCIPLES

Article 1 (Romanian State)

31. The Venice commission welcomes the fact that, the new sentence[7] which was added to paragraph 4 of article 1 by the 2013 draft, redefining roles in the institutional architecture of the country, a sentence involving the risk of difficulties in the event of future inter-institutional conflicts, has been dropped out.

32. The Commission nevertheless regrets that the principle of loyal co-operation between powers, which was added, in the 2013 draft, to the list of founding principles of the Romanian constitutional democracy, has not been maintained in the revised draft (in article 1 or elsewhere). The Commission strongly recommends inclusion of this principle, as an important constitutional guarantee - and commitment - for the constructive co-operation between the various authorities in the Romanian state.

33. There is a proposal to add to Article 1 new point 1(1) which reads as follow: "*Romania acknowledges the historic role in establishing and modernizing the Romanian State of the Orthodox Church and of the other religious denominations recognized by law, of the Royal House and of the national minorities*".

34. This formulation is typical for the wording usually used in a Preamble to the Constitution, especially in constitutions adopted as a consequence of big transformation from authoritarian to democratic system. Such constitutions usually make references to the history of the country, to the state's tradition, as well as to recognition of important events from the past and institutions (like a church) which have had an important influence on the establishment of contemporary, democratic state. However, since there are no common European standards in this area, it belongs to the Constitution making authority to decide on the kind and scope of regulations to be included in the country's fundamental law.

35. Yet, the reference to the Royal House seems to be a most unusual provision to find in a republican constitution, particularly a Constitution which expressly prohibits any amendment which would alter the republican character of the state. In addition, it is difficult to see the proposed new clause having any practical effect, although it is not unknown for similar declarations to have unintended consequences. In particular, listing a number of disparate institutions and groups in society entails the risk that groups which are not included are likely to feel slighted.

Article 2 (Sovereignty)

36. It is proposed to insert here a statement concerning human dignity ("(2[1]) Human dignity is the source of all fundamental rights and freedoms and is inviolable. All the forms of public authority shall respect/observe and protect human dignity"). Human dignity has indeed become a point of reference to the system of values included in constitutions. The wording is clear and in line with the universal concept of human rights (see 1996 ICCPR). However, this statement would fit more logically at the beginning of Title II concerning fundamental rights rather than in a provision which deals with sovereignty. The statement might not be needed at all since Article 1 (3) already makes reference to human dignity as an underlying value of the Romanian state.

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[7] "*The legislative power is represented by the Parliament, the executive power is represented by the Government and the other specialised bodies of central public administration, and the judicial power is represented by the High Court of Cassation and Justice and the other judicial instances*."

Article 3 (Territory)

37. According to the proposed Article 3(3^1), "[t]*hrough organic law traditional areas may be recognised as administrative subdivisions of the region*". What 'traditional areas' means is unclear. It is also unclear what type of administrative subdivisions with what kind of administrative organisation this will result in. One may also wonder why traditional territorial divisions should be relevant only with respect to the regions.

38. It is noted that the Constitutional Court of Romania, considering this amendment to be in breach of the limits of the revision, declared it unconstitutional.

Article 4 (Unity of the people and equality among citizens)

39. The formulation "unity of the people" in the already existing text is unclear; moreover, it is a rather outdated notion, typical of instruments of the system prevailing in the country prior to its democratic transformation. Similarly, although not concerned by any amendment proposal, "equality among citizens" should be reconsidered and changed into *equality of all* before the law in order to be in line with the international standards[8].

40. Insofar as it does not add much to Article 1 of the Constitution, the first sentence in the proposed Article 4(2) ("*Romania is the common and indivisible homeland of all its citizens*") could be deleted, especially that, read in conjunction with the second sentence, it may give rise to an interpretation that prohibition of discrimination protects merely citizens.

41. The reformulation of Article 4(2) – a general anti-discrimination clause - is more comprehensive than the current constitutional text and serves as a basis for more detailed regulations in the Title on fundamental rights. The omission of any specific reference to discrimination on grounds of sexual orientation is to be regretted, although the general phrase "*or on any other situation*" at the end of the provision could be interpreted to include also this and other grounds.

Article 6 (Right to identity)

42. In the amendment to Art 6(1), reference should be made to organic law and not to law in general. It is recalled that, according to article 73 (r) of the current Constitution, the status of national minorities in Romania shall be regulated by organic law. The Constitutional Court declared the new article 6 (1^1)[9] unconstitutional.

43. The amendment adding a new paragraph (2^1) to article 6, which contains a guarantee for the consultation of the organisations of national minorities on issues of interest for the preservation and development of their identity, is a welcome proposal, in line with article 15 of the Framework Convention for the Protection of National Minorities. Nevertheless, such a guarantee, since it may be seen as a modality for implementing the right to identity protected under article 6(1), does not necessarily require a constitutional provision.

Article 10 (International relations)

44. The proposed Art 10(2) includes a reference to Romania's membership in the EU. By contrast, the Constitution lacks a provision on the transfer of competences to the EU (or other

[8] See CDL-AD(2013)032, *Opinion on the Final Draft Constitution of the Republic of Tunisia adopted by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013), § 45*

[9] "*The legal representatives of national minorities may establish, according to the status of national minorities approved by law, their own decision-making and executive bodies, having competences in relation to the right to preserve, develop and express their identity*".

transnational or international organizations).

Article 12 (National symbols)

45. In view of the guarantees provided by Article 6 of the Constitution dealing with the right to identity, new Article 12 (4^1)[10] may not seem necessary. It is noted that the proposed provisions have been declared unconstitutional by the Constitutional Court.

B. TITLE II - FUNDAMENTAL RIGHTS, FREEDOMS AND DUTIES

1. General remarks

46. The current Constitution contains a rather wide catalogue of fundamental rights, freedoms and duties which follows the tendency existing also in other countries.

47. What seems to be important in the Romanian constitutional system at this stage is not to widen the constitutional catalogue of human rights, but to reinforce, through additions and specifications, the implementation of existing rights. Some of the new proposed guarantees are welcome, but sometimes too descriptive or incomplete; other aspects do not necessarily require constitutional protection, since they may be regulated by organic or ordinary law.

48. At the same time, the Romanian Constitution, adopted rather quickly after the beginning of the democratic transformation (and entered into force on 8 December 1991), very often uses the term citizen instead of "everyone" or "all individuals' in relation to fundamental rights (see current articles 18 and 20 and proposed articles 15 and 16). To be in line with the universal and European standards[11], guarantees of fundamental rights and freedoms should apply to everybody not just the citizens (see also comments under article 4 above).

49. More generally, it is noted that treaty-based rights are not regulated in a uniform manner: while some of their aspects are explicitly regulated, others not, which may be a source of difficulties in their interpretation and implementation. Also, the internal structure of this Title, lacking appropriate systematization between rights and freedoms, would deserve consideration. For example, freedom of assembly is regulated in article 39 after the right to be elected to the European Parliament.

2. Specific remarks

Article 15 (Universality)

50. The wording of the amended article 15 (1) suggests that human rights belong only to Romanian citizens. However, most of these rights apply to all human beings, both nationals and foreigners. This is also indicated very clearly by the title of the article (universality). It is

[10] "*National minorities may freely use, in the public and private space, their own symbols which represent their ethnic, cultural, linguistic and religious identity.*"

[11] It is noted that, according to article 20 (unchanged) of the Romanian Constitution : "*(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to.*
(2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions."

recommended that the wording be changed.

Article 16 (Equality of rights)

51. The remarks made with regard to article 15 are also applicable to the (un-amended) article 16(1). Human rights, in particular the principle of equality, apply to everyone, not just to citizens. There are only some fundamental rights that may be granted to citizens only: these are political rights (the right to vote and to be elected), for example those mentioned in article 16 (3) (see also comments under article 4 above).

52. The new paragraph 4 of article 16, guaranteeing EU citizens' active and passive electoral rights in local elections is a welcome proposal.

Article 21 (Free access to justice)

53. The new amendment in article 21 (3), according to which "Parties are entitled to a fair trial and the solution of their cases within *an optimal and predictable term*" instead of "*a reasonable term*", can be seen as a constitutional guarantee to hear the cases without undue delay (delay being a problem in many post-communist countries). This is a welcome proposal likely to contribute to the better implementation of individual rights.

54. The notion of "fair trial" needs to be further specified. Consideration could be given to including the main constituent elements of "fair trial", as does article 6 of the European Convention on Human Rights (hereinafter the ECHR).

55. The elimination, in article 21(4), of the optional nature of special administrative courts, was ruled unconstitutional by the Constitutional Court.

Article 23 (Individual freedom)

56. The draft proposes to amend paragraph (4) in order to provide that deprivation of liberty of a person charged with an offence should be exceptional and duly motivated. At present, the paragraph simply provides that preventive custody is to be ordered by a judge and only in the course of criminal proceedings.

57. The obligation proposed in article 23(4) to provide a motivation for deprivation of liberty is a welcome strengthening of the freedom of the individual who has not been convicted of an offence, as is the provision to the effect that such deprivation of liberty should be exceptional. Furthermore, preventive custody should be decided by the judge of the court competent on the merits of the case, in accordance with the law and only in the course of the criminal proceedings, after indictment. This requirement - that the judge who has seisin of the substantive case should decide these matters - is most probably meant to prevent the arbitrary assignment of judges to hear such cases, which seems to be a positive step.

58. According to the proposed new paragraph (13^1), it is forbidden to use illegally obtained evidence, with the exception of evidence in favour of the accused. There is indeed a strong argument that the interest in ensuring that innocent persons are not convicted should outweigh the public interest in avoiding the use of evidence illegally gathered. As an exception to the general principle of equality of arms, it may be considered acceptable that the prohibition on the use of illegally-gathered evidence should not apply to the defence even if it applies to the prosecution. It is noted that this proposal has been ruled unconstitutional, for non-compliance with article 152 on the limits of the revision.

Article 24 (The right to defence)

59. The draft revision law proposes to expand this article to include the right of defendants to the necessary time and facilities to prepare their defence. It is also proposed that throughout all stages of criminal proceedings the principle of equality of arms between prosecution and defence should be guaranteed. These are essential guarantees for the right to a fair trial.

Article 26 (The intimate, private life and the personal data)

60. In article 26(2) it is proposed, for unclear reasons, to delete the reference to "morals" as a ground for acceptable interference with the right to private and family life. It is recommended to reconsider this amendment, with a view to ensuring the conformity of the constitutional provision with wording of Article 8 ECHR.

61. It is also proposed that article 26 be extended to include the right to the protection of personal data, under the supervision of an autonomous authority (new paragraphs (3) and (4)). This is a welcome proposal since these are valuable safeguards reflecting contemporary threats to privacy.

Article 27 (Inviolability of domicile)

62. Under the current constitutional provisions, searches can be ordered by a judge. According to the proposed amendment, the aim of which seems to be to prevent the arbitrary assignment of judges to deal with such matters, the concerned judge should be from the court competent to rule on the merits of the case. While noting that the proposal might need some clarification, the Venice Commission stresses that such aspects are not necessarily a matter for constitutional regulation.

Article 28 (Secrecy of correspondence)

63. According to the draft revision law, the amended article 28[12] states:

> *"(1) The secrecy of letters, telegrams, of other postal dispatches, of telephone calls, of other communications carried through electronic means, of traffic data, location data and other legal means of communication is inviolable and guaranteed.*
>
> *(2) The retention, the handing over or the search of postal dispatches, the interception of calls and communications, technical surveillance in public and private spaces, the electronic search and the access to an information system and to an information support system for data storage, obtaining electronic data, including the traffic and location data, the identification of the subscriber, owner or user of an electronic communication system or of an access point to an information system or other such techniques are ordered by a judge from the court competent to rule on the merits of the case and only during criminal proceedings."*

[12]The current article 28 states: "Secrecy *of the letters, telegrams and other postal communications, or telephone conversations, and of any other legal means of communications is inviolable*."

64. It is noted that the Constitutional Court has found the proposed paragraph (2), to be unconstitutional (in the light of the limits to the constitutional revision).

65. In the Commission's view, there is a tension between paragraphs (1) guaranteeing absolute protection of the right, and paragraph (2) introducing a limitation clause. In addition, it is fundamental that the clause in paragraph 2 clearly specifies the acceptable grounds for limitation and the principle of proportionality. While enumerating all possible means of communication might not be necessary, the relation between the general limitation clause and the specific limitation clauses should be clear and both should be in harmony with the ECHR.

66. In the opinion of the Commission, a mechanism to permit these techniques to be used is an essential aspect of modern criminal investigation provided proper safeguards are put in place. Without such techniques, it would, for example, in most cases be impossible to identify and prosecute persons who produce child pornography on the Internet for gain. To impose a complete ban on investigating communications could result in a failure to defend the rights of many victims of crimes and in some cases very serious crimes which could include murder or the inflicting of serious harm.

67. In a series of cases the ECtHR has developed the doctrine that states have not merely the duty not to infringe the human rights of individuals but also have positive obligations to take certain measures to prevent non-state actors from infringing the rights of others[13]. The states duty and challenge is in such case to strike for the most adequate balance between the rights in play.

68. A complete deletion of the proposed paragraph (2) would therefore be problematic if it resulted in an absolute prohibition of interfering with correspondence and electronic communication.

Article 29 (Freedom of conscience)

69. This Article deals with freedom of conscience. It is proposed to amend paragraph (4) so that all forms, means, acts or actions of religious hatred are forbidden, and not merely in the context of relationships between churches. This more general provision is welcome as a more comprehensive prohibition against religious hatred than the existing provision which only regulates the conduct of religious denominations amongst themselves.[14] Care should, however, be taken that it is not abused to prevent legitimate public debate.

[13]The Court has held that the state's obligations "*may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves*" *(X and Y v. Netherlands*, application no.8978/80, Judgment 26 March 1985, paragraph 23.) and continued that "*the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated*." In the case *Osman v. United Kingdom* (Osman v. United Kingdom (87/1997/871/1083), [1998]), the Court held that Article 2 § 1 ECHR enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction and that "*the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions… the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures*." (Ibid, at paragraph115).

[14] See the Report of the Venice Commission on the *Relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to hatred*, (CDL-AD(2008)026), 23 October 2008, § 56; see also *ECRI general policy recommendation No 7 on national legislation to combat racism and racial discrimination* (13/12/2002).

Article 30 (Freedom of expression)

70. There are a number of proposed amendments to the article concerning freedom of expression. It is important to define freedom of expression as implying the freedom to set up any means of mass communication and not just written publications, as it may be understood if the proposed new paragraph 3 is read in conjunction with the current paragraph (4) ("*No publication shall be suppressed*").

71. A second amendment provides not merely that the law may require mass media to make public their financing sources, as stipulated by the current paragraph 5, but that mass media have an obligation to do so and to declare the structure of their shareholding. Given the key role played by the media in forming public opinion, there is a strong argument to be made for ensuring public information concerning the ownership of media organs.

72. It is also noted that the possibility to restrict freedom of expression in current article 30(7) is formulated too broadly and in too vague terms (for instance, "defamation of country and nation" or "territorial separatism"). In the absence of an element of "violence", the prohibition on expression favouring territorial separatism (which may be seen as a legitimate expression of a person's views), may be considered as going further than is permissible under the ECHR. The ECtHR has consistently ruled that speech is protected even though it may shock, offend or disturb and has protected the rights of political parties who support separatism provided they use and advocate only peaceful means to bring about change.[15]

Article 31 (Right to information)

73. The amendment in paragraph 2 is a welcome proposal. It is recommended to specify what is meant by the requirement that draft normative acts be "submitted to public debate", i.e which normative acts should be submitted to public consultation and by which means. In addition, this provision, regulating one of the stages in the legislative process, should be placed under the specific Chapter devoted to this matter and not under the right to information.

Article 32 (Right to education)

74. Education is to be carried out in the Romanian language (paragraph 4) and the right of persons belonging to national minorities to learn their mother tongue and receive education in this language is guaranteed, according to modalities to be specified by law (paragraph 5). The relationship between paragraphs 4 and 5 might be problematic. Hence, it would be important to clarify, in the implementing legislation, in line with the applicable standards, the conditions for receiving instruction *in* the minority language.

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[15] See *Kizilyaprak c; Turkey*, Application no. 27528/95, § 40 ; *Isak Tepe v. Turkey*, Application no.17129/02, § 25 ; *Stankov and the United Macedonian Organisation Ilinden*, § 97; United *Macedonian Organisation Ilinden-Pirin and Other v. Bulgaria*, Application no. 59489/00, Judgment of 20 October 2005, § 61; see also *Batasuna v. Spain, Application nos. 25803/04 and 25817/04*, Judgment of 30 June 2009.
See also CDL-AD(2011)046 *Opinion on the Draft Law on Amendments to the Law on Political Parties of the Republic of Azerbaijan*, adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011), §22: "*The court has on many occasions made clear that the right to freedom of expression includes the right to advocate ideas that offend, shock or disturb. In particular the court has also held that political parties are entitled to campaign in favour of a change in the legislation or in the legal or constitutional structures of the state subject to two conditions (1) that the methods employed for this purpose must in all respects be legal and democratic and (2) the change proposed must itself be compatible with fundamental democratic principles … the Court held that the fact that a particular political proposal was incompatible with the existing principles and structures of the state did not mean it was contrary to democratic principles. It was of the essence of democracy to permit the advocacy and discussion of different political proposals, even those which would alter the existing structures of a state. (See* Socialist Party of Turkey (STP) and Others v Turkey*, No. 26482/95, 12 November 2003.)";* See also *Guidelines on political party regulation by OSCE/ODIHR and Venice Commission,* CDL-AD(2010)024, 15-16 October 2010, § 96.

75. According to current paragraph 9, the state ensures "freedom of religious education, according to the specific requirements of each denomination". It is recommended that the right not to take part in religious education be also guaranteed.

76. It is noted that the proposed definition of university autonomy has been ruled unconstitutional by the Constitutional Court.

Article 33 (Access to culture)

77. Culture seems to be defined in a very broad sense since it apparently includes spirituality:

> (3): "*The State shall ensure the preservation of spiritual identity, the support of national culture, the stimulation of arts, the protection and conservation of cultural heritage, the development of contemporary creativity, the promotion of cultural and artistic values of Romania worldwide"*.
>
> (3^1) "*The State promotes the diversity of cultural expressions nationwide and encourages the intercultural dialogue*".

78. However, the proposed provisions lack clarity and may raise issues of interpretation. In particular, the notion of "spiritual identity" is too vague, as is the duty of the state to ensure "the preservation of spiritual identity". The interrelation between these provisions and the constitutional guarantees for freedom of conscience might be problematic: could article 33 be used to make proselytising or even criticism of religious ideas unlawful? Also, it is difficult to see how the duty to "ensure the preservation of spiritual identity" in paragraph 3 relates to that of promoting "the diversity of cultural expression" in new paragraph (3^1). Such vague and sensitive notions should be avoided in a constitutional text or adequately specified.

Article 35 (Right to a healthy environment)

79. It is difficult to see that the ill-treatment of animals is an issue concerning the right to a healthy environment. It should be addressed by a separate provision or deleted.

Article 36-38 (Electoral rights)

80. The new proposed article 16(4) stating that *"[t]he citizens of the European Union who meet the requirements of the organic law have the right to elect and be elected to local public administration authorities*" should be addressed under electoral rights rather than, as proposed, under the issue of equality.

81. The proposed new article 37(2^1), introducing a limitation of the right to be elected as Parliament member or President of Romania to candidates having had their domicile in Romania "at least 6 months prior to the election date" has been ruled unconstitutional for non-compliance with article 152 of the Constitution.

Article 40 (Right of association)

82. Freedom of association should be recognized to all persons, including foreigners, and not limited to citizens as in article 40(1) of the current Constitution.

83. Also, article 40(2) does not seem to take into account the distinction made by the Venice Commission between the objectives and activities of political parties when it comes to the criteria for the prohibition or dissolution of parties. A comparative overview shows that "*only a few states prohibit party objectives and opinions as such. It is more common that the national criteria refer to illegal means, such as the use of violence. But the most common*

model in those countries that have rules on party prohibition is that prohibition requires both unlawful means (activities) and illegitimate ends (objectives)."[16] See also comments regarding article 30 above.

Article 44 (Right of private property)

84. The amendment in article 44 (1) ("*The debts incurring on the State have the same juridical regime as the payment of fiscal obligations, in accordance with the law*") is unclear and should be reformulated. It is noted that, in view of the Constitutional Court, the deletion of the requirement, in paragraph 1 of article 44, that the content and limitations of property rights shall be established by law, is unconstitutional.

Article 48 (Living standard)

85. The definition of family remains unchanged in the draft revision law: "*The family is founded on the freely consented marriage of the spouses, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children, with the observance of the principle of the their superior interest***.**"

86. In the absence of established European standards on the matter and taking into account the ECHR case-law, the Commission considers that the definition of marriage belongs to the Romanian state and its Parliament.

87. The inclusion of the principle of the superior interest of the child in article 48(1) is a welcome proposal (see also comments under article 49).

Article 49 (Protection of children and young people)

88. While the proposed article 48 (1) guarantees *"[…]the right and duty of the* ***parents*** *to ensure the upbringing, education and instruction of their children, with the observance of the principle of their superior interest", t*he proposed new article 49 (1) states that *"****Children*** *and young people shall enjoy special protection and assistance in the exercise of their rights, with the observance of the principle of their superior interest*."

89. To avoid any possible interpretation which would see the two rights (of parents and children) and two different interpretations of principles of superior interest as competing/contradictory rights, it is suggested to maintain as a constitutional principle the provision in article 48 (1) and to delete the addition in article 49 (1). The detailed provisions can be regulated by law.

Article 50 (Protection of persons with disabilities)

90. Article 50 contains guarantees for persons with disabilities, which is welcomed:

> *"Persons with disabilities enjoy all the fundamental human rights and freedoms, under the conditions of the equality of opportunities. The State ensures the implementation of a national policy based on the equality of opportunities and of inclusion, prevention and treatment with a view to the effective participation of persons with disabilities in the life of the community, with the respect of the rights and duties incumbent on parents and tutors."*

[16] See CDL 2013(45), *Compilation of Venice Commission Opinions and Reports concerning Political Parties,* p.42

91. The new terms of the first sentence of article 50 - proposing deletion of the "special protection" provided to persons with disabilities though replacing it by a reference to "the conditions of the equality of opportunities" - may be interpreted as diminishing the level of protection presently guaranteed to persons with disabilities. The Constitutional Court has declared this proposal unconstitutional.

Article 51[1] (The right to a good administration)

92. According to the proposed new article, "[*a]ny person has the right to benefit, in his/her relations with the public administration, from an impartial, equitable treatment and to obtain, within a reasonable delay, an answer to his/her requests*". It is not clear whether the answer must be one of substance or not.

Article 52 (Right of a person aggrieved by a public authority)

93. According to amendment proposed to article 52 (1), the person prejudiced by a public authority in his/her right or in a legitimate interest, would be entitled, instead of "the reparation for the damage", to "reparation of the prejudice by an equitable compensation". The reasons for which the principle of full compensation for damage would no longer be applicable to public authorities are not clear. In addition, the text does not contain any indication of what is meant by "equitable compensation". The Constitutional Court of Romania, considering this limitation to be in breach of article 152 of the Constitution, has ruled it unconstitutional.

94. Under article 52(3), in case of judicial errors, the state exercises the right to sue for compensation (recourse action), in accordance with the law. In the view of the Venice Commission, such a recourse is unproblematic if the judge acted with ill will.

Article 53 (Restriction on the exercise of certain rights or freedoms)

95. This article is of key importance for the effective enjoyment by all of fundamental rights and freedoms. Its provisions should indicate more clearly which rights and freedoms may be restricted and include a list of non-limitable rights. The limitation clauses should be brought into harmony with those of the ECHR, including as regards permissible derogations in time of emergency and legal effects of a state of emergency on the enjoyment of fundamental rights and freedoms.

Article 55 (Defence of the country)

96. Article 55 (3^1) does not pertain to fundamental rights and freedoms. It should go under Title VI on Romania's membership to the European Union and the North-Atlantic Treaty Organization.

Article 58 (Advocate of the People – Appointment and role)

97. The proposed amendments to article 58 refer to the Advocate of the People as an autonomous institution with a role in promoting and defending "rights and freedoms of the citizens, in their relations with public authorities". According to the current provision, the Advocate of the People is appointed "in order to defend the natural persons' rights and freedoms." The inclusion of the *promotion* of rights and freedoms among the responsibilities of the People's Advocate is a welcome proposal. Nevertheless, it is regrettable and worrying that the new text significantly reduces the sphere of action of this institution, limiting it to the rights of citizens - and no longer of individuals, as in the current Constitution - and this, only in sphere of the relations between citizens and public authorities.

98. One may wonder whether the new provision entails limitation of the right of the Advocate of the People to challenge the constitutionality of Government ordinances not addressing relations between citizens and public authorities. This is of particular importance in view of the fact that the Advocate of the People is the only public institution entitled to ask for constitutional review of Government ordinances. It is noted that this amendment has been found unconstitutional by the Constitutional Court.

99. The proposal in the new paragraph 1^1, specifying the grounds for which the mandate of the Advocate of the People may cease before the end of term, goes in the direction indicated by the Venice Commission in its 2012 Opinion. It is important that this provision be interpreted to be exhaustive. In addition, the meaning of "incompatibility with other public or private functions" should be clarified and harmonized with the remaining paragraph 2 of article 58.

100. The Commission is of the view that, as they do not provide per se protection of a fundamental right, the provisions regulating the Advocate of the People should be part of a different Section of the Constitution.

C. TITLE III - PUBLIC AUTHORITIES

1. General remarks

The form of government. The position of the President

101. The Venice Commission finds regrettable that the draft revision law does not make a clear and coherent choice with regard to the form of government of Romania, which is still halfway between parliamentary system and presidential system, in such a way that it can be easily qualified both as semi-parliamentary and/or semi-presidential.

102. In particular, the Commission notes that the position and the role of the Presidential institution remain unclear and the interconnection of this insufficiently determined position with the President's direct election still problematic[17]. A clear choice still seems not to have been made between the position of a neutral power or a political arbitrator and that of a President with important independent powers, enabling him/her to be an active player in daily politics.

103. In the opinion of the Venice Commission, it is not the direct election of the President that poses a problem, but the internal coherence of the presidential powers, on the one side, and the distribution of powers between the highest institutions of the State, on the other side. In view of the new arrangements proposed for the relations between the President, the Government and the Parliament, the Venice Commission sees the risk of continued difficulties in the event of future inter-institutional conflicts.

[17] In its 2002 *Opinion on the Draft Revision of the Romanian Constitution*, adopted by the Venice Commission in July 2002, the Venice Commission was stating, with regard to the direct election of the President of Romania: *"This is an essentially political problem of relevance primarily to the Romanians and the balance they want to achieve in their Constitution. Two general remarks are all that need be made here:*
a. The election of the head of state by universal suffrage necessarily gives him the legitimacy and importance which are essential to the state. If elected on the strength of a programme, the President will have to try and carry it out and must therefore have the constitutional means of doing so. A President of the Republic is not elected by universal suffrage if he is merely to be confined to a role of pure representation. It must therefore be ascertained whether the Romanians want the presidential office to be strong or weak.
b. It is always politically difficult to withdraw from the people a political power granted to it. The citizens of a country who have been granted the right to elect their own President by direct universal suffrage can hardly be expected to renounce such a prerogative."

104. Some of the proposed amendments clearly enlarge the functions of the President, as in the case of two of the three provisions which are added to article 92. The new article 92.5 entrusts the President with the power of proposing to the Senate the candidates for the office of Director of the Romanian Intelligence Service and Director of the Foreign Intelligence Service. Furthermore, under the proposed article 92.7, it is the President who sends to Parliament the National Security Strategy.

105. Also, there is a clear concurrence of powers between the President and the Government in the field of defence, involving not only appointments to leading positions of the superior bodies of the States, but also the elaboration of the State's policies in this field. Moreover, while the President "presents annually before the Parliament, a message on the state of the national security" (article 92.8), it is the Government which is responsible for the programmes of general policy (articles 103 and 114 of the Constitution). Probably, in the legislator's view, the coordination and the collaboration of the different competent authorities will be promoted by the presence of both the President and the Prime Minister in the National Security Council, as chairman and vice-chairman of that body.

106. Nevertheless, taking into account that the Government "*ensures the achievement of the country's domestic and foreign policy*" and "*exercises the general management of the public administration*" as stipulated by article 102 (1) of the Constitution, it is not easy to understand whether the implementation of the policies in the matter of national security pertains to the President himself or to the Government after the adoption of the decisions by the National Council. The same question arises from the provisions according to which the President may declare, with prior (and in exceptional cases subsequent) approval of the Parliament, partial or total mobilization of the armed forces (article 92.2), and shall take measures to repel an armed aggression against the country, with the obligation of promptly bringing them "to the cognizance of the Parliament" (article 92.3). While the intention of the legislator seems to be to enlarge the presidential powers in the matter, given that the President does not have at his/her disposal the necessary executive structures, it might be advisable to clarify that the execution of all the measures in the field of the national defence and security depends on the Government. The inclusion of the National Council of Security in the Chapter V, Public Administration is also of relevance in this connection.

107. By contrast, the provisions concerning the powers of the President in the event of Government reshuffle or vacancy of office restrain the presidential powers. According to the amended article 85 (2), in such a case the President shall dismiss and appoint Government members, on the proposal of the Prime Minister, "after the candidates are heard in the specialised committees of the Parliament". Under the proposed new article 85(3^1), the President cannot reject those proposals and is bound to revoke or appoint Government members according to the will of the Prime Minister. This solution is completely different from those usually adopted by Constitutions reflecting the option for a presidential form of government. At the same time, it circumscribes the powers of the Prime Minister by requiring a prior parliamentary approval, which is not frequent when the holder of that office has the competence of the formation of the Government.

108. Also, the qualification (whether of political or judicial nature) of the suspension of the President (regulated by article 95) remains uncertain since the indications provided by the proposed amendments in this respect are ambiguous (see below). Some of the new powers of the President have apparently a political relevance and might be of interest for a political justification of the suspension. By contrast, the amended text of the Constitution maintains the existing clause of "having committed grave acts infringing upon constitutional provisions" as the basis for the adoption of the suspension measure, while at the same time leaving in the hand (not of a judge but) of the electors, by referendum, the final decision on removal from office.

109. The draft revision law tries to provide for an explicit division of the competences between the President and the Government in matters of foreign policy (article 91). While this is welcome, there is still potential for possible concurrence (and conflict) of political lines. A statement on the need to comply with the principle of loyal collaboration between the powers of the State, in the above provisions or in article 1 of the Constitution, would be advisable (see for more detailed comments §§ 156-159).

110. In view of the above, one may conclude that, according to the amendment proposals, the President would have a role which is similar to the role of the Chiefs of the State in parliamentary government, notwithstanding him/her direct election by the people, which is a typical feature of the presidential governments.

111. Consequently, the choice made by the legislator not to amend article 80 (2) on the role of the President as a mediator between the powers in the State, a guarantor of the observance of the Constitution and of the proper functioning of the public authorities, may be seen as coherent. The President is not a constituent part of the Executive. The Chapter V, devoted to the public administration, is kept separated from Chapter III dealing with the President of Romania. Moreover, ministries and other specialized agencies are organized in subordination to the Government (article 116 of the present Constitution).

112. The content of the presidential function of mediator between the State and society, involving a direct relation typical for presidents in presidential systems, is not very clear. Also, the President's powers in the field of defence and security raise questions, as such extensive powers are not always assigned to Presidents in parliamentary systems.

113. At the same time, the new proposals relating to the investiture of the Government are more restrictive than the rules dealing with this matter in presidential systems. The amended article 103 provides for the selection by the President of the candidates for the office of Prime Minister taking into consideration the possibility of successive failures in getting a majority vote of the two Chambers in joint sitting, and the following necessity of submitting new candidates to the Parliament. Therefore, space is given first to the representative of the political party or alliance having obtained the highest number of mandates or votes, and - at a second passage - to the representative of the political party or alliance which obtained the second highest number of mandates. If even this choice fails, the President must nominate as candidate the representative of a coalition of political formations having been able to gather the absolute majority of mandates: the choice is no more oriented by the electoral results only, but depends also on agreements negotiated by political parties in Parliament. This may be seen as a welcome step into a parliamentary direction.

114. No space seems to be given in article 103 to some discretion, in dealing with the procedure of the investiture, to the President, who is bound to stick to the choice made by the Constitution. One may wonder whether amended article 103 is not in conflict with article 85 which gives the President the power of designating the candidate for the office of Prime Minister. The answer should be negative: both article 85 and article 103 refer to the vote of confidence of the Parliament - the expression of the will of the political parties - which is certainly binding for the Chief of the State. To summarise, article 85 identifies the holder of the power of appointment of the Prime Minister, while article 103 provides for the relevant conditions and procedures.

115. If even the third candidate fails, "*the President of Romania will dissolve the Parliament*"(article 103.3). This provision has to be read in connection with article 89, which expressly entrusts the President with the power of dissolving the Parliament, "*after consulting the presidents of the two Chambers and the presidents of the parliamentary political parties,*

formations or alliances", if it failed to give its vote of confidence for the investiture of the Government (within a delay of 60 days since the first notification and only after rejection of at least three requests for investiture).

116. On the other hand, the President also dissolves the Parliament "*in case a decision to this end is adopted with the vote of two thirds of the members in each Chamber*" (new article 89 (1^1)). This new amendment is difficult to explain: first, it disconnects the dissolution from the functioning of the Government; second, it requires the separate vote of both Chambers, which otherwise proceed in joint sittings (for the investiture of the Government, in the case of its assumption of responsibility and in view of the withdrawing the confidence given to it (articles 103, 113-114). Clarification of the meaning and purpose of this provision is recommended, as well of the relations between the proposed articles 89 (1^1) and article 103.

2. Specific remarks

a) Chapter I – The Parliament

117. The proposed amendments give the Senate pre-eminence over the Chamber of Deputies. In all articles of the Constitution where the two Chambers are mentioned, the provisions are amended to refer first to the Senate, and quite a large number of coordination provisions have been added. The Senate is provided with expanded powers at the expense of the Chamber of Deputies, including a major prerogative of appointment which, according to the draft law, it will exercise alone (see comments under Article 75 below).

Article 61 (Role and structure)

118. It is wise on the part of Romanian legislator that, in article 61.1, the qualification of the Parliament as "*the supreme forum of debate and decision-making of the nation*" was dropped from the preliminary draft revision law. The Parliament is now defined, as in the current Constitution, as "*the sole legislative authority of the country*". In a balanced separation of the state powers, no single organ can be the supreme decision making body. Each organ is bound by the Constitution within the powers and jurisdiction constitutionally provided.

Article 62 (Election of the Chambers)

119. In the draft revision law, the Parliament remains composed of two Chambers, the Senate and the Chamber of Deputies, whose members are elected in the same manner, by direct universal suffrage, equal and secret and for the same term of four years.

120. It is noted that, while the current Constitution specifies that the number of members is established by the electoral law in proportion to the population of Romania, this provision no longer appears in the draft revision law. However, the distribution of parliamentarians in the territory should always be taken into account, due to its democratic meaning, for example by setting a ratio of population for each member of Parliament. That said, these are issues that fall under the election law rather than the Constitution.

121. In contrast, it is proposed to limit the number of deputies to 300. Fixing a maximum number in the Constitution is undoubtedly a wise measure aimed at avoiding excessive or frequent increases in the number of MPs. However, one may wonder why, while the status of the two Chambers is almost identical, the maximum number of senators is not fixed in the Constitution too.

Article 64 (Organizational structure)

122. The internal organization of the two Chambers is almost unchanged in the draft revision law, with the exception of a notable addition: the obligation, enshrined in the new article 64 (4^1), that any public or private person or entity must appear before any parliamentary committee upon written invitation by the latter. It is further specified that the activity of the parliamentary committee should not "replace" that of the judicial institutions.

123. In the Venice Commission's view, increased clarity is needed regarding the purpose of such an invitation and the concerned committees themselves. It is only in the specific case of inquiry committees, provided that specific guarantees are available, that such an obligation may be seen as acceptable. Yet, the proposed new article 64(4^1) refers to "a parliamentary committee" and not to an *inquiry* committee.

124. In any case, it would be preferable to indicate that the activity of the inquiry committee should not "interfere" with pending legal proceedings that concern the specific facts having led to the creation of such a committee.

125. The Commission notes that, for reasons linked to the limits of the constitutional revision, the Constitutional Court ruled the proposed article 64 (4^1) unconstitutional.

Article 65 (Sittings of the Chambers)

126. The number of matters that must be the subject of a joint session of the two Chambers is increased by the proposed constitutional amendment. Political issues of the highest importance, such as the suspension of the mandate of the President of Romania, the vote of confidence in the government, motions of no confidence, and the engagement of the government responsibility would be subject of joint sessions of the two Chambers. This does not call for any comments.

127. However, the appointment of the Advocate of the People would no longer fall within the competence of these joint sessions but of the Senate, which is unfortunate. The Advocate of the People should indeed, considering his/her important functions, benefit from the widest legitimacy, as is the case under current article 65 (2.i). It is suggested that this amendment be reconsidered.

Article 67^1 (Powers in the field of European Union's affairs)

128. It is welcome that the draft proposes to regulate in the Constitution the involvement of the State's institutions in EU affairs (involvement of the Parliament in art .67^1, the representation of the country by the president in certain EU meetings, regulated by new article 91^1, as well as provisions in the special Title VI). There is however ground for further improvement of the draft in this area, especially as regards the parliamentary *ex ante* control over the position of national representatives on future policies and legislation of the EU.

129. In particular, the new article 67^1 provides that the Parliament is involved in decisions in the field of EU affairs and shall verify their compliance with the principles of proportionality and subsidiarity in accordance with the European Treaties. In order to guarantee the possibility for the Parliament to effectively contribute to and influence EU policy, the Government's obligation to submit information on issues pending in the EU and the procedure for the Parliament's involvement in such matters should also be regulated.

Article 70 (Term of office of Senators and Deputies)

130. The proposed article 70 (2.e) provides that:

"*(2) The status of Senator and Deputy ceases:*
[…]
on the date of the resignation from the political party or political formation on whose behalf he/she was elected or on the date of his/her enrolment in another political party or political formation".

131. While the proposal may be understandable against the background of the phenomenon of the parliamentarians' "migration" in the Romanian Parliament, this kind of clause is rather rare; it is often regarded as contrary to the principle of free mandate, according to which the mandate of parliamentarians is general and independent, the latter representing the nation and not a given constituency. The provision may appear extremely rigid and inconsistent with Article 61 of the Constitution which provides that "*Parliament is the supreme representative body of the Romanian people*". The Venice Commission has criticised similar provisions in the past[18].

132. It is noted that the Romanian Constitutional Court has ruled this proposal unconstitutional.

Article 72

133. The proposed amendment to the paragraph (2) and paragraph (3) of current article 72 eliminates the competence of the Public Prosecutor's Office attached to the High Court of Cassation and Justice and of the High Court of Cassation and Justice for the investigation and prosecution of MPs. Ordinary courts would henceforth be competent on the matter.

134. While this is in principle an improvement in the light of the principle of equality, it is understood that the exclusive competence of the High Court and of the Prosecutor's Office attached to it was established in Romania and continues to be perceived as a means to strengthen the fight against corruption within the political class. It is noted that the Constitutional Court declared these amendments unconstitutional.

Article 73 (Classes of laws)

135. In the current Constitution, the scope of organic laws is vast. The essential feature of organic laws is to be adopted by an absolute majority of members present of each Chamber (Article 76). This scope is increased in the draft revision law by three new areas: the status of regulated professions, the status of the National Bank of Romania, the organization and functioning of the Constitutional Court. The regulation by organic law of the organization and functioning of the Constitutional Court and of the National Bank is welcome.

136. The scope of organic laws however includes some problematic fields, such as criminal law (paragraph (h)), the general organization of education (paragraph (n)) and property and inheritance law (paragraph (m)).

137. In this context, the Commission recalls the observations it made in similar cases of constitutions making an extensive use of organic laws to regulate in detail the most important society settings. The Commission is of the view that *"[f]unctionality of a democratic system is rooted in its permanent ability to change. The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-third majority have of cementing its political preferences and the country's legal order. Elections, which, according to Article 3 of the First Protocol to the ECHR,*

[18] See CDL-AD(2009)027, *Report on the Imperative Mandate and Similar Practices adopted by the Council for Democratic Elections and by the Venice Commission*; CDL-AD(2008)015, *Opinion on the draft Constitution of Ukraine*, §41; CDL-AD(2009)024, *Opinion on the Draft Law of Ukraine amending the Constitution presented by the president of Ukraine*, §53.

should guarantee the "expression of the opinion of the people in the choice of the legislator", would become meaningless if the legislator would not be able to change important aspects of the legislation that should have been enacted with a simple majority. When not only the fundamental principles but also very specific and "detailed rules" on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk. […] This also increases the risk, for the future adoption of eventually necessary reforms, of long-lasting political conflicts and undue pressure and costs for society."[19]

Article 75 (Notification of the Chambers)

138. This article deals with two different issues: the legislative procedure, regulated by paragraphs 1), 2) and 5); and the appointment powers of the Senate, regulated by paragraphs 3) et 4). These should be the subject of two separate articles.

The legislative procedure

139. The Senate is *de jure* the first Chamber notified, while the Chamber of Deputies is the first notified only for exhaustively listed matters. While this principle remains unchanged, according to the proposed amendments the list of matters is significantly reduced for the Chamber of Deputies, which will no longer be the first notified for important matters of organic law, including: the organisation of the public broadcasting company, the People's Advocate, the organisation of the Government and of the National Security Council and the parliamentary incompatibilities.

140. The current parliamentary procedure is apparently simple but complicated by the concept of first notified Chamber. The first Chamber has 45 days to decide - 60 days for codes and other complex legislation. Beyond this time, the draft is considered adopted and sent to the other Chamber to which belongs the final decision. When the law contains provisions relating to the jurisdiction of the first notified Chamber, the procedure may also include a third stage: if the second Chamber does not adopt the law in the same terms, the draft will be reviewed again by the first notified Chamber, which will adopt the final decision using its emergency procedure.

141. It is noted that, under the proposed new article 75(2), *"[the] first Chamber notified shall decide within a delay of 30 days. For codes and highly complex bills, the delay is 45 days. If these delays are exceeded the bills and the legislative proposals are considered to be adopted.*" Since no reference is made of referral to the other Chamber, one may understand that a single reading of a draft law in a Chamber could be enough to pass the legislation, sometimes even without formal adoption by the Chamber. The Venice Commission finds this amendment problematic and recommends the Romanian authorities to reconsider it carefully.

142. More generally, it appears necessary to pursue the reflection with a view to establishing a more simple and effective parliamentary procedure. One may wonder whether the more radical solution of a unicameral system, already nascent with the prominence of the joint sessions of the two chambers if not a clearer division of the roles of both Chambers, would not be more appropriate for Romania.

The appointment powers of the Senate

143. The draft revision law entrusts the Senate with important appointment powers (amended article 75), which is an innovation. Under the proposed provisions, the Senate would elect or appoint the Advocate of the People, the President and Vice President of the Legislative Council, the councillors of the Court of Auditors, the Chairman of the Economic and Social Council, the directors of the intelligence services, the representatives of other public authorities

[19] See CDL-AD(2011)016, *Opinion on the new Constitution of Hungary,* adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), § 24.

or institutions. In addition, the Senate would have control over all these authorities or institutions, in accordance with its own rules of procedure. This control is presently exercised by the Parliament, thus by both Chambers.

144. This appointment power raises issues of separation of powers. While it is useful that the Parliament has a degree of control over the most important appointments within the jurisdiction of the executive, it seems excessive to entrust a legislative Chamber with the direct appointment - and control - of the representatives of public authorities or institutions. In addition, this broad power of appointment is inconsistent with current Article 102 of the Constitution, according to which the Government, in accordance with its program accepted by Parliament, ensures the implementation of internal and external policy and exercises general public administration. The Government should be able to designate the authorities which will implement its policy, possibly through consultations with the Parliament.

145. In view of the above comments, it is recommended that the proposed powers of the Senate be reviewed and clarified. Particular attention should be paid to the issue of designation/appointment for top positions of public authorities or institutions and the necessity to ensure full respect of the principle of the separation of powers.

Article 76 (Passing of bills and resolutions)

146. It is recommended that the reference to “certain rights and freedoms” referred to in this Article, as well as in Article 53, be clarified (see also comments under article 53 above).

b) Chapter II – The President of Romania

Article 83 (Term of office)

147. The revision brings little change in the status of the President. It is proposed to shorten the duration of the term of office by one year, four years instead of five. The four years term is period, equal to that of the parliamentary mandate, is undoubtedly intended to limit the cases of "cohabitation" between the President and a majority in Parliament of a different political colour, as was the case when the political crisis arose in Romania in summer 2012.

Article 85 (Appointment of the Government)

148. As previously noted, the proposed version of article 85, paragraph 2 and paragraph 3^{l} goes into the direction of a more parliamentary government with limitation of the President’s discretion to appoint the Prime Minister and the Ministers.

149. In the event of government reshuffle or vacancy of a post of minister, the President appoints new ministers on the proposal of the Prime Minister, but only after the candidates are heard by the specialized committees of the Parliament (article 86 (2)). Clarifications would be welcome on the usefulness of such a hearing, on whether it is followed by a vote and the consequences of the vote.

Article 89 (Dissolution of Parliament)

150. The amendment in article 89 concerning the power of dissolution is in line with preference for a more parliamentary form of government, by limiting the presidential discretion in relation to the dissolution of the Parliament. Under the proposed amendment, the President is bound to dissolve the Parliament, if no vote of confidence has been obtained to form a government within 60 days after the first request was made, and after rejection of at least three requests for

investiture, while currently he/she "may" dissolve the parliament after 60 days, if at least two requests for investiture have been rejected.

151. It is not clear, in the current paragraph (2) which states that the Parliament can be dissolved only once "during the same year", whether "during the same year" refers to a calendar year, or a period of twelve months since the previous dissolution.

152. As previously stated, clarifications should be provided with regard to possible situations when the amendment proposed in article 89 (1^1) would be applicable (dissolution of Parliament when decided by each of the two Chambers), as well as on the inter-connection between this article and the investiture rules under article 103.

Article 90 (Referendum)

153. The presidential monopoly to initiate referendums is limited by providing the option for 250,000 citizens to initiate referendum. This is a welcome proposal. Additional clarity would be needed on how this will work. Does the petition have to specify what question will be asked? If not, who will formulate the actual question? It is noted that the President appears to have a degree of discretion in the matter. Does the Constitutional Court have any role?

154. It is furthermore noted that, compared to the current article 90, the amended provisions do not allow referendum on issues regarding the revision of the Constitution. It is not specified what the consequences will be if the question, without proposing an amendment to the Constitution, poses a question the answer to which might raise constitutional questions. It is recommended that these provisions be better specified.

Article 91 (Powers in matters of foreign policy)

155. The proposed new paragraph (1^1) provides that the President represents the State at European Union meetings dealing with certain major topics: EU foreign relations, the common security policy, amendments to the EU treaties. As previously stated, this article should be correlated with new Article 102 (3^1), specifying that it is the government that represents Romania at other meetings of the European Union.

156. It is understood that, through these amendments, it is also aimed to clarify the division of power between the President and the Government in this field: the President would have the full responsibility of the matters referred to in paragraph (1^1) and the Government the responsibility for the rest of the EU policy of Romania. Participation in EU meetings is defined in a way which corresponds to the respective competences.

157. Such a division does not seem to be either workable in practice or sound in principle. Numerous questions would require a clearer answer: what is to be the role of the President vis-à-vis the Government? Is he or she to be subordinate to the decision of the Government? Is the President to attend Cabinet meetings when these issues are being discussed? What is the position if the President cannot persuade the Government to support his or her point of view? Does the President's view nonetheless prevail? If so, how is the Government's position tenable? If the President's view does not prevail, how can he or she continue in office and fulfil this role? What is the role of the Ministry of Foreign Affairs and the Prime Minister? What happens if they disagree with the President?

158. Considering the difficulties in 2012, when there was a power struggle between the President and Prime Minister to represent Romania in the bodies of the European Union, clarifications on the matter are extremely important. Such clarifications have also been requested by the Venice Commission in its 2012 Opinion.

Article 92 (Powers in the field of national security)

159. As previously stated, the relations between the President and the Government in the field of national security should be refined and the implementing role of the executive following the presidential decisions (ex. articles. 92.2 and 3) should be expressly mentioned. This would help avoid conflicts between the two institutions and an excessive personalization of the intervention of the President.

Article 95 & 96 (Suspension from office; Impeachment)

160. In its 2012 Opinion, the Venice Commission expressed concerns over the procedure regulating the suspension and dismissal of the President: "*the procedure as a whole implies that the dismissal of the President may have been politically motivated rather 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 »*".

161. In its recommendations the Commission was stressing that "*[t]he 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*" (see § 78).

162. The above criticism is still valid as the amended articles 95-96 on suspension from office and impeachment of the President do not bring about the clarity called for by the Venice Commission. As suggested by the Commission in 2012, it would be preferable that the procedure following the parliamentary decision of suspending the President be transferred to a judicial body. It is contradictory to submit to a political decision of the people a President who is accused of legal violations even when he is elected by universal suffrage.

163. Within the framework of the present system, maintained in the draft revision law, the proposed new paragraph (3) may be welcomed, as it provides a solution to a gridlock which happened in the past: when participation in a referendum has not reached 50%, dissolution of the Parliament is to follow and new parliamentary elections should take place within 45 days.

164. At the same time, the inconsistency of the system is perpetuated: where article 95 provides for suspension and ousting of the President, for unconstitutional conduct, by way of referendum, article 96 provides for impeachment and dismissal, for high treason, by decision of a judicial body.

c) Chapter III – The Government

Article 103 (Investiture)

165. A new investiture procedure of government has been proposed, much more detailed than the current article 103, with the clear aim at avoiding political deadlock after parliamentary elections. In concrete terms, the amended procedure is designed to increase efforts for cabinet formation by exhausting all possible formations before dissolution of the Parliament and new general elections[20]. At the same time, as previously indicated, the proposed procedure

[20] The proposed procedure might be compared to parliamentarianism in Greece 1975 Constitution, 1982 Constitution of Turkey and 1991 Constitution of Bulgaria.

considerably limits the role of the President, who has no room for discretion left in the appointment of the Prime Minister.

166. The Constitutional Court ruled the proposed procedure as unconstitutional for failure to comply with article 152 on the limits of the constitutional revision; it also declared unconstitutional the proposed new article 110 (1), stating that the Government "exercises its mandate until the date of the investiture of the new Government".

Article 109 (Responsibility of members of the Government)

167. Article 109 distinguishes between the political responsibility of the Government (paragraph 1) and its members and their legal liability for acts committed in the exercise of their office (paragraph 2).

168. It is unclear whether the decision of the Senate, the Chamber of Deputies and the President of Romania to ask that proceedings be initiated against a member of the government requires a previous initiative by a judicial authority, as it is not clear what would happen if information about the concerned acts would come to the attention of a judicial body. It is suggested that these aspects be specified.

d) Chapter IV – Relations between Parliament and the Government

Article 114 (Assumption of responsibility by the Government)

169. The limitation of the cabinet's power to engage its responsibility to only once during one session is a welcome proposal, since it increases the Parliament's opportunities to control the Executive, thus reinforcing the position of the Parliament within the parliamentary form of government.

Article 115 (Legislative delegation)

170. In its 2012 Opinion, the Venice Commission clearly recommended that *"[t]he 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 even quicker 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)." (§ ..)*

171. The Commission was further explaining that*, "[b]y 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*". (§80)

172. Regrettably, the proposed amendments to the constitutional provisions on emergency ordinances do not appear to meet the Venice Commission recommendations.

173. In article 115, the proposed new paragraph (6) would extend somewhat the category of matters for which the Government cannot legislate by way of ordinances. This will now include the regime of crimes, punishments and their enforcement. This is very welcome as the practice of legislating for criminal law in Romania by Government ordinances had become widespread to the detriment of democratic principle.

174. However, there is still a need to harmonize the rules established in article 115.6 (under which ordinances may refer to organic laws) and in article 76.2.[1] (organic laws cannot be changed through lower level acts). Instead of excluding some of the organic laws from the scope of government ordinances by adding the areas regulated by these laws to the list of exceptions, a much clearer solution would be to state that organic laws are unamendable through delegated legislation.

175. It is recalled that, in addition to the reconsidering the scope of government ordinances, the Commission recommended clarifying the framework for emergency ordinances, including the definition of "emergency" and shorter deadlines for their approval by Parliament. The Commission had also strongly recommended reviewing the system of "tacit approval" of government ordinances, stressing that formal approval by vote should be the rule not the exception.

176. Regrettably, no amendment is proposed to give follow-up to these recommendations. This is all the more worrying as, according to the information received by the Commission, the Government in place following the 2012 elections has continued to make extensive use of ordinances (more than 100 in 2013), perpetuating a practice which involves risks for democracy and the rule of law in Romania.

177. While this may be explained by the complex and heavy legislative procedure applicable at present, the choice for Government ordinances seems also to be a way to more easily regulate sometimes controversial issues. It is recalled that the Advocate of the People is in Romania the only institutional actor entitled to challenge government ordinances before the Constitutional Court. It appears that this possibility has been used only in a few number of cases since the current Government came to power.

178. In view of the above, it is strongly recommended that the issue of Government ordinances be adequately addressed in the next stages of constitutional revision.

e) Chapter V – Public administration

Article 119 (National Council of Security)

179. The proposal, in the new paragraph (2) [21], to place the National Council of Security and its decisions ("*mandatory for the authorities of public administration and public institutions")* above any other public institutions seems problematic from the standpoint of the separation and balance of powers, especially in relation to other public institutions competent for the same matters.

180. Furthermore, in view of the importance of the matters and decisions for which the Council is competent, more detailed indications should be provided in the Constitution concerning: the nature of this body (whether ad-hoc or standing structure), its composition, the appointment of its members and, in particular, its supervision by the Parliament. It is noted that the proposed paragraph 2 has been found unconstitutional by the Constitutional Court.

[21] New Article 119 (1):"*The National Council of Security organizes and unitarily coordinates the activities regarding the national security, participation in maintaining the international security and collective defence within the systems of military alliance, as well as actions of peacekeeping and peacemaking.*
(2):"*The National Council of Security issues decisions which are mandatory for the authorities of public administration and public institutions.*
(3) The National Council of Security, annually or whenever is required, submits to the Parliament reports on its activity".

Article 119[1] (The Prefect and the Sub-Prefect)

181. As stated at paragraph 5 of the new article 119[1](replacing current article 123), the Prefect can challenge in court acts of local and regional authorities which he/she considers illegal. According to the proposed amendment, "[t]he act challenged can only be suspended by the competent court according to the law", as opposed to "[t]he act thus challenged shall be suspended de jure" in the current article 123 (5).

182. The Venice commission stresses that the court should be able to cancel the illegal acts and not just suspend them. The suspension of an act may only be understood in an emergency procedure, when the immediate implementation of the contested decision would result in irreversible facts that it would not be possible to repair. The court will then decide on the merits. It is recommended that the concerned provisions be reconsidered.

Article 120 (Local Public Administration - Basic Principles)

183. The amended Article 120 (1) draws on the current Article 120, which sets out the principles of decentralization, local autonomy and decentralization of public services. It adds that decentralization should be implemented according to the principle of subsidiarity and that the transfer of competence must be accompanied by corresponding financial resources. This proposal is a welcome addition.

f) Chapter VI - Judicial authority

184. The draft revision law proposes only a few amendments to the chapter on the Judiciary, which do not change the current system of courts and the scope of independence of judiciary. Most of them deal with the structure of the Superior Council of Magistracy. While they have a rather "technical" character, they raise a number of issues.

Article 126

185. According to the draft revision law, the organic law governing the High Court of Cassation and Justice is now described as "its" law rather than "the" law and, in addition to regulating the composition and functioning of the High Court, would also regulate its organisation. The purpose and significance of this amendment is not entirely clear and would need to be specified.

Article 132

186. No changes have been proposed to the status of prosecutors. The current provisions of article 132 place prosecutors, according to the principal of hierarchical control, under the authority of the Minister of Justice[22]. At the same time, the role and status prosecutors are at present governed by the Chapter VI, as part of the judicial authority.

187. The Venice Commission acknowledges that there are no international standards requiring the independence of the prosecution service. At the same time, the Commission stresses, as it did in its *Report on the European Standards as regards the Independence of the Judicial System: Part II: Prosecution Service*[23], that "*only a few of the countries belonging to the Council of Europe have a prosecutor's office forming part of the executive authority and*

[22] *"(1) 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."*

[23] *Report on the European Standards as regards the Independence of the Judicial System: Part II: Prosecution Service*, CDL-AD(2010)040), §26

subordinate to the Ministry of Justice (e.g. Austria, Denmark, Germany, the Netherlands). The Commission notes that there is a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive. […] Also, it is important to note that in some countries, subordination of the prosecution service to the executive authority is more a question of principle than reality in the sense that the executive is in fact particularly careful not to intervene in individual cases. Even in such systems, however, the fundamental problem remains as there may be no formal safeguards against such intervention. The appearance of intervention can be as damaging as real interference […]."

188. The Commission recalls the importance, already discussed during its exchanges with the Romanian authorities and the representatives of the associations of Romanian magistrates, of a unified and coherent regulation of the status of prosecutors, with clear, strong and efficient guarantees for their independence. It invites the Romanian authorities to review the system in place with a view to addressing the shortcomings noted in terms of coherence and available guarantees for its proper operation. In the framework of a more comprehensive approach, this might also involve including independence in the list of principles according to which prosecutors fulfil their functions. The Commission has stated in its above-mentioned report that "The 'independence' of prosecutors is not of the same nature as the independence of judges. […][24]. Nonetheless, the interests of an independent judicial system require certain guarantees of non-interference as concerns the Prosecutor General, individual prosecutors and on a structural basis[25].

Article 133 (Superior Council of Magistracy - Role and Structure)

189. The Superior Council of Magistracy (SCM) represents both the judges and the prosecutors, who together comprise the magistracy. There are 14 elected magistrates, consisting of nine judges and five prosecutors. The draft revision law increases the number of members of the (SCM) from 19 to 21 by adding two extra representatives of civil society - specialists in law, who enjoy high professional and moral reputation - to bring the total number to four. It is regrettable however that the civil society representatives may only attend the plenary sessions, being excluded from debates in the two SCM sections.

190. It is noted that the proposal extending to four the number of these representatives was found unconstitutional by the Constitutional Court.

191. While there is no single model which applies to all countries, the revised number is more in accordance with the consistently held view of the Venice Commission concerning the role of representatives of civil society in judicial councils. In the view of the Venice Commission, an autonomous Judicial Council "*that guarantees the independence of the judiciary does not imply that judges may be self-governing. The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges. In fact, as a general rule, the composition of a Council foresees the presence of members who are not part of the judiciary, who represent other State powers or the academic or professional sectors of society. This representation is justified since a Council's objectives relate not only to the interests of the members of the judiciary, but especially to general interests. The control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Council's performance of this control will cause citizens' confidence in the administration of justice to be raised*."[26]

[24] Idem, §86
[25] See also CDL-AD (2013) 006, §19
[26] CDL-INF(1998)009, *Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania* , par. 9, cited in CDL-AD(2007)028 *Judicial Appointments (report)*, para. 29, 30 et 31

192. It is also recalled that, in a previous opinion adopted in 2002 in the context of a previous revision of the Romanian Constitution, the Commission was suggesting that "*Corporatism can be avoided by ensuring that the members of the Judicial Service Commission, elected by their peers, should not wield decisive influence as a body. They must be usefully counterbalanced by representation of civil society (lawyers, law professors and legal, academic or scientific advisors from all branches)*."[27]

193. Up until now any of the 14 elected magistrates was eligible to be elected as president of the Council. According to the proposed amendment in article 133 (3), the president must be elected from among the nine judges, although the five prosecutors will still have a vote as before. In the opinion of the Venice Commission, this amounts to a step backward. Should there be one single council, designed to represent the two branches of the judiciary, it is unfair that the President can only be elected from one branch. In any event, it is difficult to identify the reasons for this choice since a prosecutor cannot be elected without substantial support from the ranks of judges. Another option could be to set up two separate councils.

194. The Commission recalls in this connection that there has been some discussion in Romania on removing the prosecutors from the magistracy. To do so at this time could risk threatening the already fragile independence of the prosecutor's office. The above-mentioned amendment proposal could send a very bad signal that a downgrading of the independence of the prosecutor is in contemplation.

195. The diminished terms of the SCM members (from 6 to 4 years) may also raise problems from the perspective of independence in the case of simultaneous elections for Parliament and the CSM (the term of the CSM should not be connected to the Parliament's term). The very short mandate - one year - of the SCM President is also likely to have a negative impact on the Council's work and its management, as it entails a severe lack of time and continuity in devising and implementing projects and initiatives that may be of importance for the judiciary and the society as a whole. More generally, the CSM role seems weakened by the above amendments, which may be seen as a worrying trend.

196. The proposed new paragraph (4^1) of article 133 introduces the possible recall of the magistrates elected as members of the SCM by the general assemblies of the courts or prosecutor's offices which they represent. This possibility is currently provided by the SCM law[28]. It is noted that the provisions of art. 55 para. (4) and (9) of the CSM Law were declared unconstitutional by the Decision of the Constitutional Court (No. 196/2013, 22 April 2013). There is no information as to the circumstances in which this might be done other than that the matter is to be regulated by a special law.

197. In the Commission's view, a person elected to an important position such as membership of a judicial Council should not be subject to recall merely because the electorate do not agree with the decisions which are made. It should be the duty of persons elected to such positions to bring their own independent judgement to bear on the important decisions the council has to deal with without having to anticipate a possible recall. Furthermore, such a rule is difficult to reconcile with SCM's disciplinary functions. Revocation for very strict conditions, such as failure to attend meetings or otherwise neglecting duties may be stipulated by the law on the organisation and functioning of the SCM. It is noted that the Constitutional Court has found this proposal problematic and recommended its deletion.

[27] CDL-AD(2002)012 *Opinion on the Draft Revision of the Romanian Constitution*, para. 66.; see also CDL-AD(2002)021 *Supplementary Opinion on the Revision of the Constitution of Romania*, para. 21-22

[28] Article 55 (4) of the Law no. 317/2004 on the Superior Council of Magistracy, republished

Article 134 (Superior Council of Magistracy - Powers)

198. According to the draft revision law, it is proposed to take away the powers to propose the appointment of judges and public prosecutors from the SCM as a whole and to entrust the judges' section consisting of the nine judges, with the appointment of judges to, and the five prosecutors who form the prosecutors section with the appointment of prosecutors. Furthermore, the sections of judges "shall deal exclusively with the professional career of judges, while the Section of prosecutors […] shall deal exclusively with the professional career of prosecutors" (amendment to article 134 (1).)

199. The proposal seems to be in line with the position of the Venice Commission (CDL-AD(2010)040, p. 66) having stated that: "*If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot outvote the other group in each other's appointment and disciplinary proceedings because due to their daily 'prosecution work' prosecutors may have a different attitude from judges on judicial independence and especially on disciplinary proceedings. In such a case, the Council could be split in two chambers, like in France, where the Conseil supérieur de la magistrature sits in two chambers, which are competent for judges and prosecutors respectively*[729]). That being said, the Venice Commission finds it difficult to understand why the other members of the Council should not participate in both sections to discuss the question of appointments.

D. TITLE V - CONSTITUTIONAL COURT

Article 146

200. Article 146 of the current Constitution lists in a non-exhaustive manner the powers of the Constitutional Court. Point "l" of article 146, states that the Court will "carry out also other duties stipulated by the organic law of the Court", thereby giving constitutional protection to all powers of the Court, including those which are only mentioned in the Court's law.

201. By abrogating the provision in letter "l" without including in the former list those prerogatives having been added to it by organic law[30], the Constitutional Court seems to loose two important prerogatives: the review of the constitutionality of the law for the revision of the Constitution after its adoption by the Parliament and of resolutions by the Plenary of the Chamber of Deputies, resolutions by the Plenary of the Senate and resolutions by the Plenary of the joint Chambers of Parliament.

202. The Venice Commission finds worrying that the scope of the constitutional control - one key means for ensuring respect for the balance of powers and the rule of law - is reduced. The Romanian authorities are invited to reconsider this amendment, in line with the comments made by Commission, in its 2012 Opinion, with regard to the judicial control off internal acts of the Parliament. The Commission was in particular stressing, in the said Opinion (§21), that "*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*." The Commission notes that this amendment has been ruled unconstitutional, for breach of the Constitutional provisions on the limits of the constitutional revision.

[29] 7 Until the entry into force of the amended Article 65 of the Constitution of France on 23 January 2011 (by virtue of the Organic Law n°2010-830 of 22 July 2010), the *Conseil de la Magistrature* has a majority of five judges in the "judge's chamber" and a majority of five prosecutors in the "prosecutor's chamber". The reform adds 6 "qualified personalities" from civil society to each of the chambers.

[30] Law n° 47/1992 on the Organisation and Operation of the Constitutional Court*), republished in the Official Gazette of Romania, Part I, no.807 of 3 December 2010.

203. The Commission also believes that stating explicitly, in the Constitution, the place of the Constitutional Court in the system (either within the judicial branch or as a judiciary out of the judicial branch) could be a helpful clarification.

E. TITLE VII - REVISION OF THE CONSTITUTION

Article 151

204. The current procedure for amending the Constitution requiring a qualified majority of the two Chambers followed by approval by popular referendum (see article 151 of the current Constitution), is a rigid procedure. Under the Romanian referendum law, in addition to the majority of 50 % plus one for approval, a participation quorum is required for the referendum to be considered valid.

205. The Venice Commission has taken a general stand against both forms of quorums in referendum: a turn-out quorum tends to foster abstention, whereas in case of an approval quorum the majority might feel that they have been deprived of victory without an adequate reason. The Commission however acknowledges that the system in place in Romania for Constitutional revision has been devised so in order to protect the new democratic order when the 1991 Constitution[31] was adopted. In addition, the requirement of popular approval through referendum appears to be, like the direct election of Romania's President, firmly rooted in the national tradition.

206. The draft revision law proposes to amend the provision relating to the constitutional referendum to provide the same rule as applies, under the new article 90 (3), for the consultative referendum. According to that rule, the referendum is valid if at least 30 % of the number of persons registered in the electoral lists takes part in it. Since this proposal constitutionalizes a recent amendment to the referendum law[32] diminishing the participation quorum required for the validity of referendums from 50% to 30% of the people on the register, it may be seen as a step in the direction of a less rigid procedure. It is however noted that the Constitutional court recommends its deletion, as of the provisions of the new article 90(3).

207. The Venice Commission recalls that, as it stated in its 2010 Report on constitutional amendment, *"there are good reasons both why constitutions should be relatively rigid and why there should be possibilities for amendment. The challenge is to balance these two sets of requirements, in a way that allows necessary reforms to be passed without undermining the stability, predictability and protection offered by the constitution by making the adoption of the constitutional amendment too difficult to achieve or practically impossible.[…]The final balancing act can only be found within each constitutional system, depending on its specific characteristics "(§ 88)*[33].

[31] See Constitution of Romania, 1991, Official Gazette of Romania, Part I, no.233 of 21 November 1991

[32] See Law n° 341/2013 on amending Law N° 3 of 2000 on organising and holding the referendum, Official Gazette of Romania, Part I, no.787 of 16 December 2013. According to the amended provisions, « *The referendum is valid if at least 30% of the people registered in permanent electoral lists participates in it* ». Furthermore, «*The result of the referendum is valid if options cast representing at least 25% of those on the permanent electoral lists*.»"

[33] See Venice Commission, CDL-AD(2010)001, *Report on Constitutional Amendment*; see also CDL-AD(2002)012, *Opinion on the Draft Revision of the Romanian Constitution*, adopted by the Venice Commission at its 51st plenary session (Venice, 5-6 July 2002)

F. TITLE VIII - FINAL AND TRANSITORY PROVISIONS

Article 154

208. For the case where the proposed amendments on the composition and operation of the Superior Council of Magistracy are adopted, the Venice Commission recommends that transitional provisions be adopted in relation to the mandate of the members of the Superior Council Magistracy. The Commission stresses that the revision of the Constitution should not be used as a means to put an end to the term of office of persons elected or appointed under the previous Constitution.[34]

IV. Conclusions

209. The Venice Commission welcomes the initiative of the Romanian authorities to launch a process of revision of the Romanian Constitution following the political crisis of the summer of 2012. The Opinion subsequently adopted by the Venice Commission (in December 2012) contained, in additional to a general call for loyal and constructive inter-institutional cooperation, recommendations stressing the need for clarification and improvement of a number of institutional and other arrangements provided by the Constitution.

210. The Commission welcomes the fact that, following exchanges held on a preliminary draft in July 2013, efforts have been made, taking into account a number of proposals made by the rapporteurs, towards clarification and removing inconsistencies noted in the previous draft, including by removing the most controversial provisions.

211. The Commission finds regrettable that, following some initial positive steps indicating an option for an open and transparent approach, the revision process was lead in a less inclusive manner and did not entirely benefit of the timeframe available and the potential input of the various circles having shown interest, in the Romanian society, for the revision of the Constitution. The Commission expects that, in the forthcoming stages of the process, increased efforts be made and effective opportunities offered for the involvement of all stakeholders concerned. A constructive co-operation between the majority and the opposition and a wide public debate are key pre-requirements for a successful revision process and the legitimacy of the future text of the Constitution.

212. As far as the revised draft is concerned, only a limited part of the recommendations contained in the 2012 Opinion of the Venice Commission have been translated into amendments to the Constitution. This includes the clarification, to some extent, of the distribution of powers between the President and the Government in relation to matters of foreign affairs; a constitutional basis, with specified criteria, for the dismissal of the Advocate of the People and, to some extent, the addition, to the procedure for revocation of the President, of the requirement that the Parliament would be dismissed in the event of refusal by the population, in referendum, of the dismissal proposal.

213. At the same time, the revised draft fails to address key issues underlined by the Commission in its 2012 Opinion, which are of fundamental importance for the consolidation of the Romanian Constitution, in line with the common standards of democracy and rule of law, including:

- to make a clear choice for a government system, as a precondition for subsequent institutional and other arrangements; to consistently address throughout the Constitution, in

[34] See CDL-AD(2011)016, Opinion *on the new Constitution of Hungary,* adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011)

line with the choice made, the powers and inter-relations of the highest State institutions; to clarify the respective competences of the President and the Prime Minister;
- to introduce, among the founding principles of the Romanian constitutional system, the principal of mutual respect and loyal co-operation between powers the Constitution;
- to streamline the legislative procedure and limit to the minimum the need for government ordinances;
- to provide for the basic tenets of the status and competences of the Advocate of the People in the Constitution itself, in order to safeguard its independent status;
- to provide a clear and improved legal basis to enable the Superior Council of Magistracy to effectively fulfil its task of guarantor of the independence of judicial body;
- to transform, if maintained at all, the procedure on the suspension of the President into a clearly legal responsibility, initiated by Parliament but settled by a court.

214. The Venice Commission is especially concerned that a clear option for one particular form of government, as a foundation for entire system, is still missing. As a result, despite some improvements, the definition of the respective roles and inter-relations of the main state institutions still lacks clarity.

215. In addition, recommendations aiming at strengthening guarantees for independence in the field of the judiciary have not been adequately taken up. Amendments proposed in relation the Superior Council of Magistracy do not seem to be aimed at strengthening this institution, although its contribution in maintaining a stable democracy, based on the rule of law, is essential. Also, a unified and coherent regulation of the status of prosecutors, with clear and efficient guarantees for their independence is still to be provided.

216. More generally, increased clarity and consistency throughout the various chapters of the Constitution and, in the area of fundamental rights, formulations more closely harmonised with those of the ECHR, would considerably improve the draft.

217. In the opinion of the Venice Commission, additional work is needed and further improvements, both as regards the substance and the formulation of the constitutional provisions, in order for the draft to be ready for adoption. Particular consideration should be given, in this context, to the adequate implementation of the decision adopted by the Constitutional Court of Romania with regard to the draft.

218. The Venice Commission remains at the disposal of the Romanian authorities, should they ask for further assistance.